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CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

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(173 FED.)

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OF THE

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³ Appointed Jan. 11, 1910, to succeed Solomon H. Bethea, deceased.

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CASES
ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
CIRCUIT AND DISTRICT COURTS.

PENNSYLVANIA R. CO. v. INTERNATIONAL COAL MINING CO.
INTERNATIONAL COAL MINING CO. v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. October 6, 1909.)

No. 36.

- 1. CARRIERS (§ 32*)—INTERSTATE COMMERCE ACT—DISCRIMINATION BETWEEN SHIPPERS—"SIMILAR CIRCUMSTANCES AND CONDITIONS."**

In Interstate Commerce Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155), which prohibits discrimination between shippers under "substantially similar circumstances and conditions," such phrase relates to the circumstances and conditions of carriage only, and does not include matters affecting individual shippers; and a railroad company is not authorized to charge one shipper of coal a lower rate than is charged another shipper between the same terminals, because the former is shipping under contracts extending over a term of years, based on lower rates which were in force when such contracts were made, while the other shipper has no such contracts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 85; Dec. Dig. § 32.*]

- 2. CARRIERS (§ 32*)—INTERSTATE COMMERCE LAW—DISCRIMINATION IN RATES.**

Where a railroad company operating an interstate road treated points on a connecting road which it also operated as within a certain coal district, from all points in which, whether on such line or its own line, it made and published the same rates, such road for freight purposes was a part of its line, and its relations with the owner thereof are immaterial.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 83; Dec. Dig. § 32.*]

- 3. CARRIERS (§ 36*)—ACTION FOR DISCRIMINATION IN RATES—MEASURE OF DAMAGES.**

In an action by a coal mining company against a railroad company under Interstate Commerce Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), to recover damages because of discrimination in rates made in favor of other shippers between the same terminals, the measure of damages recoverable is the difference between the amount paid by plaintiff and the amount it would have paid at the lowest rate charged on any other shipments carried under substantially the same circumstances and conditions during the same time, and not the difference between the rates paid by it and the average rate paid by any other shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 36.*]

4. CARRIERS (§ 36*)—INTERSTATE COMMERCE LAW—ACTION FOR DISCRIMINATION IN RATES.

To entitle a shipper to maintain an action against a railroad company under Interstate Commerce Act Feb. 4, 1887, c. 104, § 8, 24 Stat. 382 (U. S. Comp. St. 1901, p. 3159), to recover damages for being unjustly discriminated against in rates, it is not necessary that he should have paid the freight charged under protest.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 36.*]

5. ABATEMENT AND REVIVAL (§ 41*)—TRANSFER OF TITLE BY PLAINTIFF.

A pending action to recover damages is not abated by a judicial sale of the plaintiff's property, including the chose in action in suit, and proof of such sale constitutes no defense to the action.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 212; Dec. Dig. § 41.*]

6. CARRIERS (§ 36*)—INTERSTATE COMMERCE ACT—ACTION FOR DISCRIMINATION IN RATES.

A coal shipper, which, with others, was given rebates by a railroad company in violation of law, cannot maintain an action against the company to recover damages for discrimination because others were granted larger rebates.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. § 36.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action by the International Coal Mining Company against the Pennsylvania Railroad Company for discrimination. Judgment for plaintiff, and both parties bring error. Affirmed.

Francis I. Gowen and Sellers & Rhoads, for Pennsylvania R. Co.
James W. M. Newlin, for International Coal Mining Co.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the International Coal Mining Company, herein called the "Mining Company," recovered a verdict against the Pennsylvania Railroad Company, herein called the "Railroad," for alleged unjust discrimination in freight charges. To a judgment entered on such verdict, both parties sued out writs of error. We will first consider that of the Railroad.

It seems the Mining Company shipped coal over the Railroad's lines from its mines in bituminous regions of Pennsylvania to tide water from 1894 to 1901. The court excluded evidence bearing on the shipments prior to July 29, 1898, on the ground they were barred by the statute of limitations. As to the shipments from that date to April, 1899, the evidence showed the Mining Company paid the same rate as other shippers. Consequently there was no recovery for that period. From April 1, 1899, to 1901, it was conceded the Mining Company paid a higher rate than other shippers, and the verdict covered shipments during such period. The suit is based on section 2 of Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3155), which provides:

"If any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The Railroad sought to escape liability for such excess freight charges during said last-named period by reason of the following facts: On April 1, 1899, by its published tariff, it advanced its coal freight rates. At that time many shippers from the Mining Company's vicinity to seaboard had outstanding contracts to make coal deliveries over a series of years. These contracts were based on the freight rates in force when they were made. The Railroad, feeling its new and higher rates would entail serious loss on shippers bound by such contracts, herein called "contract coal," continued in the case of such contracts the old and lower freight rates. This was done openly, and, indeed, the Mining Company was informed, if it had such contracts, its coal would be carried at the old rate. It had no such contracts, and therefore it was charged the higher rate for what was called "free coal," and the verdict is based on such differential. The Mining Company's shipments were in part from the Huntingdon & Broad Top Railroad, which was a separate company from the Railroad, but was operated by it. No shipments of contract coal were made from the Huntingdon & Broad Top Railroad. The other shipments of the Mining Company, as well as shipments of contract coal by other shippers, were made from the Clearfield district. The court submitted to the jury the question whether the Huntingdon & Broad Top Railroad was part of the Clearfield district, and its verdict established that such was the case. Now the Railroad sought to draw a distinction between shipments of "contract coal" and "free coal" as above described, requesting the court to charge:

"If the jury believe that it would tend to the benefit of its shippers, and would also tend to secure for it a larger volume of business, the carrier is not guilty of discrimination forbidden by the interstate commerce act, because it carries, at rates of freight in force at the time such contracts were entered into, coal embraced in and shipped under contracts extending for a period of time, even though at the same time it may be charging a higher rate on coal not covered by or embraced in contracts of such a character, provided it extends the benefit of the lower rates to all shippers having such contracts and shipping coal thereunder."

We are thus brought face to face with the question whether the existence of these contracts created a dissimilarity of circumstance and condition under which the service of carriage was rendered. To us the reading of the act is clear. The act contemplates "compensation for any service rendered." Now it is manifest that "service rendered" is the physical service of carriage. Elsewhere it is spoken of as "a like and contemporaneous service." Such service is "service in the transportation," it is a "service in the transportation of a like kind of traffic"; and it is a service in transportation "under substantially similar circumstances and conditions." The law having in view the carriage of freight and equal rates to all, it is clear to us that the words "sub-

stantially similar circumstances and conditions," as used in this subsection, are those which affect transportation, and not those which involve personal conditions or contractual relations between one particular shipper and the carrier, but are such things only as are circumstances of carriage generally.

In *Wight v. United States*, 167 U. S. 513, 17 Sup. Ct. 822, 42 L. Ed. 258, it was sought to differentiate the service performed by the different terminal facilities of the two shippers at their respective warehouses; but the court held these were not the circumstances and conditions of the act, but that the circumstances and conditions the act contemplated were those which affected the actual carriage of the freight, using this language:

"It was the purpose of this act to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay."

And that this phrase, "circumstances of carriage," was a carefully chosen one, limiting the circumstances to such as affected haulage of freight, is shown in *Interstate Com. Com. v. Alabama R. Co.*, 168 U. S. 166, 18 Sup. Ct. 49 (42 L. Ed. 414), where, referring to *Wight v. United States*, supra, the court say:

"We there held that the phrase 'under substantially similar circumstances and conditions,' as used in the second section, refers to the matter of carriage, and does not include competition between rival routes."

It follows, therefore, that if these circumstances and conditions of section 2 are those which affect haulage, and do not include competition between rival routes, they do not include individual elements affecting individual shippers. The purpose of the section is to afford identity of rate for substantial identity of transportation service, and anything that does not aid in determining what is such substantial identity of haulage does not aid in the application of the section. Evidently it was with this view the court purposely said in that part of its charge here assigned for error:

"It is contended by the defendant that, if shippers have overlapping contracts, they can be classified. The interstate commerce act authorizes the classification of commerce. You can ship coal for one price per ton, iron pipe for another, and pig iron for another. In other words, there is a classification of commerce. Whether they could classify overlapping contracts, schedule them, and make them public or not, is not a question in this case; but it is a question whether or not, when they schedule a certain figure for the transportation of property from one point to another as their tariff rate, and make that public, they are bound by it, and the law is that they cannot have a private agreement, overlapping or not overlapping, which gives a competitor, during the contemporaneous shipments, a return or an advantage over the published rate."

Where, as in this case, the Railroad made a published rate for coal from the Clearfield district to tide water, and the Railroad charged the Mining Company for this haulage the published rate, but charged other shippers for the same haulage lower rates, it is clear it violated the second section, in that, as said by the Supreme Court:

"Two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor."

Whether, indeed, the railroad might have classified contract coal in one class and free coal in another is not before us; for in point of fact it made no such classification and made no differential rates for such coal. What it did was to give a rate on coal from the Clearfield district to seaboard to one shipper and deny it to another, and thereby it violated the express provisions of the statute. The like circumstances and conditions are those which arise within the field of haulage, and not those which exist outside. In this case the Railroad charged to one shipper a rate of haulage, and, the coal of the other shipper being hauled from the same initial locality to the same terminal point, the haulage was identical, and therefore the freight should be the same. To hold otherwise, and to say that because one shipper had made a prior contract, based on lower freight rates, the service was thereby made dissimilar, is not only to contend for a physical non sequitur, but it introduces a practice fraught with possibilities of unjust discriminations and fraudulent rebates.

The next question concerns the shipments of the Mining Company from the Huntingdon & Broad Top Railroad Company. Just what the relation of that road is to the Pennsylvania Railroad we are not exactly shown, either in the proofs or briefs. The proofs do show, however, that the Huntingdon & Broad Top Railroad was within what for freight purposes was known as the "Clearfield district," that the rate from it was obtained from the Pennsylvania Railroad and was the general Clearfield district rate, and that the Mining Company had no dealings or rate quotations from the Huntingdon & Broad Top Railroad. The portion of the charge which reads:

"It is contended by the defendant that all the shipments made by the plaintiff during this time, starting from the Huntingdon & Broad Top Railroad, were not in the Clearfield district, and for that reason they were not a like service rendered under substantially similar conditions and circumstances. The plaintiff contends that the shipments on the Huntingdon & Broad Top Railroad and the point of shipment from which the plaintiff shipped its coal on that road are in the Clearfield district, and that the evidence in this case shows that they were treated as being in the Clearfield district. You will say which is correct. You will say whether the evidence shows it is in the district, or is not in the district. If it is in the district, the shipments from that point would be from the same initial point. If it is not in the district, they would not be from the same initial point. It is a matter for you,"

—is here assigned for error. We find no error in such language. Whatever may have been its relations with the Broad Top Railroad, the Pennsylvania, for freight purposes, chose to include it within the Clearfield district, published rates from it as within such district, quoted such rates to the Mining Company, and collected the same. By such acts the jury had a right to infer the Broad Top Railroad was, so far as the purposes of this case went, and for freight purposes, a part of the Pennsylvania Railroad system. Thus one of the witnesses, speaking of the Broad Top as a separate organization, operated by its own officers, says:

"We didn't know it in freight rates. We didn't ask them for freight rates. We never obtained any freight rates from them. There was no difference in getting a freight rate on Broad Top shipments from a Sonman or Clearfield county shipment."

He further said:

"Q. Taking up the matter of the Huntingdon & Broad Top, they were in the Clearfield region? A. Yes; under the tariff rates. Q. And your dealings as to freight were entirely with the Pennsylvania Railroad; that is to say, the Pennsylvania fixed a rate which covered the movement on the Huntingdon & Broad Top? A. Yes. Q. So that was one transaction, without regard to the starting point, and that was in the Clearfield region—one transaction from start to finish, delivery point, with the Pennsylvania Railroad? A. Yes."

Under these proofs we think the court was right in submitting the question to the jury whether shipments over the Pennsylvania Railroad originating on the Huntingdon & Broad Top were shipments from the Clearfield district and embraced within the rate established for that district by the Pennsylvania Railroad; for by the first section of the act the term "railroad" is defined to mean:

"All the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease."

That being established, the shipments of the Mining Company were entitled to the same rates for like shipments the railroad gave any other like shipper in the Clearfield district, although the shipments of the latter did not originate in that particular part of the Clearfield district covered by the Huntingdon & Broad Top. As a matter of policy it may well be that it would be to the advantage of railways to make such an arrangement; but Congress has not left these matters open to them. It has laid down the broad, simple principle of like rate for like service, and has not authorized the railroad to make other extrinsic considerations a ground for giving different rates for the same service. For, as was said in *London & Northwestern Ry. Co. v. Evershed*, 3 Appeal Cases, Law Reports, 1038:

"If equality of charges is to be disregarded under any circumstances, that might be made a cloak for making inequalities of charge under unjustifiable circumstances. I do not know whether that was the motive and intention of the Legislature or not, and I do not inquire. What the Legislature has clearly said is that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances as to the goods, not as to the person. I do not think the person comes into the question at all."

The next assignment of error raises the question of the propriety of the court's refusal of defendant's seventh point, which is:

"The plaintiff is not entitled to recover on all its shipments made in any one month or period of time because of the fact that during such time the defendant transported at a lower rate than it charged the plaintiff a portion of the shipments of some other shipper. If such lower rate was not justified, the amount which the plaintiff is entitled to recover is measured by the difference between the rate per ton which it paid on all its shipments during such period and the rate per ton which the other shipper paid on his or its whole volume of shipments during such period. As there is no evidence from which the jury can estimate the rate per ton paid on all their shipments by the shippers, a portion of whose shipments were carried at lower rates than were charged the plaintiff, there is no basis on which to estimate the amount which the plaintiff is entitled to recover, and it is only, therefore, entitled to recover nominal damages."

This point in effect requested the court to charge, as fixing the measure of recovery, not the lowest rate charged by the railroad to another shipper, but the general average paid on all shipments made by such

shipper. For instance, the railroad contends that, where another shipper's contract coal was charged a less rate than the Mining Company, the recovery was not fixed by the difference between these two rates, but the fixing rate was the average rate paid on all contract coal shipped at the lower rate and all free coal at the higher rate. We think the court was right in denying this point. Whatever may be argued in support of the equity of such a rule, the simple answer is that Congress made no such rule. The purpose of the act is clear, viz., to enforce equality of rate for like service in every case, and the mischief is done when for that service a shipper is charged more than any other shipper is charged for "any service rendered, or to be rendered, in the transportation of passengers or property." So long as it charges a lower rate for any shipment, the law is defeated, although on other shipments it may charge the proper rate.

The next assignment of error raises the question whether the plaintiff can maintain this action in view of the fact, that, with knowledge that it was being charged a higher rate for its free coal than other shippers were charged for contract coal, it nevertheless paid the freight without protest. It is now claimed that the absence of protest accompanying payment of freight is fatal to the right of action. We are of opinion such is not the case. This is not the ordinary case of a suit to recover back a sum of money which has been mistakenly paid and received, but is one where a statute has stamped the receipt of the money as unlawful. Thus section 2 provides:

"Such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful"

—and creates a statutory right of recovery, not of the freight paid, but of damages, viz.:

"Such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act."

From this it is clear that, Congress having conferred a statutory right of action, and having imposed a liability to action by section 8 on the carrier, who shall "do, or cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful," and, we may add, having conferred such right of action without imposing the precedent condition of protest, it follows that the courts cannot by construction impose on the statutory right a condition which Congress has not imposed. It follows, therefore, that this assignment cannot be sustained. This is in harmony with the holding of the Supreme Court in *United States Bank v. Bank of Washington*, 6 Pet. 17, 8 L. Ed. 299, where it was said:

"Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation to refund it. A notice of intention to recover back the money does not, even in such cases, create the right to recover it back. That results from the illegal exaction of it; and the notice may serve to rebut the inference that it was a voluntary payment, or made through mistake."

The next question raised is that the court erred in refusing to admit in evidence an exemplification of a record of the state court in the

case of *Cresson & Clearfield Coal & Coke Company v. International Coal Mining Co.*, for the purpose of showing a judicial sale of the International Coal Mining Company's claim or chose in action which is the subject-matter of the present suit. We see no reversible error in such ruling by the court. Whatever might be the effect of such judicial sale, the refusal of the court to admit it as a matter of evidence at the trial was not improper. When this suit was brought the right of action was clearly in the International Coal Mining Company, then and now the legal plaintiff. It is alleged such right of action was, after action brought, sold from it by judicial sale. But, waiving the question whether this sale, which was made on a lien obtained within four months prior to bankruptcy, is not void under the law, it is clear the sale would not abate the action. *Thatcher v. Rockwell*, 105 U. S. 467, 26 L. Ed. 949; *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403. No contention is now made that the right of action did not pass to the trustee, if it was not previously divested by the alleged judicial sale. When a plaintiff in a pending action becomes bankrupt, such action is not thereby abated (*Hahlo v. Cole*, 15 Am. Bankr. Rep. 591, 112 App. Div. 639, 98 N. Y. Supp. 1049), for section 11 of the act (Acts July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]) provides:

"A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him."

Accordingly the trustee in this bankruptcy was here made use plaintiff and the action proceeded. Now it seems at some prior stage the defendant sought to abate the action by virtue of this judicial sale, but the court had not sustained such effort. However that may be, we have in the assignment of error now before us the simple offer of the exemplification in evidence. In that forum the question was simply a contest of use plaintiffs, and the defendant had no legal right to interject that question into the trial. If admitted, so far as anything disclosed in the offer on which the assignment is based is concerned, it could not have affected the defendant. Consequently its rejection constitutes no reversible error.

It remains to consider the assignments of error raised by the Mining Company on the writ it has taken to review this judgment. Theoretically it may have a right to have these questions reviewed, but that it has no practical administrative end in view is apparent from the fact that on the other branch of the case it is strenuously insisting on the affirmance of the same judgment it here academically, but not really, asks to have reversed. With this in view, it suffices, without an extended discussion, to say we have examined the assignments involved and find no error. For example, it is here sought to convict the court below of error in overruling challenges of the plaintiff to certain jurors. In view of the fact that the jury awarded the plaintiff the full amount of its claim on the evidence before it, and that the plaintiff is insisting on sustaining the judgment on such verdict, it is clear the court's ruling did the plaintiff no harm, and the assignment is void of merit.

It is further contended that there was error in the court's refusing to enter judgment for default of defendant in not producing papers

in obedience to order. The court below was satisfied with the production made, and we find nothing in the record to satisfy us that the court did not understand its own order, or was mistaken in holding it was complied with.

Another assignment involves the right of the plaintiff to recover damages on shipments of coal made before April 1, 1899. In that respect the court ruled that, while there was evidence the Railroad had carried coal for others prior to that date for less than its published rates, the plaintiff itself had received the benefit of such lower rates in common with other shippers, and there was no discrimination against it. We think the court properly disposed of this aspect of the case in its charge, when it said:

"Up until July 1st, if all the evidence is to be believed, the plaintiff, its competitors, and the defendant were all engaged in violating the law—the railroad in giving rebates unlawfully, and the plaintiff in soliciting and accepting the same rebates that its competitors solicited and accepted; and under those circumstances courts do not sit to measure the difference in degree of violation of the law in favor of one party or the other. The question of the money value that each of them received in their violation of the law will not be looked into, nor taken up, nor investigated by courts of justice. Courts of justice are not instituted to measure difference in money value to two people who are engaged in violation of the same law, and therefore the court will not permit them to recover, not for the purpose of relieving the defendant, but because the plaintiff is just as culpable, and under this law, if any criminality attaches, has been just as much a violator of the law, as the defendant. That is the reason I say they cannot recover up to that time."

The next question raised involved the court's restricting plaintiff's right to recover to a sum measured by the difference between the rates charged it and other shippers, and declining to consider alleged advantages enjoyed by the Berwind-White Company in reference to a lease of Harrison's pier, allowance for handling coal there, and on the Altoona Coal & Coke Company, a short connecting line. It suffices to say no such ground of action was declared on, and the court was justified in the exclusion of such features from the jury.

Indeed, after due consideration of these and the other assignments, which we do not deem it necessary to discuss in detail, we find no error by the court below; and its judgment is therefore affirmed, each party to pay costs on its own writ of error.

GRAHAM v. PEALE, PEACOCK & KERR OF NEW YORK.

(Circuit Court of Appeals, First Circuit. October 5, 1909.)

No. 804.

FRAUD (§ 20*)—FALSE REPRESENTATIONS—FAILURE TO COLLECT CLAIM.

Defendant, while acting for a trust company to which a corporation was largely indebted, induced plaintiff's attorney to refrain from pressing plaintiff's claim against the corporation then due by attachment or other process by falsely representing to such attorney that the corporation was in good financial condition, that the trust company would extend the corporation's credit by loaning an additional \$25,000, and that, if plaintiff and the trust company and another constituting the corporation's lar-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gest creditors would permit the corporation to continue, the corporation would make pro rata payments, and would be able to relieve itself from its difficulties. The trust company at this time, however, was secretly gaining absolute control of the corporation's assets, and recovered for itself a large portion of its indebtedness before plaintiff discovered defendant's duplicity, when the corporation was found to be bankrupt and proceedings in bankruptcy were instituted against it. *Held*, that such facts were insufficient to sustain an action for deceit against defendant. *Bradley v. Fuller*, 118 Mass. 239, applied.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 18; Dec. Dig. § 20.*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action by Peale, Peacock & Kerr of New York against John M. Graham. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

Robert M. Morse (William M. Richardson, on brief), for plaintiff in error.

Ezra R. Thayer and Harold S. Davis, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This was a suit at common law for an alleged deceit, in which the plaintiff in the Circuit Court recovered a verdict for \$20,005.81, with interest, being substantially the entire amount of its debt as hereinafter described. Thereupon the defendant in that court sued out this writ of error. It will be convenient to describe the parties in this opinion as arranged in the Circuit Court. Many questions were discussed before us which it is not necessary for us to consider; because, unless an entirely different case is hereafter made in the Circuit Court than what appears on this record, the point on which we let our decision turn will dispose of the litigation. In order to properly settle this point we must take the case as told by the plaintiff, which is as follows:

The Thomas & Pike Company (hereinafter called the "Coal Company") was a corporation selling coal at retail in Boston. It had a capital stock of \$100,000, and did a business of about 80,000 tons a year. Its treasurer and manager was Herbert W. Pike, who had been in the business, either as treasurer of the corporation or as partner in the firm which preceded it, for many years. The secretary of the corporation was Fred L. Childs, who came into the business about 1900. Before that time he had for many years been discount clerk at the International Trust Company, of which the defendant was the president, and his relations with the defendant were very close. He caused the Coal Company to bank with the Trust Company. As secretary of the Coal Company, he attended largely to its financial affairs. In 1902, when the coal strike began, the credit and business of the Coal Company were good. In the early winter of 1902 the Coal Company adopted the policy of keeping itself fully supplied, and it had coal all winter to meet all demands. It had to pay high prices for the coal, but

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the profit was very large, as it sold at retail all the way from \$18 to \$25 a ton. But this condition of affairs was unexpectedly interrupted. The weather grew warm in January, and remained so until the demand for coal greatly decreased, and prices dropped accordingly. As a result the Coal Company found itself by the end of January with a large stock of coal on hand, on which it was likely to make a heavy loss. It had bought its coal from various dealers, much the largest part of its supply coming from E. B. Townsend. Among others it bought several cargoes from the plaintiff, the last two of which, amounting to \$35,505.81, were shipped on January 8th and January 21st, and arrived in Boston about ten days after those dates. By the terms of the sale the Coal Company was bound to pay cash on receipt of bill of lading; but it did not do so. On January 26th Pike asked Edgarton, the broker who had sold the coal for the plaintiff, to resell it at a considerable loss, and promised to make up the difference. Edgarton could not get his price, and Pike presently reported that he had resold the cargoes himself. He promised to pay the plaintiff in a day or two, as soon as he received the money; but he did not pay. On Monday, February 9th, he came in and asked Edgarton to see the defendant. This Edgarton did at once. The defendant urged the desirability of granting some indulgence to the Coal Company, expressed the utmost confidence in it as a thrifty going concern, worthy of the support of the few larger creditors, and as proof of his confidence said that his bank was ready to advance it, if necessary, \$25,000 more than it then owed. Upon his advice Edgarton wrote to New York laying the matter before the plaintiff, and in consequence F. D. Peale, Esq., a New York lawyer, who was the plaintiff's counsel, and also its secretary and director, came to Boston on February 12th to attend to the matter.

Peale called on the defendant, who discussed the Coal Company's affairs in detail, enlarging on the value of its business and the excellence of its prospects. He argued that its present difficulties were merely temporary, resulting from its overstock of coal and the peculiar conditions caused by the strike; and he strongly recommended as the only wise course that the three large creditors stand together, and let the Coal Company pay off its debts pro rata as it sold its coal and collected its accounts. Peale testified:

"I asked him what they owed his bank, and he said about \$65,000; and he said he had such confidence in their ability to pull through that he had said to them already, and he repeated it to me, that he was willing to loan them an additional \$25,000 if that should prove necessary in connection with the conduct of their business. He further said that he had laid before Mr. Townsend, whose claim was even larger than the Trust Company's, the plan of having the three creditors stand together; and that Townsend had assented to it if the plaintiff was willing. He said he and Mr. Townsend had agreed that was the best thing to do, and that they were both willing to do it, and that it simply was up to us, and our decision would determine whether the plan should become effective or not."

Peale was persuaded by these representations, and accepted the defendant's view as to the best course to be pursued. Accordingly he returned to New York without insisting on immediate payment. The plaintiff's directors approved his decision, and permitted the Coal Com-

pany to go on with its business, supposing that sundry payments which were thereafter received from time to time, amounting in all to \$15,500, were made in accordance with the plan proposed. On June 10th these payments ceased, and in consequence Peale came to Boston in July and saw Childs. After assurances from the latter that he had kept faith with the plaintiff, and had paid it pro rata with Townsend and the Trust Company, and after every excuse and device to prevent an investigation of this statement had been exhausted, Peale at last obtained access to the Coal Company's books. From these and from the bookkeeper, he learned for the first time, not only that the Trust Company's debt had been paid in full, and that Townsend had received over \$90,000 on account of his claim, leaving a balance due him of only about \$20,000, but, furthermore, that the business of the Coal Company had long since been secretly sold out, leaving no assets for the payment of the plaintiff's claim except some accounts of doubtful value, and that this winding up of its affairs had been completed in April, long before the dates of the letters in which, as late as the end of May, Childs had kept up the pretense that he was actively engaged in the affairs of a going concern. The plaintiff immediately filed a petition in bankruptcy against the Coal Company, and it was adjudicated a bankrupt. The plaintiff disclosed its present claim at the outset of the bankruptcy proceedings, but it did not sue the defendant until after the trial of a suit brought against the Trust Company by the trustee in bankruptcy, preferring that litigation for the benefit of the estate should have precedence over its private claim.

On February 12, 1903, the Trust Company held 11 notes of the Coal Company, amounting to \$68,500, falling due at different dates between February 16th and May 15th of the same year. On February 2d the Trust Company lent to the Manufacturers' Commercial Company, a corporation engaged in lending money on the security of accounts, the sum of \$48,000, taking as security an assignment of open accounts for \$64,694.61 due the Coal Company. These were substantially all its good accounts. The Manufacturers' Commercial Company drew a check for \$48,000, and turned it over to the Coal Company. The Coal Company simultaneously deposited the \$48,000 to its credit with the Trust Company, drew a check in favor of the Trust Company for \$67,878.09, the amount of its outstanding notes discounted at 6 per cent., and paid off those notes. To make this check good the Trust Company gave the Coal Company an additional credit of \$17,000 for which it took a demand note. At the close of the day it had thus changed its claim against the Coal Company from \$68,500, no part of which was due, to \$17,000 due on demand, and had received through the Manufacturers' Commercial Company an assignment of all the Coal Company's good accounts. The final stages of these transactions were going on at the very moment the defendant was talking to Peale. And on the following day, by lending \$5,800 more to the Coal Company upon a note which gave the holder the right to apply the collateral to any other obligations of the Trust Company, and taking as security an assignment of the equity in the accounts received the day before from the Manufacturers' Commercial Company, the Trust Company completed its hold on those accounts as security for all its claims. The transac-

tion between the Manufacturers' Commercial Company and the Coal Company began on February 9th, when Childs called on Wolcott, the manager of the Manufacturers' Commercial Company, and applied for the loan. Wolcott said that he could not make it without the consent of the Trust Company, from which he would have to get the money. This consent he obtained. On that day or the next the Manufacturers' Commercial Company agreed to make the loan, and on February 11th, the list of accounts and the other papers were completed, and Childs took them in to Wolcott; but the latter refused to accept them because of a formal defect in the execution, and the transaction accordingly did not go through till the next day.

The plaintiff contended that the defendant's representations to Peale that there was a plan on foot by which the three large creditors should permit the Coal Company to go along and should accept payments pro rata as it collected its accounts, that Townsend had assented to this, that the Trust Company was ready to do so, and was ready to increase the Trust Company's loan by further advances to the extent of \$25,000, if necessary, were all willfully false; that they were intended to prevent the plaintiff, the only creditor whose demand was pressing and required instant attention, to abstain from insisting on the immediate payment which it had been promised and was entitled to receive; and that they accomplished their purpose.

The only portion of the plaintiff's declaration, as finally settled by amendment, which we need cite, is as follows:

"Whereas, in fact, at the time when the defendant made the said representations each of said representations was altogether fraudulent and false and no plan or arrangement whereby said three parties should act together and give time and accept payment of their several debts only pro rata or co-operate in any way was then or ever had been under consideration, and said Townsend had never assented to any such plan or arrangement, and the defendant as president of said International Trust Company was not willing to enter into any such plan or arrangement, or to advance \$25,000 or any other sum in addition to said sums advanced before February 12, 1903, but, on the contrary, the defendant was then secretly arranging and contriving with said Thomas & Pike Company to place said International Trust Company in a more favorable position than the plaintiff and said Townsend, and to obtain advantages for said International Trust Company over plaintiff and said Townsend in case said Thomas & Pike Company should prove to be unable to pay its debts in full, all of which the defendant then well knew. And by means of the said representations the plaintiff, acting on the faith thereof and in the belief that the same were true, was induced to abstain from insisting on immediate payment of said indebtedness due to it from said Thomas & Pike Company and from taking immediate steps to collect, and from collecting, the full amount of said indebtedness as it otherwise could and would have done, and to accept from time to time certain payments on account of said indebtedness, amounting in all to the sum of \$15,500, in the belief that said payments were made in accordance with said pretended plan and arrangement, and said Thomas & Pike Company thereafter became bankrupt and wholly unable to pay the whole or any part of the balance of its said indebtedness to the plaintiff over and above said sum of \$15,500, and the plaintiff thereby wholly lost said balance of said indebtedness and otherwise suffered great damage, all by reason of said false and fraudulent representations of the defendant."

The charge of the judge very carefully pointed out to the jury certain elements necessary to maintain an action for deceit, and in all those particulars it was thoroughly guarded. The portions of the

charge essential to the point which we will consider were summed up as follows:

"I am asked to instruct you, and I do instruct you, that if the plaintiff intended to demand immediate payment in full of the debt owed it by the defendant, and if it refrained from so doing until the Thomas & Pike Company had become altogether insolvent, in reliance upon the false representations of the defendant, and if, at the time such representations were made, the Thomas & Pike Company were solvent, so that, as the result of the demand, the plaintiff would have obtained payment in full, he is entitled to payment in full. That I have already charged you, as matter of law, but have suggested to you that it appears to me to be highly improbable that, under any circumstances, the Thomas & Pike Company, could have paid all its debts in full. You are judges of that as a question of fact. I have a right to suggest to you that the difficulties in the way of that conclusion are at least very considerable."

The defendant relies on *Bradley v. Fuller*, 118 Mass. 239, decided on September 3, 1875, the substance of which he correctly states as follows:

"In *Bradley v. Fuller*, 118 Mass. 239, it was held that, if a person who has a claim against a corporation, which he intends to enforce by an attachment of its property, is purposely induced by false and fraudulent representations of its treasurer to refrain from making an attachment, and all the property of the corporation is subsequently attached for the debt of another person and is sold on execution, an action of tort for such fraudulent representations will not lie against the treasurer."

Taking this case as thus explained in connection with the fact that the plaintiff had not even sued out a writ of attachment with any present intention of seizing the property of the debtor in question here, and had in no way secured any lien on, or any present right of any kind to, the assets of its debtor, *Bradley v. Fuller* seems decisive against the plaintiff on the record before us. The decision, so far as brought to our attention, must be accepted as the settled law of Massachusetts, where these transactions occurred; and we are unable to perceive any reason why we should not, on this point, follow the local law as thus promulgated by the local courts. All the later Massachusetts decisions cited by the plaintiff have substantial elements not found here or in *Bradley v. Fuller*. There is nothing in the nature of the question, or in any decision of the Supreme Court, so far as we have been able to discover, which justifies us in making a departure therefrom. On the other hand, the decisions of the Supreme Court support it. *Findlay v. McAllister*, 113 U. S. 104, 5 Sup. Ct. 401, 28 L. Ed. 930, decided on January 12, 1885, has been pressed on us. We find nothing therein inconsistent with *Bradley v. Fuller*; but, on the other hand, the expressions in the opinion, so far as they furnish a rule for our guidance, are in harmony with it. Indeed, *Bradley v. Fuller* is cited by the court at page 114 of 113 U. S., page 406 of 5 Sup. Ct. (28 L. Ed. 930), without any dissent therefrom or disapproval thereof. Certain Pennsylvania decisions which look to sustaining the plaintiff's case, cited at page 113, the opinion disapproves of at page 114 of 113 U. S., page 406 of 5 Sup. Ct. (28 L. Ed. 930) in the following words:

"The three cases last cited extend the rule further than the exigency of the present case requires, and further than this court has been disposed to go."

In *Yates v. Joyce*, 11 Johns. (N. Y.) 136, cited at page 113 of 113 U. S., page 405 of 5 Sup. Ct. (28 L. Ed. 930), the plaintiff had an ex-

isting lien on the property removed or destroyed. In *Smith v. Tonstall*, Carthew, 3, also cited at page 111 of 113 U. S., page 404 of 5 Sup. Ct. (28 L. Ed. 930), the plaintiff had had a judgment on a *scire facias* to have execution, so that he had advanced beyond the conditions in *Bradley v. Fuller*, and beyond those in the case at bar. However, *Findlay v. McAllister* reaches clearly only a case where there is an existing right of a specific character; that is, the plaintiff there had secured a writ of mandamus directing a levy of a tax to pay his debt, which levy the defendants there had conspired to prevent. The general distinction which takes *Bradley v. Fuller* out of that case was clearly made at page 111 of 113 U. S., page 404 of 5 Sup. Ct. (28 L. Ed. 930), as follows:

"The right of a judgment creditor to proceed by action against those who rescue the person of his debtor arrested on mesne or final process, or interfere with the goods of his debtor so as to prevent a levy or sale by the sheriff to satisfy his judgment, is well recognized at common law."

And so again at pages 114 and 115 of 113 U. S., page 406 of 5 Sup. Ct. (28 L. Ed. 930), where the court lays aside, as not pertinent to the issue before it, cases in which "the plaintiff was merely a general creditor, and had no judgment or attachment or lien."

Smith v. Tonstall need not be referred to further, but it is interesting to do so. On account of statutory changes in the law during the more than 200 years since it was decided, it seems to have become obsolete in England. It is not cited in *Mews' Digest* of 1897, nor is it referred to by either *Pollock* or *Mayne*. By the common law, execution had relation to the time of the awarding of judgment, and from that time it imposed a lien on all the defendant's goods, even though sold *bona fide* and for a valuable consideration. The statute of 29 Charles II relieved this condition only in favor of purchasers *bona fide*. Consequently, as against the defendant in that case, who was not a *bona fide* purchaser, and who removed the goods out of the jurisdiction, the plaintiff had an existing present right. Therefore the case is like *Yates v. Joyce*, already explained, with only the unimportant difference that in one there was a lien in hand on personal property and in the other a like lien on realty.

Adler v. Fenton, 24 How. 407, 16 L. Ed. 696, decided that a creditor whose debt was not due could not bring a suit against the debtor and persons conspiring with him to fraudulently conceal his goods. The opinion does not point out that the fact that the debt was not due was an essential matter. At page 412 it states that the creditor "lost no claim upon or interest in the property, for he never acquired any." It adds:

"The most that can be said is that he intended to attach the property, and the wrongful act of the defendant has prevented him from executing his intention."

It also observes that the claims of morality and justice require that there should be protection against such acts of dishonest debtors; "but the Legislature must determine upon the remedies appropriate for this end." In some states this suggestion has been acted on, and statutes have been enacted of a penal character against persons receiving conveyances of property intended to defraud creditors.

Adler v. Fenton is explained in *Lincoln v. Claflin*, 7 Wall. 132, 137, 19 L. Ed. 106, wherein it is said:

"The creditors in that case possessed no lien upon or interest in the property of their debtors to impair or clog in any respect the right of the latter to make any use or disposition of it they saw proper. The exercise of that right, whatever the motive, violated no existing right of the creditors, and consequently furnished them no ground of action."

Bigelow on Torts (8th Ed., 1907) p. 101, asserts without any question the rule laid down in *Bradley v. Fuller* quite as broadly as we accept it. A careful examination of the other text-writers has failed to help us in either direction. Nevertheless, the decisions we have cited proceed on grounds so broad as to lead to the result that we should apply *Bradley v. Fuller*, 118 Mass. 239. As *Bradley v. Fuller* goes to the root of the plaintiff's suit, we need not follow this record further.

The judgment of the Circuit Court is reversed, the verdict is set aside, and the case is remanded to that court for further proceedings in accordance with law; and the plaintiff in error recovers his costs of appeal.

ALDRICH, District Judge (concurring in the result, but disagreeing with the ground of decision). I am far from agreeing with the idea that there can be no recovery by a party who has an overdue claim and intends to demand immediate payment of a solvent debtor, and who is directly influenced from making his demand and enforcing payment by the willfully false representations of another creditor, who intends that the false representations shall be acted upon, and who, by means thereof, reaps the benefit of his fraud by collecting his own claim in full, thereby rendering the debtor insolvent and thus causing the party whom he has misled to suffer substantial pecuniary loss; and I do not think the right of recovery depends at all in such a case upon whether the injured creditor had proceeded so far as to take out a writ.

The learned judge submitted the case to the jury with distinct and emphatic instructions that the plaintiff could not recover unless the representations and the story which the defendant told were willfully false, "that it is a lie, that the defendant lied." There were also explicit instructions that the plaintiff must have intended to demand immediate payment when the debtor was solvent, and that he must have refrained from doing so by reason of the false representations of the defendant, and but for such representations that the plaintiff would have obtained payment in full.

Aside from the foregoing explicit instructions, the theory on which the case was submitted and the general principles governing were stated as follows:

"For the plaintiff to recover, he must satisfy you first that the representations which he alleges, the story which he says defendant told, is false, not merely that it is untrue in the sense that it is not accurate, that it does not correspond to the facts, but that it is willfully false, that it is a lie, that the defendant lied. That is the first thing the plaintiff must establish.

"The second point is that the lie is concerned with matter of fact. It must not be merely a breach of a promise or something of that sort. It must be a

false statement regarding a fact. And what a fact is in the eye of the law I shall discuss with you later.

"In the third place, the statement must be made by the defendant with the intention that the plaintiff shall act upon it; that is, a mere passing remark, not made with any intention that the plaintiff shall act upon it, is not such a false representation that the plaintiff can recover.

"And the fourth requisite to the plaintiff's case, the fourth thing that the plaintiff must prove, is that he did act upon it, that he did act upon this lie, to his own pecuniary hurt.

"Those are the four matters concerning which the plaintiff must satisfy you here. First, that the statement was a lie. It must be false. If it should happen to be true, the plaintiff cannot recover. It must be not only untrue in the sense that it does not correspond with the facts, but that it is willfully untrue, willfully false, false to the defendant's knowledge. That is the first. The second is that it must be a representation of fact. The third is that it must be a representation made with the intention that the plaintiff shall act upon it. And the fourth is that the plaintiff must have acted upon it to his own pecuniary hurt."

In short, as disclosed by the record and as established by the verdict of the jury upon the issues of fact submitted, the defendant, representing another creditor of the Coal Company, through false representations, stood the plaintiff off from collecting its claim, and by means thereof collected in full the claim of the Trust Company, which he represented, and of which he was president. Holding that there can be no recovery in such a situation where damages are susceptible of legal proof would be setting a premium on one's wrongdoing for one's own benefit.

I do not conceive that *Bradley v. Fuller*, 118 Mass. 239, at all applies to a situation like this, because in *Bradley v. Fuller* it was not the party who made the false representations that reaped the benefit of the fraud. That was simply a case where the treasurer of a debtor corporation (not a representative of another creditor like Graham) by false representations induced a creditor not to sue, and thereafter another creditor, one not tainted with fraud at all, stepped in and attached the property of the corporation, and that case therefore presents an entirely different question. If in *Bradley v. Fuller* the attaching creditor who collected his claim had secured the pecuniary advantage and benefit through fraud which lulled the first creditor into nonaction, and if legal remedy had been sought against him, it would be like the case at bar. Again, this case is not like *Bradley v. Fuller* and *Adler v. Fenton*, but in some respects more like *Lincoln v. Clafin*, because the action here is not against the debtor or the representative of a debtor, and because the question here is not whether the plaintiff, as a ground of action, had acquired a lien upon or an interest in the property of the debtor, but, quite independent of such considerations, whether the plaintiff, who was a creditor, has a right of action against the representative of another creditor, grounded upon fraud and deceit, successfully practiced under circumstances of trust and reliance.

But aside from the fundamental question of the right of recovery by an injured party upon the ground of fraud against another who has for himself, or for the interests which he represents, intentionally reaped a harvest by means thereof under circumstances where the question of damages would be susceptible of solution with legal certainty, I think the record presents a serious question whether the

plaintiff in this case is entitled to recover. This question results because, under peculiar and exceptional circumstances, his alleged damages are so far in the field of contingency as to present a situation of legal uncertainty in that respect. There were many inherent contingencies. If Peale, Peacock & Kerr had pressed payment, they might have secured their entire indebtedness, and they might not. If not, they might have secured a writ and made an attachment, and they might not. And in case of an attachment the Coal Company might have been thrown into bankruptcy, thus involving the contingencies and uncertainties of such a proceeding, and a result based upon unforeseen and unexpected depreciations. Or if they had been voluntarily paid without attachment, under possible bankruptcy proceedings and a possible showing of belief of insolvency, the money might have been recovered back by a trustee in bankruptcy upon the ground that the payment amounted to a voidable preference.

The question of legal uncertainty in respect to damages was raised by the requests and assignment of errors (20 to 25, inclusive), and the court was, in effect, asked to direct a verdict for the defendant on the ground that the plaintiff had proved no legal damages. It is true the court, in effect, told the jury that the damages must be made certain, that the jury must find that the Coal Company was solvent, and that the plaintiff would, in fact, have collected its entire claim; but, after all, the question still remains fairly enough, under the requests, whether the proofs were of such a character of legal certainty as to entitle the plaintiff to have that question submitted to the jury. Apparently the whole case in respect to damages was in the field of conjecture, and apparently all theories about damages are necessarily speculative and uncertain, thus presenting, I fear, one of those unfortunate situations where it is impossible for an injured party to show in a legal sense the extent of his injury, or even to show with legal certainty that he was injured at all. *Lamb v. Stone*, 11 Pick. (Mass.) 527, 534; *Adler v. Fenton*, 24 How. 407, 412, 16 L. Ed. 696.

I cannot agree to the ground of decision disclosed in the majority opinion, but, as my impression is that the plaintiff is not in a position to make his damages legally certain, I agree with the result reached.

CITY OF HELENA v. HELENA WATERWORKS CO.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1900.)

No. 1,703.

1. COURTS (§ 328*)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Where the primary purpose of a bill was to enjoin the execution of a contract for the construction of a city water system and to restrain the issuance and delivery of city bonds to the extent of \$600,000 on the ground that the issue of the bonds was void, and the bill alleged that if the bonds were issued complainant would be required to pay in taxes a sum exceeding \$10,000, such amount represented the amount in controversy for the purpose of determining federal jurisdiction, and not the amount of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

first annual assessment on complainant's property to pay interest and provide a sinking fund for the payment of the bonds.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. § 328.*]

Jurisdiction of Circuit Court as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.]

2. MUNICIPAL CORPORATIONS (§ 1000*)—BONDS—PRELIMINARY INJUNCTION—SCOPE—BILL.

Where a bill sought to restrain the issuance of bonds by a city for the construction of a waterworks system and to restrain the city from entering into a contract for the construction of such system on the ground that the proceedings were void, a preliminary injunction restraining the issuance of the bonds, and also restraining the city from making any contract or incurring any indebtedness for a waterworks system or supply, was to be construed in accordance with the allegations of the bill and the purposes of the suit, and was, therefore, not objectionable as enjoining the city from taking further steps for a new bond issue to acquire a water system.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 1000.*]

Appeal from the Circuit Court of the United States for the District of Montana.

Bill by the city of Helena against the Helena Waterworks Company to enjoin the issuance and sale of water bonds and the making of a contract for the construction of the city water system. From an order granting an interlocutory injunction, the city appeals. Affirmed.

The appeal in this case is taken from an interlocutory injunction issued on February 11, 1909, enjoining the appellant from issuing or selling \$300,000 of its water bonds, and from making any contract or incurring any indebtedness for a water system or supply, and from collecting from the appellee a tax of one mill, or any other amount, for the payment of interest on the bonds. The appellee, as complainant, in its bill set forth facts showing the invalidity of the issue of the bonds, and upon the bill and the answer of the appellant thereto the court found and adjudged that the issue was unlawful and void, and thereupon granted the interlocutory injunction. The appellant objected to the jurisdiction in the court below, both by demurrer and plea, on the ground that it did not appear from the bill that the requisite jurisdictional amount was involved in the controversy. The bill alleged that the matter in dispute exceeds the sum of \$2,000, exclusive of interest and costs; that the appellee is the owner of real and personal property in the city of Helena, of the value of several hundred thousand dollars, on which taxes have been levied and collected by the city; that the assessed value of the taxable property of the city of Helena, for state and county taxes for the year 1907, was the sum of \$10,799,050, and for the year 1908, \$11,629,834; that on September 24, 1908, the city council of said city passed a resolution, which was approved by the mayor, levying a tax for the payment of interest upon said water bonds of one mill; that if the bonds are issued, and become obligations on said city, the taxes on the property of the appellee within the said city, to pay interest on said bonds and provide a sinking fund for the redemption thereof, will exceed the sum of \$10,000.

Edward Horsky and C. A. Loomis, for appellant.

Milton S. Gunn and Carl Rasch, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The appeal presents but two questions: First, whether the amount in con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

troversy was sufficient to confer jurisdiction on the court below; and, second, whether, in view of the issues involved, the injunction order was more inclusive than it should have been. It is not alleged in the bill that the first of the annual assessments about to be levied upon the appellee's property will exceed \$2,000, exclusive of interest and costs, and in the answer it is alleged that the first assessment will be but \$398.50. But the bill does allege that, if the bonds issue and become obligations of the city, the taxes on the appellee's property to pay interest on the bonds from year to year and to provide a sinking fund for the redemption thereof will exceed in the total the sum of \$10,000.

The appellant relies upon decisions such as *Holt v. Indiana Mfg. Co.*, 176 U. S. 68, 20 Sup. Ct. 272, 44 L. Ed. 374, in which it is held that, in a suit to enjoin the collection of a certain specific annual tax, the future taxes which may be affected by the decision cannot be included in determining the value of the matter in dispute. But the present case does not come within the doctrine of those decisions. Here the main and primary purpose of the bill is, not to enjoin the collection of a sum claimed to be due as a tax, but to enjoin the execution of a contract for the construction of a water system and to restrain the issuance and delivery of bonds of \$600,000. In such a case it is sufficient to sustain the jurisdiction if it appear that the total burden of future taxation that will be imposed upon the complainant's property by the threatened action equals or exceeds the jurisdictional amount. The question of the power of the municipality to take the proposed step and to create the liability to taxation being involved, the amount in controversy is the sum of the complainant's taxation—not his taxes for one year, but his taxes for the whole period of his liability thereunder. In *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987, the suit was brought by several hundred taxpayers, for themselves and others associated with them, and for the benefit of all other taxpayers, alleging the invalidity of certain bonds, and praying that their collection be enjoined. The court said:

"The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon, and finally the principal thereof, and not the mere restraining of the taxes for a single year. The grievance complained of was common to all plaintiffs, and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiff. The rule applicable to plaintiffs, who claim under a separate and distinct liability, and that contested by the adverse party, is not applicable here; for, although as to the tax for the particular year the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard."

In *Colvin v. Jacksonville*, 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053, a citizen of another state brought a suit against the city of Jacksonville, Fla., and its mayor, to enjoin and restrain the issue, sale, delivery, pledge, or other disposition of a certain issue of bonds to the amount of \$1,000,000. The Circuit Court had found that the total amount of tax which the plaintiff would be obliged to pay for interest and sinking fund on account of the said proposed issue of bonds would

not exceed \$2,000, and on that ground had denied its jurisdiction. In the Supreme Court the ruling was affirmed, and it was held as matter of law that the interest which the complainant had in the issue of the bonds, and not the amount of the entire issue thereof, was the amount in controversy. So in *El Paso Water Co. v. El Paso*, 152 U. S. 157, 14 Sup. Ct. 494, 38 L. Ed. 396, in a bill to enjoin the city from issuing certain bonds, it was alleged that if they were issued the complainant would be compelled to pay taxes on its property for the interest on the bonds and to provide a sinking fund for the principal thereof; but the amount of the tax that would thus be imposed upon the complainant's property was not disclosed. The court held that, in a bill filed by a plaintiff to protect his individual interest and to prevent damage to himself, it must affirmatively appear that the acts charged against the city, and sought to be enjoined, would result in his damage in a sum equal to the jurisdictional amount. Said the court:

"So far as respects the matter of taxes which by the issue of bonds will be cast upon the property of the plaintiff, it is enough to say that the amount thereof is not stated, nor any facts given from which it can be fairly inferred."

It is clear, from the expressions of the court in the two cases last referred to, that it was solely because the total possible liability of the complainants under the bond issue sought to be enjoined therein would not amount in the aggregate to a sum sufficient to confer jurisdiction that the power of the court to restrain the creation of that liability was denied. In harmony with the doctrine of those cases is the decision of the Circuit Court of Appeals for the Eighth Circuit in *City of Ottumwa v. City Water Supply Co.*, 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

The appellant attempts to distinguish that case from the case at bar on the ground that there the constitutional power of the city to issue the bonds was denied, and argues that a distinction is to be observed between cases where the municipality has absolutely no lawful power to enter into the contract to issue the bonds and cases where the power exists and it is sought to defeat the action of the municipality on grounds affecting the legality of the proceedings. Upon principle, we think no such distinction can be made. If, on the ground of the alleged invalidity of the proposed action of the municipal corporation, the amount in controversy in a taxpayer's suit for an injunction is to be measured by the total amount of the burden to be imposed on him, it can make no difference whether the illegality of the action consists in the violation of constitutional restrictions, or in irregularities in procedure, or, indeed, in mere violation of the complainant's contractual rights; for in either case the controversy involves but one question, the power of the corporation to make the contract and to issue the bonds. We hold that the amount in controversy in the present case is sufficient to sustain the jurisdiction.

It is contended that the injunction goes beyond the issues in restraining the appellant "from making any contract or incurring any indebtedness for a water system or supply," and that in the broad terms in which it is expressed the appellant is enjoined from taking further

steps to provide for a new bond issue for the purpose of acquiring a water system. In answer to this it is sufficient to say that the injunction is to be read in the light of the averments of the bill and the purposes of the suit. When so considered, it is apparent that it restrains only the action which is complained of in the bill. *Sailors' Union of the Pacific v. Hammond Lumber Co.*, 156 Fed. 450, 85 C. C. A. 16. The injunction order is affirmed.

NATIONAL CASH REGISTER CO. v. SALLING.†

(Circuit Court of Appeals, Ninth Circuit. October 4, 1909.)

No. 1,652.

1. APPEAL AND ERROR (§ 702*)—SCOPE OF REVIEW—REQUESTS TO CHARGE—RECORD—INSTRUCTIONS GIVEN.

The refusal of requests to charge cannot be reviewed on a writ of error, where the bill of exceptions does not contain the entire charge given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2938; Dec. Dig. § 702.*]

2. LIBEL AND SLANDER (§ 50½*) — PRIVILEGED COMMUNICATIONS — WRITINGS UNNECESSARILY DEFAMATORY.

The rule that communications by one having an interest to one having an equal interest are privileged, if made in good faith and without malice, does not protect against a communication which is unnecessarily defamatory.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 138-140; Dec. Dig. § 50½.*]

3. LIBEL AND SLANDER (§ 45*)—FALSE STATEMENTS—PRIVILEGE.

Where plaintiff had resigned his position, and his resignation had been accepted, and his employment terminated, several days before the writing of the letter which purported to discharge him, a communication to defendant's agent, reciting that plaintiff had been discharged from his employment for cause, that defendant would not again give him a position under any circumstances, and that he was "a dirty dog and a traitor," known by the writer to be false, and intended to prevent plaintiff's success in his endeavor to go into business for himself, was not privileged.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 139; Dec. Dig. § 45.*]

4. LIBEL AND SLANDER (§ 34*)—PRIVILEGED SUBJECT—PRIVILEGED COMMUNICATION.

In the law of libel, the subject may be privileged, while the communication may not.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 113; Dec. Dig. § 34.*]

5. LIBEL AND SLANDER (§ 123*)—PRIVILEGED COMMUNICATION—QUESTION FOR JURY.

Where there is uncertainty whether the facts which give an alleged libelous communication a privileged character have been established by proof, it is not error to submit such question to the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 362; Dec. Dig. § 123.*]

6. LIBEL AND SLANDER (§ 124*)—INSTRUCTIONS—PRESUMPTIONS AND BURDEN OF PROOF.

Where a communication was false, known by the writer to be so, and was too defamatory to be privileged, an instruction defining "prima facie"

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied.

to be that the law assumes the communication was false and unprivileged, that the presumptions were disputable, and that defendant was allowed, where the falsity and unprivileged character of the publication was specifically denied, to establish both by proof, was not error.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 367; Dec. Dig. § 124.*]

7. LIBEL AND SLANDER (§ 101*)—PRIVILEGE—BURDEN OF PROOF.

The burden of proof of privilege is on the defendant.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 279; Dec. Dig. § 101.*]

8. LIBEL AND SLANDER (§ 112*)—MALICE—EVIDENCE.

Where defendant wrote a letter concerning plaintiff, falsely stating that he had been discharged for cause, that he was "a dirty dog and a traitor," and one whom defendant would not give a position to under any circumstances, and the writer of the letter, in an action for slander, testified that it was part of his business to look out for people going into business in opposition to defendant, and that he had heard that plaintiff was about to go into business for himself, and wrote the letter "to nip plaintiff's proposition in the bud," such facts were sufficient to prove malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 329; Dec. Dig. § 112.*]

9. LIBEL AND SLANDER (§ 50*)—QUALIFIED PRIVILEGE—GOOD FAITH.

A libelous communication is not qualifiedly privileged, unless made in good faith, with the honest belief that it is true.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 149; Dec. Dig. § 50.*]

10. LIBEL AND SLANDER (§ 123*)—GOOD FAITH—QUESTION FOR JURY.

Whether a libelous communication was made in good faith is for the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 362; Dec. Dig. § 123.*]

11. LIBEL AND SLANDER (§ 5*)—MALICE—PROOF.

In an action for libel, malice may be inferred from the fact that the defamatory communication was false, and known to be so by him who uttered it.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. § 5.*]

In Error to the Circuit Court of the United States, for the Southern District of California.

Action by C. Z. Salling against the National Cash Register Company. Judgment for plaintiff, and defendant brings error. Affirmed.

In May, 1904, the defendant in error entered into the employment of the plaintiff in error as a traveling salesman within the state of California, and continued in such employment until April 21, 1906. The plaintiff in error, a corporation of the state of Ohio, had its principal place of business in the city of Dayton, and F. L. Ditzler was general manager of all its American agencies for the sale of its goods, and N. F. Thomas was general manager, under his direction, of the business of said corporation in the state of California, and had general charge and control and direction of all such business in that state, including the authority to hire and discharge employes. On April 11, 1906, the defendant in error sent to the plaintiff in error at its home office in Dayton his resignation as an employe. On April 16th Ditzler, in his official capacity as manager, telegraphed to the defendant in error, accepting his resignation, to take effect April 21, 1906, and on the same day wrote him a friendly letter, acknowledging appreciation of his honesty and candor in stating his true reasons for resigning, and expressing "best wishes" for his success in whatever line of work he might engage. On April 21, 1906, said contract of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

employment ended. About this time Thomas learned that the defendant in error was about to enter into the business of selling secondhand cash registers at Los Angeles. On April 26, 1906, he wrote the plaintiff in error as follows: "Exercising our option as per our contract with you, I hereby cancel your contract with the National Cash Register Company, to take effect immediately. I have advised the sales department of my action. While you have been in our employ, and while accepting our salary, you have been devoting your time to other work, and in many other ways doing things that warrant me in the action taken herein." On or about May 2, 1906, the plaintiff in error issued, published, and distributed to its agents throughout the United States and Canada a circular letter containing the following: "The company has been obliged to terminate the employment of Mr. C. Z. Salling for cause. We must absolutely forbid Mr. Salling from being received in any of our offices." On July 6, 1909, Thomas wrote to E. B. Wilson, who represented and acted for the plaintiff in error as its agent and had charge of its office and business in Los Angeles, subject to Thomas' control, direction, and supervision, a letter as follows: "I am in receipt of a letter from Mr. Brizzolari, who says he has met Salling, and that Salling has been in conference with Hallar. Salling says he is going into the secondhand cash register and rental business, etc. While neither you nor I have any faith in Salling's ability to get into a business of this kind, it is still our duty to be on the lookout for anything that may injure the company's business. I would therefore ask you to keep this on your mind, and, should you get an opportunity, see Mr. Hallar, telling him this much, at least—that Salling is a man who has been discharged from our employ, and one whom we would not give a position to under any circumstances. I want to say one other thing. I wish you would, upon receipt of this letter, bring it to the attention of Mr. Alexander and Mr. Holmes. I must absolutely forbid Mr. Salling from being received in any of our offices. I know you feel as I do about this matter, and you may act upon my authority if you will. If he calls at your office, I want him told that we do not care for his company, and will be much obliged to him if he would keep away from us hereafter. Please do not fail to do this, as he must not make our office his loafing place. * * * Don't forget my request about Mr. Salling, for I want that dirty dog to understand that he cannot get into a cash register office in district No. 9. There is only one way to treat a traitor, and you know what that way is."

The defendant in error brought an action against the plaintiff in error to recover damages for libel in issuing and publishing the circular letter above referred to, alleging that the same was false and malicious, and was published and circulated with intent to injure the defendant in error in his character, reputation, and standing as salesman and business man. In a second cause of action upon the second letter, the complaint alleged that the Hallar referred to there was X. H. Hallar of Los Angeles, Cal., and that at the time when the letter was published the defendant in error was conducting negotiations with Hallar for the establishment and maintenance of a corset factory, and that while said negotiations were pending the plaintiff in error sent said letter to Hallar for the purpose of creating distrust and suspicion in his mind against the defendant in error; that the letter was received and read by Hallar in July, 1906, and that after he had read it, and solely on account thereof, he broke off negotiations with the defendant in error, and declined to enter into any contract with him, to his damage in the sum of \$25,000. The plaintiff in error answered, denying that the plaintiff in error sent notice to Thomas of the resignation of the defendant in error, and denying that the latter ceased to be an employe of the plaintiff in error on April 21, 1906. It admitted that, at about the time when the defendant in error sent in his resignation, the plaintiff in error became informed that he had resigned for the purpose of entering into the secondhand cash register business in the state of California, and that the plaintiff in error regarded such business as conflicting with and interfering with its own business, but denied that it was unfriendly or hostile to the defendant in error on that account. It admitted the distribution of the circular among its agents throughout the United States and Canada, and alleged that it was a privileged communication. Answering the second cause of action, the plaintiff in error alleged that it had not knowledge

whether Hallar received or read the letter of Thomas to Wilson, or that on that account he broke off his said negotiations with the defendant in error, and it denied that said letter was published with intent to injure the defendant in error, and alleged that the same was a privileged communication. Upon the trial of the cause the jury returned a verdict for the plaintiff in error in the sum of \$5,000 "as damages on account of the injury and prejudice to plaintiff's good name, reputation, and credit, and in the sum of nothing as punitive and exemplary damages."

Lawler, Allen, Van Dyke & Jutten and Henry S. Van Dyke, for plaintiff in error.

Davis, Kemp & Post and James P. Clark, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). Error is assigned to certain of the instructions given by the court to the jury and to the denial of certain requested instructions. We are precluded from considering the latter, for the reason that the bill of exceptions does not contain the entire charge. For aught that we know to the contrary, the court properly instructed the jury upon all questions involved in the requested instructions.

One of the instructions excepted to is the following:

"Every publication which charges upon or imputes to any person that which exposes such person to hatred, contempt, ridicule, or obloquy, or which causes such person to be shunned or avoided, or which has a tendency to injure such person in his or her occupation, is *prima facie* false and unprivileged, and implies malice in the author or publisher."

The exception taken to this was that it was erroneous for want of facts rendering it applicable, and that the facts in the case showed that the communications were privileged, and therefore malice would not be implied in the author of them, and because the instruction left it to the jury to decide whether or not the communications were qualifiedly privileged. The rule is that a communication made by one who has an interest to one who has a corresponding interest is privileged, if made in good faith and without malice; but where the communication goes beyond what the case requires, and is unnecessarily defamatory, the person making the same will not be protected. Did the undisputed facts show that the communications in this case came within the rule? The testimony shows, in the first place, that they were false, and known to be false. It was not true that the defendant in error had been discharged from his employment for cause, or that he had been discharged at all. He had resigned his position, his resignation had been accepted, and his employment had terminated, several days before the date of the paper which purported to discharge him. The evidence is that, between the date of his resignation and the issuance of the so-called discharge, knowledge had come to the officers of the plaintiff in error that the defendant in error intended going into a business which would compete with theirs. Therein is to be found the apparent motive of the so-called discharge, and of the communications which became the subject of this action.

It is urged that the plaintiff in error was justified in directing its employes to exclude the defendant in error from its various places of business, in order to prevent his acquiring information which might

be advantageous to him, but detrimental to them, in view of the competing business in which he was about to enter. Undoubtedly this is true. But it does not appear on the face of the communications that such was their purpose. The subject may be one that is privileged, and a communication on that subject be unprivileged. A circular stating that the company had been obliged to terminate the employment of the defendant in error for cause, and that "we must absolutely forbid Mr. Salling from being received in any of our offices," would, upon its face, seem to have been intended only for the purpose of discrediting the defendant in error and injuring his reputation. It went beyond the plain necessity of the situation, and in that respect is not unlike those which were criticised by the courts in *Merchants' Ins. Co. v. Buckner*, 98 Fed. 222, 39 C. C. A. 19-30, and *Landon v. Watkins*, 61 Minn. 137, 63 N. W. 615. It would have been error to instruct the jury that such a communication was, upon its face, privileged. *Tonini v. Cevasco*, 114 Cal. 266, 46 Pac. 103; *Merchants' Ins. Co. v. Buckner*, 98 Fed. 222, 39 C. C. A. 19.

It was not essential to the protection of the business of the plaintiff in error to cast imputation upon the character of the defendant in error. It would have been sufficient to warn the employees to withhold from him all information regarding the business, and, for that purpose, to exclude him from the company's offices. Had the communications in this case been of that character, it would have been the province of the court to decide whether they were privileged, as was held in *Carpenter v. Ashley*, 148 Cal. 423, 83 Pac. 444, and other cases cited by plaintiff in error. But it is well settled that, where there is uncertainty whether the facts which give the communication the privileged character claimed for it are established by the evidence, it is not ground to reverse the judgment, if the question is submitted to the jury. 25 Cyc. 747; 13 Enc. of Plead. & Prac. 107; *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360; *Howland v. Blake Mfg. Co.*, 156 Mass. 543, 31 N. E. 656; *Nord v. Gray*, 80 Minn. 143, 82 N. W. 1082.

Error is assigned to the following:

"The words 'prima facie,' heretofore employed in these instructions, mean that the law presumes that the publication such as there described was false and unprivileged. These presumptions, however, are disputable, and the defendant is allowed, where the alleged falsity or unprivileged character of the publication are specifically denied, as in the present case, to establish both or either of said denials by proof; and, if such proof be made, it justifies the publication, and constitutes a complete defense to the action."

As the bill of exceptions does not contain the whole of the instructions, we are not advised as to the use of the words "prima facie" as theretofore employed in the instructions, and we therefore cannot impute any error to the charge that the law presumes that the publication such as there described was false and unprivileged. The remainder of the instruction correctly states the law.

It is urged that the burden of proof was upon the defendant in error to establish by a preponderance of the evidence that the communication was not in fact privileged by proof of the fact that it involved actual malice, and that proof of actual malice was entirely wanting in the case. But the burden of proving the privilege claimed lies upon the

defendant. 18 Am. & Eng. Enc. of Law, 1031; Schomberg v. Walker, 132 Cal. 224, 64 Pac. 290; King v. Patterson, 49 N. J. Law, 417, 9 Atl. 705, 60 Am. Rep. 622; Ritchie v. Widdemer, 59 N. J. Law, 290, 35 Atl. 825; Newell on Libel and Slander, §§ 71, 72. As we view the record, there was ample proof of malice. There was proof of it in the known falsity of the charge that the company had been obliged to discharge the defendant in error for cause. There was proof of it in the language employed in the letter of Thomas to Wilson, in which Thomas referred to the defendant in error as a "dirty dog" and "a traitor," and particularly requested Wilson to see Mr. Hallar and tell him that the defendant in error "is a man who has been discharged from our employ, and one whom we would not give a position to under any circumstances." The motive is further shown by Thomas' testimony, in which he said:

"It is part of my business to look out for somebody that is going into business in opposition to the company. I was endeavoring to nip Salling's proposition in the bud, you bet. * * * I guess my object in putting the facts before Hallar was so that he would not go into the secondhand business with Salling."

Error is assigned to an instruction in which the court, after affirming the right of an employer to communicate with his employé upon any subject relating to the business in which they are mutually interested, and to communicate with a common employé with reference to the subject-matter of their common employment, said:

"If, however, such statement is known to the party communicating it to be false, such knowledge excludes the existence of good faith, and takes from the communication what otherwise would be its privileged character."

It is urged against this instruction that knowledge on the part of the author of the communication that it is false does not necessarily exclude the existence of good faith, nor take from the communication what otherwise would be its privileged character. To this we cannot assent. In order to the protection of a communication as qualifiedly privileged, it must appear that it was made in good faith, and in the honest belief that it was true. *Swan v. Tappan*, 5 Cush. (Mass.) 104; *Gassett v. Gilbert*, 6 Gray (Mass.) 94; *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360; *Quinn v. Scott*, 22 Minn. 456. And the question whether the communication was made in good faith is one of fact for the jury. *Bacon v. Michigan Central R. R. Co.*, 66 Mich. 166, 33 N. W. 181, and cases there cited.

It is contended that the court erroneously instructed the jury in charging them that damages might be recovered in such an amount as the jury might find would fairly compensate the defendant in error for the injury done him, "regardless of the defendant's motives in making the publication, and without actual proof of the opinions of witnesses or otherwise as to the extent of the loss." It was objected to this instruction that actual malice must be established by actual proof, by testimony or otherwise. If it is meant by this that, in order to recover damages in such a case as this the plaintiff must adduce proof of express malice on the part of the defendant, the objection was not well taken. Malice may be inferred from the fact that the defamatory communication was false, and known to be false by him who uttered

it. *White v. Nicholls*, 3 How. 266, 11 L. Ed. 591; *Noonan v. Orton*, 32 Wis. 106; *Bacon v. Mich. Cent. R. R. Co.*, 66 Mich. 166, 33 N. W. 181; *Locke v. Bradstreet Co. (C. C.)* 22 Fed. 771; *Gassett v. Gilbert*, 6 Gray (Mass.) 98. In *White v. Nicholls et al.*, 3 How. 287, 11 L. Ed. 591, the court approved the following from the opinion in *Wright v. Woodgate*, 2 Crompton, M. & R. 573:

"A privileged communication means nothing more than that the occasion of making it rebuts the prima facie inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact, but not of proving it by extrinsic evidence only. He has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is evidence of malice on the face of it."

The record contains assignments of error to the rulings of the court as to the admissibility of testimony. We find no error in them, and, as they are not discussed in the brief of the plaintiff in error, we deem it unnecessary to discuss them here.

Finding no error for which the judgment should be reversed, we affirm the same.

PACIFIC MAIL S. S. CO. v. COMMERCIAL PACIFIC CABLE CO.
COMMERCIAL PACIFIC CABLE CO. v. PACIFIC MAIL S. S. CO.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1909.)

No. 1,687.

1. SALVAGE (§ 16*)—THEORY AND PURPOSE OF REMUNERATION—SERVICES RENDERED UNDER EMPLOYMENT.

The principles which govern the allowance of compensation for a salvage service are not the same where the service is rendered under an employment and where it is volunteered. In the latter case it is more meritorious, and the salvaging vessel takes the risk of receiving nothing if the service is unsuccessful, and if successful is entitled to a liberal reward; while if employed she is entitled to payment on a quantum meruit in any event, and whether entitled to more in case of success depends on the circumstances and the spirit in which the service is rendered.

[Ed. Note.—For other cases, see *Salvage*, Cent. Dig. § 29; Dec. Dig. § 16.*]

2. SALVAGE (§ 30*) — AMOUNT OF COMPENSATION — SERVICES RENDERED UNDER EMPLOYMENT.

The steamship *Manchuria* grounded on a coral reef in the bay of Waimanalo on the northeast side of the island of Oahu, Hawaii. Being unable to free herself with the aid of three other vessels which went to her assistance, the owners' agent applied for the assistance of libellant's cable ship, *Restorer*, a vessel of 4,000 horse power, then lying idle at Honolulu. Libellant's superintendent stated that she could not go without permission from New York, which was cabled for and obtained. In the meantime the master refused to fire up unless the expense was guaranteed, and such guaranty was given. On receiving permission libellant's agent required a written request for her services, which being given, the *Restorer* went to the assistance of the *Manchuria*; but her efforts, added to those of the other vessels, were unsuccessful, and on the next day an expert salvor employed by the underwriters with a powerful wrecking outfit started from San Francisco, arriving nine days after the stranding. In the meantime the *Restorer* and other vessels had assisted in keeping the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Manchuria in position and from further injury, and she was retained by the expert who took charge of the work, and who understood that she was under employment, until the Manchuria was finally released. Throughout libelant and its representatives worked with a view to making as large a salvage claim as possible. The Restorer was at no time in any special peril, nor did it appear that her services were indispensable to the safety or rescue of the Manchuria. *Held*, that she was entitled to recover for her consumption and loss of stores and expenses on account of the salvage operations, and to a per diem allowance for the time employed, but to no bonus in addition as a purely salvage reward.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 72-74; Dec. Dig. § 30.*]

Appeal from the District Court of the United States for the Territory of Hawaii.

Charles Page, E. B. McClanahan, and S. H. Derby, for appellant and cross-appellee.

M. F. Prosser, Robbins B. Anderson, and Sidney Ballou, for appellee and cross-appellant.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

ROSS, Circuit Judge. The very voluminous record in this cause renders it impossible to review the evidence in detail in an opinion of reasonable length, so that we will not undertake to do more than indicate the grounds upon which we rest our judgment.

The appeal of the Commercial Pacific Cable Company, which was the libelant in the court below, is upon the ground that the amount awarded it by the trial court was inadequate, and that the court also erred in dividing, as it did, costs between the respective parties. What we shall say in respect to the main appeal, which is that taken by the Pacific Mail Steamship Company, the claimant, will dispose of the appeal taken by the libelant as well.

The action was in rem against the claimant's twin screw steamship Manchuria for salvage, and resulted in a decree by the court below awarding the libelant \$62,636.80, and dividing the costs between the libelant and claimant. It appears from the record that about 4 a. m. of August 20, 1906, the Manchuria, which was of 13,638 tons gross, and 8,750 tons net, register, ran upon a coral reef in the bay of Waimanalo on the northeasterly side of the island of Oahu, and there stranded. The place of stranding was on the lee shore, several hundred yards from the shore line, and less than a mile from the landing place of the Waimanalo Sugar Company. Waimanalo Bay is an open roadstead with a northern exposure, but at the time of the stranding of the Manchuria the water and sea were moderate, and the time of year was such that storms were not to be anticipated. The city of Honolulu is on the opposite side of the island, about 15 miles distant by wagon road, and within about two or three hours' steaming distance. Immediately upon the stranding of the ship one of its officers was sent to Waimanalo, and by telephone notified Hackfeld & Co., the ship's agents at Honolulu, of the accident. Both the engines of the Manchuria were reversed, and the full power of her propellers used, as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

soon as the reef was struck, in an attempt to back off, but without success. Within a few hours thereafter, to wit, about 9 o'clock in the morning of August 20th, the tug Fearless, of 700 horse power, and especially fitted for salvage work, arrived from Honolulu, and by means of a line to the ship attempted to aid in her effort to back from the reef. About 10:45 of the same morning the United States revenue cutter Manning, of 2,500 horse power, and the steamer Maui, of 447 horse power, arrived, and by means of lines therefrom to the distressed ship commenced aiding in the effort to release her. During the afternoon the ship ran out her stream and one bower anchor and emptied her ballast tanks, but still remained stranded. Other vessels during the morning and afternoon came to the assistance of the Manchuria, and were used in transferring her cabin and steerage passengers and their baggage to Honolulu. At the time of the accident the libelant's cable ship Restorer was lying idle, with cold boilers, in the port of Honolulu, where she had been stationed since April 24, 1905. She was a vessel of about 4,000 horse power, of the value of about \$600,000, and was maintained by the Cable Company for service in the repairing of its cables in the event of need. In the evening of the day of the stranding of the Manchuria, Hackfeld & Co. asked the master of the Restorer, who was Capt. Combe, and the superintendent of the Cable Company's business at Honolulu, Mr. Gaines, whether the Restorer could be sent to the assistance of the Manchuria. They replied that she could not without express authority from the home office in New York. They were then requested by Hackfeld & Co. to cable for such authority, and while waiting for a reply to get up steam in the Restorer's boilers in order to save time, which they agreed to do provided payment of the expenses of getting up steam was guaranteed them in the event the home office declined to grant the requested assistance. Hackfeld & Co. thereupon gave such guaranty, after which, to wit, about 10:30 p. m. of August 20th, the request was cabled and the Restorer's fires started. The next morning a reply was received authorizing the Restorer to go to the assistance of the Manchuria, whereupon Gaines asked and received from Hackfeld & Co. a written request for the assistance of the Restorer, and at 3:07 in the afternoon of August 21st, that ship left Honolulu for Waimanalo Bay, which she reached about 6 o'clock in the evening, according to the testimony of Capt. Combe. He anchored from a quarter to half a mile from where the Manchuria lay. Being asked by his counsel what he did on his arrival in respect to the Manchuria, Capt. Combe answered:

"I did nothing, sir, until the morning of the 22d. I just sent my chief officer on board that evening when I arrived. Q. Why did you do nothing that night? A. Well, I arrived there at about 6 o'clock in the evening. It being a strange place, and not having any soundings, and on a lee shore, I decided for the safety of the vessel—it was getting on nighttime—that I would stop where I was until daylight. Q. What did you do at daylight? A. I hove up anchor and came up closer to the position of the Manchuria. Q. And then what did you do? A. Gave them a couple of grapnel ropes."

The evidence shows that by far the heaviest damage suffered by the Manchuria was sustained prior to the arrival of the Restorer. The unsuccessful result of the first day's attempts to release the Manchuria

was cabled to the claimant at San Francisco by its Honolulu agents the next day, to wit, August 21st. In doing so the agents gave the claimant this information:

"Manchuria overnight sagged little. Same position. Rolling, pounding heavily. Rough sea. Fresh wind. Making little water; No. 3 starboard one foot, No. 4 port bilge ten inches, in twelve hours. Port engine shaking. Main steam pipe broken 2 a. m. Saddle of double end and single end boilers cracked. Starboard engine moves little in pounding. No signs of hull getting weak. Will secure vessel hold in same position."

In reply they were instructed on the same day that Capt. Metcalfe, Lloyd's and underwriters' agent, and an expert salvor, would leave San Francisco on the 23d with a powerful wrecking outfit, and that he recommended that the ship's anchors be so placed as to prevent the vessel from going further on the reef and twisting broadside, and that the vessel should be kept as deep in water as possible until the anchors should be properly laid; that no part of the cargo should be removed unless it appeared certain that there was no risk of the vessel going further on the reef; that his opinion was that the vessel would have to be floated largely by warping, and could not be pulled off by towing alone. Capt. Metcalfe and his assistant, Capt. Pillsbury, with a large wrecking outfit, reached the Manchuria in the afternoon of August 29th, and thereupon took charge of the salvage operations. In the meantime—that is to say, from the cessation of the unsuccessful attempts to pull her from the reef—the efforts of those in charge of the disabled ship were directed towards holding her in her then position, in which efforts the Restorer participated from and including the morning of August 22d, having during that time four of her grapnel ropes on the Manchuria, which she pulled and stopped pulling as ordered by the Manchuria. These grapnel ropes were ropes of wire wound with hemp, designed for grappling deep sea cable, each having a breaking strain of from 16 to 18 tons. In adjusting them they were wound over the large cable drum of the Restorer, so that they could be taken up inch by inch if necessary, and were adjusted so that they hung in parallel curves, equalizing the strain to some extent. During the same intervening time the steamers Manning and Maui and the tug Fearless rendered service in the same behalf, and the Manchuria herself put out numerous anchors. Extensive soundings were also taken of the waters of the bay surrounding the ship, much of the Manchuria's cargo was shifted, and everything was put in as good condition as possible preparatory to the arrival of Capt. Metcalfe and his outfit. During the same time the Restorer also furnished a grapnel rope to the Manning, which was broken, after which she gave it to the Manchuria to use on her anchors. Capt. Combe, of the Restorer, also participated in the soundings referred to, furnished a chart and cable buoys for running lines over the coral, and assisted in laying anchors.

On the arrival of Capt. Metcalfe he ordered the Restorer's engines stopped and her lines cast off from the Manchuria, and cabled to the claimant's representative in San Francisco to know what arrangement had been made concerning the services of the Restorer, in response to which inquiry he was informed by cable that the Restorer's charges would be adjusted in New York, and to "use as necessary," whereupon

he furnished the Restorer with a 4½-inch plow steel cable in place of her four grapnel ropes, and made such use of her thereafter as he saw fit, in connection with the numerous steam and other craft engaged in the work in hand. The record shows that from the time of Capt. Metcalfe's arrival until the forenoon of September 14th the preparatory work of laying the wrecking anchors, discharging the ship's cargo, and installing additional pumps was vigorously and unremittingly carried on, involving the labor of a large number of men, as well as the assistance of various boats of one kind and another. On the 14th of September an attempt was made to pull the Manchuria from the reef. A strain was put on the moorings laid out from her, and the towing vessels, consisting of the Restorer, Manning, Iroquois, and the tug Eleu, pulled as directed. The result was thus reported by cable on September 14th to the claimant at San Francisco, by Capt. Metcalfe:

"After great difficulties moved Manchuria out 250 feet, altering stern to N. by E. ¼ E.; originally N. by W. Unable to haul vessel's stern to eastward account vessel having twelve degrees port list, burying bilge keel sand and coral. Will keep on heaving, although, owing to vessel going nearly straight astern, most of our anchors are too far to eastward. All coal discharged except sufficient to supply our needs for steam. All prudent water ballast pumped out."

As indicated in this cable, the movement was not in the direction anticipated or desired. Accordingly it was determined to shift the towing vessels more nearly astern, with a view to a further effort to move the ship, which was done under the direction of Capts. Metcalfe and Pillsbury; the tug Eleu being sent to help keep the bow of the Restorer to the wind during the operation, and the sea bottom around the ship's stern being dynamited in order to break up the coral. The Restorer attempted to make the shift without letting go her line to the Manchuria. In making the maneuver the Restorer crossed the bows of the Iroquois further inshore, and was dragging her anchors toward the coral reef, when she finally, by letting out sufficient anchor chain and slacking her towing hawser, was brought under control. The difficult work of warping the vessel from the reef commenced, and about noon of September 16th she was floated, and towed to Honolulu by the Restorer, and, after the making of temporary repairs, sailed to San Francisco under her own steam.

The expenditures in the salvage operations from the time of the stranding of the ship to the time of her release amounted to \$126,248.91, not including the services of the United States revenue cutter Manning, nor the services of the tugs Fearless, Iroquois, or Eleu, nor the services of the schooner Melacathon, the towing lighter Pioneer, the steamer James Makee, the steam dredger Pacific, nor the steamship Niihau, nor the fee of Capt. Metcalfe. The permanent repairs to the vessel exceeded \$500,000. The original cost of the Manchuria was \$2,061,349.42. At the time of the accident she seems to have been valued by the claimant at \$1,800,000, although it is contended on the part of the libelant that it was then about \$2,563,000. The libelant claimed for the services of the Restorer \$300,000, and it was for that sum that it libeled the ship, contending that it was the chief agent in the operations which ultimately rescued her from her perilous position. In respect to that contention the court below said, in its opinion:

"The heavy salvage of \$300,000 claimed by the libellant is based upon its theory of the case, as shown by the pleadings and by evidence introduced in support thereof, that the Restorer, as operated by those in charge of her, was the chief agent in the operations which ultimately effected the removal of the Manchuria from her dangerous position to a place of safety. I have no difficulty in finding that this theory is not borne out by the evidence. I need not go into a discussion of the grounds for such conclusion, more than to say that my mind has been irresistibly led by the evidence in the case, and by my examination, with counsel for both parties, of the steam winches of the steamship Mongolia, which were conceded by both sides to be the counterpart of those of the Manchuria, to this view, and to the nearly correlative conviction that to the steam winches of the Manchuria, acting upon anchors fixed upon the sea bottom, was mostly due the work of moving her from the bed in the reef where she was lying, which must be regarded as by far the most difficult and most important part of the salvage operations."

The court below also took notice of the undisputed fact that the libellant was not a volunteer, but contributed the services of the Restorer upon request only, without any specific agreement at the time as to her compensation. Said the trial court:

"This being the case, although libellant would have been entitled to remuneration at law, if not in admiralty, on the basis of quantum meruit, if the salvage operations had failed, yet, success having been achieved, the ordinary principles of salvage compensation would be applied, if its services contributed to the salving of the libelee."

The court below also found against the contention of the libellant that its services were effective in preventing the Manchuria from being carried further towards the shore by the sea from the bed in which she lay when the Restorer arrived. A careful consideration of the record satisfies us that the trial court was quite right in each of the above-mentioned findings in respect to the services of the Restorer; but that court further found that that vessel "was of material assistance to the Manchuria's own anchors in preventing her from swinging to a position more broadside on to the shore than the Restorer found her on the morning of August 22d; was of material service in swinging her stern outward from the shore during the period from August 25th to August 29th, as set forth above, in which movement she was the chief agent, being assisted by the United States revenue cutter Manning during a part of that period, and the four stern anchors of the Manchuria as above stated; was of material service, which, however, is not to be compared with the united power of the steam winches of the Manchuria, in the final operations of September 14th and 16th; and was of material service in towing the Manchuria when floated to the port of Honolulu"—all resulting in a finding and decree "for the libellant in the sum of \$5,219.53 for consumption and loss of stores and expenses on account of salvage operations, and in the sum of \$56,000 for salvage proper, making a total of \$61,219.53."

Based upon the contention that it appeared from the decision of the court that the said award for salvage proper of \$56,000 was estimated upon an allowance of \$2,000 a day for the services of the Restorer, the claimant asked the court, by motion, to reduce the allowance for salvage proper by \$4,000 because of the fact that the Restorer was only engaged in the service for the period of 26 days. The record shows these proceedings upon the hearing of that motion:

"Mr. Olson, of proctors for claimant, read motion to amend decision.

"The Court: Before you go on, I will call your attention to the fact that it is a miscalculation. The court did not calculate it on the basis of \$2,000 a day, but for \$1,000 a day, and the rest of it is made up by other amounts.

"Mr. Olson: We were unacquainted with that fact. We drew our information from the decision itself.

"The Court: That is 26 days at \$1,000 a day, and in addition to that, for the value of its services, there are three items; and it was the other items which made up the balance of the award.

"Mr. Olson: Well, that puts a different face upon the matter entirely.

"The Court: I can understand how such an estimate was made, but I think the estimate of the value of her services, I have it; I think it was \$10,000 the value of her services in pulling her off, \$10,000 value of her services in swinging her, and \$10,000 the value of her services in steadying her; I think it was something like that, making \$30,000, in addition to \$1,000 per day for 26 days. That would be \$56,000."

It thus appears that the allowances made the libelant by the court below for the services of the Restorer were as follows: \$5,219.53 for consumption and loss of stores, and expenses on account of salvage operations; \$1,000 a day for the time of her employment, to wit, 26 days, and an additional \$10,000 for her services in steadying the Manchuria, an additional \$10,000 for swinging her, and an additional \$10,000 for pulling her. As has been shown, the view of the law entertained by the court in approaching the consideration of the case was that, notwithstanding the fact that the libelant was not a volunteer, but undertook the services only upon express employment, "yet, success having been achieved, the ordinary principles of salvage compensation may be applied, if its services contributed to the salving of the libelee." In holding that "the ordinary principles of salvage compensation" are applicable to such a case, the court below erred.

In *Wilmington Transportation Company v. The Old Kensington* (D. C.) 39 Fed. 496, 500, which was also a case for salvage, it was said:

"In cases of this nature there is no standard by which can be absolutely measured the compensation to which the party rendering the service is entitled. Each case depends in large measure upon its own circumstances. While it is perfectly true that salvage is not a 'question pro opere et labore,' but rises to a higher degree and takes its source in a deeper policy, there is a broad distinction, as said by Dr. Lushington, 'between salvors who volunteer to go out and salvors who are employed by a ship in distress. Salvors who volunteer go out at their own risk for the chance of earning reward, and if not successful they are entitled to nothing, the rule being that it is success that gives them a title to salvage remuneration. But if men are engaged to go out to the assistance of a ship in distress they are to be paid according to their effort, even though the labor and service may not prove beneficial to the vessel or cargo.' *The Undaunted*, 1 Lush. 90; *The Sabine*, 101 U. S. 390, 25 L. Ed. 982. In the one case the reward should be more liberal than in the other. Here the services of the libelant were rendered at the request of the master of the ship, for which it was entitled to be paid, whether such services were beneficial or not; and, although the services were rendered with promptness and efficiency, there was not manifested any disposition on the part of the libelant to take any chance of earning reward, but, on the contrary, it appears that the libelant was unwilling to send the *Falcon* to aid the ship unless her master requested that it be done. Under such circumstances, while the libelant should be awarded a sum in excess of the actual value of the services rendered and the actual damage done to its property engaged in the service, and while such excess should be liberal, it should not, in my judgment, be measured by that high standard that would control the award had the services been rendered voluntarily."

In the case from which the foregoing quotation has been taken there was not only promptness, but no lack of good faith, nor any mercenary spirit shown on the part of the salvor, such as is claimed to have been shown on the part of the libelant in the present case. That the law is as indicated in the decisions above cited was also decided by this court in the case of *The Elmbank*, 69 Fed. 104, 108, 109, 16 C. C. A. 164. See, also, *The Queen of the Pacific* (D. C.) 21 Fed. 460, 471; *The Sandringham* (D. C.) 10 Fed. 556, 570; *The John Gilpin*, 13 Fed. Cas. 675, 678; 24 Encyc. of Law, 1206; *The Kate B. Jones* [1892] P. D. 336, 7 Asp. Mar. Cases, 332; *The Beularig*, 14 P. D. 3; *The Endermore*, 7 Asp. Mar. Cases, 334; *The Mark Lane*, 15 P. D. 135, 137; *The Lustre*, 3 Haggard, Adm. 154.

As a matter of course, the libelant was entitled to fair compensation for the services of the Restorer, which the court below fixed at \$1,000 a day, with which award, in view of the record, we are not disposed to interfere. Nor can we say that the \$5,219.53 awarded the libelant for consumption and loss of stores, and expenses on account of the salvage operations was too much. Whether the libelant is justly entitled to a bonus in addition to those allowances, and, if so, in what amount, depends upon the facts and circumstances hereinafter referred to. Even if the Restorer was entitled to any bonus, we think the trial court attributed to her efforts too much effectiveness, as well as exaggerated the risk to her. In respect to the risk to the Restorer, we think the evidence shows it to have been very slight. Both sea and weather were moderate, and we are unable to see where there was any danger to a well-appointed, powerful steamer, such as the Restorer was, in doing what she did, unless it be in the maneuver of September 14th, directed by Capt. Metcalfe and his assistant, Capt. Pillsbury. In respect to that maneuver the log of the Restorer is as follows:

- "2:00 p. m. Weighed anchor and set on for fresh position as advised by Captain Pillsbury.
- "3:00 p. m. Brought up with star, anchor in 7 fms. water, finding anchor dragging, with 30 fathoms chain out paid out hawser with end fast to 6x3 grapnel rope.
- "3:10 p. m. Signaled for launch. Captain Pillsbury boarded ship.
- "3:20 p. m. Ship still dragging and drifting on lee shore, paid out to 60 fathoms.
- "3:55 p. m. Signaled for tug Eleu, passed end of 8" hawser aboard, hove up anchor, and proceeded to position, where Captain Pillsbury let go mark buoy."

As has already been said, the maneuver was directed by Capt. Metcalfe, after the *Manchuria* had been unexpectedly moved almost directly astern some 250 feet, where she had stuck fast. The then towing vessels were the government vessels *Iroquois* and *Manning* and the Restorer. The movement directed was executed by the government vessels without difficulty; but the Restorer, although given the aid of the tug Eleu, got beyond the position to which she was assigned, and, her anchor dragging, she began to drift towards the shore. Capt. Metcalfe then sent Capt. Pillsbury to the Restorer to see what the trouble was, and on Capt. Pillsbury's arrival on board he suggested to Capt. Combe to stop his port engine, pay out more chain, and slack up on the

towline, which was done, and the threatened peril thus avoided. The sole fault seems to have been that of Capt. Combe.

Capt. Carter, of the government vessel *Iroquois*, was questioned, and answered as follows:

"Q. Do you remember the maneuver made by the *Restorer* and referred to herein as having been made on the 14th of September? A. I do. Q. Was it or was it not one similar to the one made by your ship? A. The object of it was; yes. Q. I am not asking the object. Was it a similar maneuver? A. No. Q. In what did it differ? A. She went in closer to tow her than I did. Q. I understand that your boat was third in order of placement before the maneuver was made? A. Yes. Q. First the *Manning*, then the *Restorer*, then the *Iroquois*—is that correct? A. Yes. Q. Can you state whether the maneuver was intended to keep those three boats in their relative positions? A. That was my understanding of it; yes. Q. Was the *Restorer*, prior to making the maneuver, anchored? A. She was anchored or moored. Q. Forward? A. Yes. Q. With the line running from the stern? A. Yes. Q. In making this maneuver referred to on the 14th, did she lift her anchors? A. She did. Q. In making the maneuver on the part of the *Iroquois*, what was necessary and proper to be done in order to do it? A. Pick up the anchor, go ahead with the starboard helm, get the right position, and let go the anchor again. Q. What would assist the *Iroquois* following that procedure to take the position required? A. The wind was favorable to do it. Q. Sea favorable? A. Wind and sea both favorable. Q. What direction did the wind and sea incline to take the *Iroquois* after the anchors had been lifted with reference to inshore or outshore? A. Take her inshore. Q. What was the use—What was the method employed by the *Iroquois* to keep her line running to the *Manchuria* from fouling her propeller in making the maneuver? A. We kept men to keep it turning in the right direction, so that it would keep clear of the propeller. Q. What kept the line comparatively taut? A. Going forward on the engines. Q. The forward movement of the engines? A. Yes. Q. Can you state anything other than sea, wind, and the use of your engines and helm that would be proper and necessary to accomplish that maneuver? A. I accomplished it without anything else. I did not think anything else was necessary. Q. Did you accomplish it properly? A. No. Q. Why not? A. I was interfered with by the *Restorer*. Q. Will you please explain now why it was and how the *Restorer* interfered with your accomplishing the maneuver properly in the first place? A. She got across my bow, and I was afraid that her line would foul my propeller or anchor. Q. What did you do when you found this condition of affairs? A. In order to keep from going too far in, I let go the anchor. Q. Did the *Restorer* actually cross your bow? A. She did. Q. Taking this third place, rather than the second, as I understood, in the position? A. Yes. Q. Do you know whether, at the time of crossing your bow, she dropped her anchors? A. I did not see her drop any anchor. Q. Did you observe the *Restorer's* maneuver? A. I did. Q. While it was being made? A. I was on the bridge when it was being made—the bridge of the *Iroquois*. Q. And observed it? A. Watched it all the time. Q. After you had dropped your anchor for the reason which you have stated, did you subsequently make a new maneuver? A. I did. Q. In what direction was that, inshore or outshore? A. Outshore. Q. Did the *Restorer* make a subsequent new maneuver? A. She did. Q. What do you know about that maneuver? A. After Capt. Pillsbury had left me, when he asked me to take up the new position, he went to the *Restorer*. The *Restorer* then got under way, shifting her berth to the northward and westward, but the exact bearing I do not know, because I was not on board of her. She got across my bow, and I was obliged to anchor to keep from going still further in. Then Capt. Pillsbury came out. Q. From where? A. Out towards me, either from the *Manchuria* or the *Manning*, and he passed me, and I asked him what the *Restorer* was trying to do, and he said he did not know, or something to that effect. He went to the *Restorer*, and the *Restorer* then took up a position practically in line with the position I wanted to take, and the one I suggested to Capt. Pillsbury, originally. Q. With the *Restorer* in the position that she was in, after crossing your bow in the first maneuver, what was necessary to put her in the position that she took in the second maneuver

which you have just testified to? A. Would have to go ahead on her engines with helm apart. Q. What engines? A. Both engines, if she had sufficient for turning. If not, she could go ahead on one engine and back on the other. She certainly could turn that way; go ahead with the port engine and turn with the starboard. Q. Did you see she made any difficulty in making the second maneuver? A. No. Q. Did you make any difficulty in making the second maneuver? A. None to speak of. I got a little further on her starboard quarter than I liked, and then shifted a little more to port. Q. Which was the more difficult maneuver made by you, the first or second? A. The second. Q. Which was the more difficult maneuver made by the Restorer, the first or second? A. I should say the second. Q. In making the first maneuver, would you find any advantage in having twin screws? A. A decided advantage. Q. Do you know of any reason why the Restorer did not properly make the first maneuver? A. No; I do not. Q. Was there any peril to the Restorer during the first maneuver? A. I do not know how close in she got. I do not know whether she took any soundings. Q. If there had been peril presumed or anticipated, was there any means of avoiding any in your judgment? A. She could have gone ahead on her port engines and backed on her starboard; but, if she could not do that, she could have anchored. Q. Either of the courses, in your opinion, would have kept her from the reef? A. Yes. Q. Do you know whether the Manning had any trouble in making the maneuver? A. Did not see any at all. Q. In your judgment, was the attempted maneuver, which we have designated the first maneuver, of the Restorer a proper one, or properly executed? A. It depends upon what they were trying to do. I don't know what they were trying to do. Q. If they were trying to go ashore, it was proper? A. It might have been successful. Q. Was it a proper maneuver to reach the position designated for the Restorer? A. I do not know what position was designated. Q. You do not know whether or not the position inshore and across your beam was her designated position or not? A. No; I do not. Q. Did you take your proper position in the first maneuver? A. No. Q. Was your present position inshore or outshore from where you did drop anchor? A. Outshore. Q. And the reason you took it was because of the line coming over your bow? A. Yes. Q. In order to execute your first maneuver with the assistance of the wind, the sea, your engines, and helm, was it made perilous because of your line running to the Manchuria? A. No; I was never in any peril. Q. If your maneuver was properly executed, would that line have been an element of danger? A. Not of danger. Q. If properly executed? A. Not of danger. It would have been an incumbrance in turning; that is all. Q. Was the Restorer's line an element of danger in the proper execution of her maneuver? A. I should not think so. Q. During your observation of the wrecking operations while at Waimanalo Bay, did you see at any time that the Restorer was in peril? A. As I said before, I do not know what soundings she got when she was inshore of me. She may have been; but I do not think so. Q. Prior to that? A. No. Q. Subsequent to that? A. No. Q. Did the Restorer have to depend entirely upon her engines to keep her from the reef in making that first maneuver? A. No; I should think she could have anchored without any difficulty. Q. Do you know of any reason why she could not have used her engines? A. Do not know any reason. Q. Will you state whether, in your opinion, she dropped her anchors at the proper time in making her first maneuver? A. She did not; that is to say, if the position that she subsequently occupied was the one intended for her."

The evidence showing, as it does, that the steamers Manning and Maui and the tug Fearless, with 3,647 combined horse power, together with the Manchuria's own engines and two of her anchors, were unable to pull that ship from the reef or to keep her from going further on, and that before the Restorer got any line to the Manchuria the ship was firmly embedded, it does not seem likely that the Restorer was capable of doing very much in the way of steadying the Manchuria, although no doubt she aided to some extent in that direction. The finding of the trial court, however, to the effect that the Restorer was

the chief agent in pulling the Manchuria's stern out $9\frac{1}{2}$ degrees between August 25th and August 29th, we think clearly unjustified by the record. The court in its opinion said:

"The Manchuria's log reports that from 1 p. m. of August 21st to 12 midnight of August 24th, she headed S. S. E., and that thereafter her stern swung out from time to time until 1 a. m. August 29th, when she headed S. 13° E. On this day Metcalfe arrived and took charge of the salvage operations, and directed the Restorer to stop towing at 4:54 p. m. In this space of five days the direction the Manchuria was heading changed $9\frac{1}{2}$ degrees toward the south and west, which was toward the shore, by which her position was changed to a marked degree for the better, inasmuch as her stern was swung out correspondingly toward the open sea, bringing her less broadside on to the reef than before. The broadside position is testified to by Metcalfe as being more dangerous and difficult than a head-on position. Here is a record showing a favorable change of the position of the Manchuria, which would naturally be produced by a pull on the stern from a position at or about right angle to the line of the hull. Such a force was exerted during those five days by the Restorer, and by the Manning after 2 p. m. of August 26th, and by cables of the Manchuria attached to anchors. On the first day of this period, August 25th, in the afternoon, a 7-ton anchor was laid with hawser to the starboard stern. On the third day another 7-ton anchor was laid with hawser to the starboard stern, and all this period there were two $2\frac{1}{2}$ -ton anchors with hawsers to port stern and two from port bow. Some credit must be given to these stern hawsers, if they were hove taut from time to time as the Manchuria swung around. The log notes only one such action; but Capt. Saunders in his deposition, on pages 8 and 9, testified that 'we hove our big anchors taut to keep the vessel as near steady as possible.' This clearly refers to the 7-ton anchors mentioned above. It is in evidence that at 10:45 p. m. August 24th the Restorer was directed to increase the speed of her engines, and this was continued; also that on the next day the Restorer was making a greater speed with her engines than usual. This increased strain was kept up during these five days; her log showing from 30 to 45 revolutions of her propeller. This evidence closely covers the time, as shown by the Manchuria's log, when she began to change her position for the better, about midnight of August 24th, which movement continued until the morning of August 29th, making a change in her direction for the better of $9\frac{1}{2}$ degrees as shown above. From August 29th to and including September 2d, a period of four days, she swung around 2 degrees more, supposedly by the force of the steam winches alone, and the Restorer towing at only 20 revolutions. Then from September 2d to September 13th there was no further movement. The fact that in the five days from August 24th to August 29th the Manchuria swung, with the assistance of the Restorer, $9\frac{1}{2}$ degrees, about 2 degrees a day, and in the next four days, without such assistance, she swung only 2 degrees, or one-half degree a day, is certainly favorable to the theory of the effectiveness of the Restorer in swinging the stern of the Manchuria to the sea. Although it is impossible under such circumstances to make an accurate estimate of the proportionate value of such efforts, it is the rule of admiralty courts to weigh such evidence liberally for the salvor."

The log of the Restorer shows that at 5:20 p. m. of August 24th the Manchuria signaled her to "reduce speed to 20 revs.," and that accordingly the Restorer's engines were then set at 20 revolutions. The next entry in her log, made at 8 p. m. of the same day, is as follows:

"Moderate E. N. E. breeze and sea. Sdgs aft $6\frac{1}{2}$ fms. The C/S Restorer only to assistance, with two lines but slack. S/S Manchuria being held off reef by her port bower anchor with 15 fms. chain out. Two anchors led out from her port quarter attached to the 6x3 grapnel rope (part of originally given to U. S. S. Manning), and her 7-ton anchor attached to her steel wire hawser led out from her port quarter from her starboard side."

And at midnight of August 24th this entry was made:

"Moderate breeze and overcast, with increasing sea. Engines at 20 revs., as ordered, with slack hawsers."

Yet it appears from the log of the Manchuria that during that time the Manchuria's head changed $1\frac{1}{2}$ degrees, which, as a matter of course, could not have been caused by the slack lines of the Restorer; it appearing by the testimony of her own captain that 20 revolutions of her engine were necessary to prevent her lines from chafing. It further appears from the log of the Restorer that at 7:33 a. m. of August 25th the Restorer obtained permission from the Manchuria "to put weight on hawsers" and to set her engines at 35 revolutions, and that two minutes thereafter the engines of the Restorer were accordingly set at 35 revolutions and so remained, according to the log, at 35 revolutions until 7:22 p. m. of August 26th, when the revolutions were reduced to 30. At 10:57 a. m. of August 27th her engines were stopped, at 11:18 a. m. of the same day they were set going at 30 revolutions, at 4:10 p. m. of August 28th they were increased to 35 revolutions, at 5:02 p. m. of the same day (August 28th) they were reduced to 30 revolutions, and at 1:45 p. m. of August 29th they were, according to the log, increased to 45 revolutions. During these various changes on the part of the Restorer, the Manchuria's head, according to her log, shows three changes, besides the change of $1\frac{1}{2}$ degrees already referred to, to wit, at 1 p. m. of August 26th there was a change of 1 degree in her head, and between midnight of August 26th and 1 a. m. of August 27th a change of 5 degrees, and at 1 a. m. of August 29th her head changed 2 degrees. It thus appears that the greatest change in the Manchuria's head, to wit, 5 degrees, occurred at a time when the Restorer's engines had been running at 30 revolutions for between 5 and 6 hours, and that there was no change during the 29 hours that her engines remained at 35 revolutions, and, further, that the change of 2 degrees in the head of the Manchuria which occurred between midnight of August 30th and 1 a. m. of August 31st occurred at a time when the Restorer's engines were making but 20 revolutions—just enough, according to her captain's own testimony, to keep her lines from chafing. These facts, shown by the logs of the Manchuria and Restorer, respectively, would seem to indicate quite conclusively that the Restorer was certainly not the chief cause in the changes in the head of the Manchuria, aggregating $9\frac{1}{2}$ degrees, although she probably was instrumental to some extent in those changes.

But, assuming that the conclusion of the court below to the effect that the swinging of the Manchuria was chiefly due to the action of the Restorer was correct, and conceding that the latter also rendered valuable services in the steadying and pulling of the Manchuria, still is the Restorer entitled to any bonus in view of the facts and circumstances of the case? As said by the proctors for the claimant, a vessel could hardly have been more favorably situated to render a genuine salvage service than was the Restorer, for "she was fully equipped and manned, yet disengaged, and neither seeking nor desiring the employment that, commercially, would have been advantageous to other ships." Yet there was not even a tardy offer on her part to go

to the assistance of the distressed ship, pounding heavily on the reef. Upon written request for her services only did she, in the afternoon of the second day, consent to render any assistance. The libellant's representatives at Honolulu would not even consent to get up steam, in order to be ready to start upon hearing from its head office in New York, without a guaranty on the part of the claimant for reimbursement for such expense. Such precaution and exaction may be commendable in securing the actual and true value of services rendered; but they come with no grace at all before a court of admiralty in behalf of a demand for a bonus. But this is not all. The libellant's head office in New York having, on the 21st day of August, 1906, granted the request for the Restorer's assistance to the Manchuria, that office on the same day cabled its Honolulu representatives to—

"keep a careful record of what you do in way of salving Manchuria, also particulars of her position, state of weather, sea, and tides, risks and perils of Restorer, description of other vessels engaged in work, and anything of value in determining salvage."

On the 24th of August Gaines, the libellant's superintendent at Honolulu, cabled its New York office, among other things, as follows:

"Manchuria is now so anchored as to keep her from pounding. * * * Restorer is only vessel with her to-day; has five lines out, and is keeping her from drifting further on reef. * * * Wrecking appliances will reach here from San Francisco Tuesday. Present plan is keep her loaded, so cannot move and pound on reef, until proper appliances arrive, when effort be made move her. * * *"

The next day, August 25th, Mr. Gaines cabled the libellant at New York the following report of Capt. Combe of the Restorer, of date August 23d:

"Now anchored with four hawsers to Manchuria. Am requested not to tow for present, but hold hawsers. They have filled all ballast tanks to keep ship in present position till more anchors run out and Lloyd's surveyor arrives from San Francisco with heavy gear before discharging cargo. She has ground bed into soft coral reef and sand on even keel. Weather fine; moderate sea. Only Restorer to assistance with hawsers."

On the same day, to wit, August 25th, the New York office of the libellant cabled its representative at Honolulu, among other things, as follows:

"Is there slightest chance of Restorer pulling Manchuria off before wrecking gear arrives? Do you think Manchuria purposely delaying to save salvage? If you think you can get her off without waiting for surveyor's arrival, can you not insist that you be allowed to do so?"

In the Restorer's log we find this entry made at 7:50 p. m. of August 25th:

"Captain Combe boarded the S. S. Manchuria and again requested the captain to do something in the way of trying to pump out the ballast tanks or get schooners down to discharge cargo into, so as to give us a chance to get her off, but received the same reply as before when boarding her at 7:35 a. m. on the 23d; that being that they were unable to pump out their ballast tanks owing to the connections being broken, and that they could not lighten her till Lloyd's surveyor arrived with more wrecking gear, their orders being to hold the ship in her present position and keep her from drifting further inshore. I advised them again I was perfectly confident I could hold them off, and, what was more, could pull them off if they lightened the ship and gave me a chance,

and also advised them they could not expect the C. S. Restorer to remain here for an indefinite time, because if anything happened to our cables we should be called off at once. Whilst aboard it was noticed she had a list to port, probably due to shifting of the cargo, which was then being carried on. The S. S. Manchuria was then heading S. 13 degrees E."

On August 27th Mr. Gaines cabled the libelant's office in New York this further report of Capt. Combe:

"Am perfectly confident could pull Manchuria off, if assisted by them discharging cargo, coal, water, ballast, which they will not do, saying cannot pump out water, connections broken. Firmly believe connections could be made aboard, or, if required, pumps obtained locally. Also saying they have been ordered not to discharge cargo till surveyor arrives; reason being to hold ship from drifting further inshore. This seems absurd, because Restorer can hold her off. They are now shifting cargo aft. Everything points to them not wanting us pull them off."

Not only do these communications and proceedings disclose upon the part of the libelant a very keen desire to obtain a large salvage award, but a distinct threat upon the part of the master of the Restorer, under direct suggestion from the libelant, to withdraw his vessel unless he was given a chance to get the Manchuria off before other aid could arrive, in disregard of the orders of the Manchuria's owners, of which the Restorer's master was aware, and which "chance" involved the lightening of the Manchuria, with the inevitable result of further embarrassing her should the Restorer fail; and this, too, when according to Capt. Combe's own testimony he had had no experience whatever in the matter of salving distressed vessels, and at a time when there was no immediate emergency so far as the Manchuria was concerned, since she had not only made a bed for herself, in which she was constantly becoming more secure, and at a time when there was not only no bad weather prevailing, but none to be anticipated, and when capable expert assistance was known to be on the way, soon to arrive. Upon these points we extract from Capt. Combe's testimony:

"Q. Had you, when you made this suggestion to Capt. Saunders (the master of the Manchuria), considered what it meant to have lightened a ship of that size, discharging her of her water, her coal, and her cargo? A. I knew what it meant, and I was prepared to do my best if they gave me a chance. Q. You were prepared to run the risk? A. If they allowed me. Q. What was the risk you were prepared to run? A. The risk of lightening the vessel. Q. What was that risk to the Manchuria in lightening? A. If I was unable to pull her off, she would have gone further up. Q. What risk in lightening the Manchuria do you refer to? A. That is the risk, sir. Q. What risk? The Court: He stated it. If he couldn't pull her off, she would have gone further up. Mr. McClanahan: That is the risk you were willing to run with the Manchuria—she would go further on if you were unable to handle her with your boat? A. Yes. Q. You seriously and purposely suggested that risk to Capt. Saunders? A. I did. Q. And you have never had anything to do with salvage? A. No; I took a good opinion from the pilot. He is a man of considerable experience. Q. Why, Captain, were you willing to have the Manchuria run that risk? A. I was anxious to get her off, sir. Q. Why? A. Why, for the good of everybody. Q. Did you not know at that time that a salvage expert was then on his way to Honolulu with wrecking paraphernalia? A. I do not know just what day I first heard that; but I knew it. Q. You knew that? A. I don't know whether on that date or not; but I think I did. I am almost sure I did. Q. Then why this unnecessary haste to make this new offer of services to have the ship lightened? Did you want to get her off before the salvor could get her? A. Yes. I knew Capt. Metcalfe, certainly; but I wanted to do what I

could for the ship. Q. Did you want to try before the salvor could get her? A. Yes. Q. To get her off before Metcalfe arrived? A. Yes, sir. There was no spite idea, it was just to do my best. There was no ill feeling anywhere at all. Capt. Saunders was as anxious as I was. Q. You knew at that time Capt. Saunders' orders from his owners? A. Capt. Saunders told me then that he had to keep the ship there until Metcalfe arrived with the paraphernalia."

The record shows that, as a matter of fact, it was little, if any, short of absurd to talk, on August 23d, about the Restorer pulling the Manchuria from the reef. When Capt. Metcalfe arrived, that expert said that five ships the size of the Restorer could not have done so. In further pursuance of the manifestly studious plan to make a case for a large salvage award to the Restorer, was the cable from the libelant's New York office of date August 29th, in which the libelant's representative at Honolulu was instructed, among other things, as follows:

"Have our attorneys in Honolulu advise you day by day as to proper course to preserve all our salvage rights. Is there any specialist on salvage law in Honolulu? Our object should be to use the fact that, but for Restorer, the Manchuria would have been total loss. Acknowledgment and report August 29th."

The record shows that these instructions were acted upon, and that an attorney was secured in Honolulu; his presence on the Restorer being noted in its log at 6:45 p. m. of the same day, August 29th, which, it will be remembered, was the day of Capt. Metcalfe's arrival from San Francisco with the wrecking outfit, and the day on which he ordered the Restorer's engines stopped. Two days afterwards, to wit, August 31st, Gaines cabled from Honolulu to the libelant in New York, as follows:

"Attorney returned this evening from Restorer. Reports valuable services already rendered, and good salvage claims if ship floated. Before ship left I suggested to Combe he better obtain written request. He has letter from Hackfelds, who are agents, requesting him (Combe) to her aid as soon as possible, but nothing said about compensation, so salvage claim unimpaired. Metcalfe, the expert, questioned to-day as to arrangements for compensation; but Combe instructed to refer all compensation questions to home office. Metcalfe will say to-morrow what further service required; but attorney advises Restorer stand by anyway till Manchuria floated. Probable this will interfere with proposed Midway trip, in which case thinks you better forward Combe instructions. There is temporary telephone connection with shore near the wreck, but is controlled by agents, who have a man always within hearing. Only other means communication is by land, which costs \$25, whether merely messenger goes or passengers taken. I will go over again if anything important."

At this time, to wit, August 31st, Mr. Ward, vice president of the libelant, was at Guam, and the Restorer had been expected to meet him at a place called Midway. On August 31st, the libelant cabled from New York to Mr. Ward as follows:

"Lloyd's surveyor arrived Manchuria. Ordered Restorer stop engines. Intends put down anchors, then lighten ship, and pull her off by strain on winches. Combe reports, if is to go to Midway, must leave Manchuria not later than September 4th. We believe Lloyd's do not want Restorer to pull Manchuria off. Combe thinks could pull her off if she was lightened. Salvage attorney advises Restorer stand by until Manchuria floated. How does this affect your orders to have Restorer meet you off Midway?"

The next day, to wit, September 1st, Mr. Ward cabled from Guam, among other things, as follows:

"Inform Combe he must not leave Manchuria so long as he can be of least assistance, even if he is unable to meet me at Midway. Nothing must be done that would invalidate our claims for any salvage. Take advice of our attorneys."

The New York office of the libelant having been informed that the Restorer's compensation would be adjusted in New York, that office cabled its representative at Honolulu on September 6th, among other things, as follows:

"As underwriters propose settle salvage New York, it will be necessary all evidence and data be forwarded to enable us determine amount salvage. Please, therefore, send any data you have; also ask Combe send copy all records he was requested keep. Papers should, if possible, show whether or not Manchuria would been lost had not Restorer arrived so quickly. Also approximate value Manchuria and cargo separately."

It thus appears that Capt. Combe was specially requested to keep certain records in regard to the matter. And we find in the log of the Restorer certain entries which were manifestly made with a view of furthering the claim of that ship to a salvage award. For example, at 0:45 p. m. of the first day of her service, to wit, August 22d, is this entry:

"Signals received from S/S Manchuria to keep hawsers taut. Set engines at 20 revolutions. U. S. S. Manning still laying at anchor with both 8" manilla and 6x3 grapnel rope slack and engine stopped. By keeping our hawsers taut it saves the S/S Manchuria from being set further inshore by the wind and sea, which are on her broadside driving her on a lee shore."

And, after the night of August 22d, during the whole of which, with the exception of 2 hours and 10 minutes, when her engines were set at 20 revolutions (just enough, according to her master's testimony, to keep her lines from chafing), they were at 15 revolutions, there is this entry in the Restorer's log, made at 8:54 a. m. of August 23d:

"The captain of the S/S Manchuria reported ship resting quietly all night, probably due to strain put on Restorer's hawsers."

The facts shown by the record did not justify the cable of September 6th, above set out, in which the New York office stated in effect that the underwriters had proposed to settle "salvage" in New York. The record shows this in respect to that matter: On Metcalfe's arrival on the afternoon of August 29th, he dispensed with the services of the Restorer. That fact was thus reported by Gaines from Honolulu the next day, August 30th, to the New York office:

"Visited scene of wreck with Ballou, senior member our attorneys. Went on board Restorer. Ballou thought he better stop on board until to-morrow in case any question should arise. All rights to salvage preserved. Manchuria has been waiting arrival of Metcalfe, salvaging expert from San Fran. Metcalfe arrived 4 p. m. Ordered Restorer stop engines. Proposes to sink Manchuria to hold her until heavy anchors in position, then lighten and put strain on winches. Do not know what use he will require of Restorer, but she will stand by and render all assistance."

In Gaines' cable of the next day, August 31st, which has already been set out, it will be seen that he therein stated that:

"Metcalf, the expert, questioned to-day as to arrangements for compensation; but Combe instructed to refer all compensation questions to home office. Metcalf will say to-morrow what further service required; but attorney advises Restorer stand by anyway till Manchuria floated."

So that compensation, not salvage, was the matter spoken of between the parties to be referred for settlement in New York; and that fact is further shown by Metcalf's cable of August 30th to the claimant's agent in San Francisco, in which he asked "What arrangement has been made services Restorer?" and by the San Francisco agent's telegram to Harriman in New York, and Harriman's reply thereto of date August 31st, as follows:

"Telegram received. Have made no arrangements regarding charges of Commercial Cable boat Restorer. Go ahead and use her, and I will attend to matter of charges afterwards. The Cable Co. is under obligations to us."

And by the San Francisco agent's reply to Metcalf of the same date, to wit, August 31st, reading as follows:

"Restorer charges will be adjusted New York. Use as necessary."

The record shows that in view of these telegrams Metcalf retained the Restorer, which fact was communicated to the libellant's New York office by its Honolulu representative, Mr. Gaines, on the 3d day of September, in these words:

"Have had an interview with Metcalf, who had received cable his company saying compensation Restorer would be adjusted New York. Metcalf said this was satisfactory, and Restorer would be kept by Manchuria."

In view of these facts it cannot be doubted that Metcalf's understanding was that the compensation for the employed services of the Restorer would be adjusted by the respective parties in New York, and such is his testimony, from which we extract as follows:

"Q. Did you, Captain, know of the relation existing between the Cable people and Mr. Harriman? A. Before leaving San Francisco, it was conveyed to me in some way which I don't remember. It was conveyed to me that the business interests of both Harriman and the Pacific Cable Co. were pretty close. In what way I got the idea I can't tell you; but it was with me all the time I was down here when we had the Restorer in operation until we got back from Midway, and then I was very disagreeably disabused of the idea. Q. When you got this cablegram of the 31st of August (reading): 'Metcalf: Restorer charges will be adjusted New York. Use as necessary'—and so forth, what did you understand that to mean? A. I understood by that that the parties interested, Mr. Harriman and the Cable Company, Mr. Harriman being president of the Pacific Mail Steamship Company, and I didn't know whether Mackay was the president of the Commercial Pacific Cable Company or not. I thought they had got their heads together and fixed on a figure to be paid, per diem or otherwise, as the case might be. Q. What did you know Mr. Harriman's connection to be with the Pacific Mail Steamship Company at that time? A. He was president of the company. Q. Did you know that? A. Oh, yes. Q. Why did you send a cablegram asking about the compensation to be paid the Restorer? A. Because it was my duty, as soon as I found out that no rate had been fixed for her employment, it was my duty, as representative of the parties interested, the owners and underwriters, to find out and establish the fact. Q. And the cablegram of the 31st of August in answer to yours of the 30th was satisfactory to you, was it? A. Perfectly, and I so expressed myself to several people; Capt. Pillsbury for one, because he was much interested with me, and several others, I haven't the least doubt—the agents, for instance. Q. Captain, in your capacity as representative of the underwriters, or as representative of the owners, did you ever propose to any one yourself

to settle a salvage claim for the Restorer in New York? A. No, sir. Q. Or any other kind of a claim? A. No, sir. Q. Or did you propose to any one down here in any capacity to settle the compensation for the services of the Restorer in New York? A. No; but if it had been intimated to me that they had been unable to come to any reasonable terms, I would have settled it very quickly. I had full authority. Q. Do you know Mr. Schwerin? A. Very well. Q. Do you know now the basis of this telegram from Mr. Schwerin of the 31st of August? A. Do you mean the telegram from Mr. Harriman to Mr. Schwerin? Q. Yes. A. I have heard it read in this court. Q. You think that telegram warranted Mr. Schwerin in sending his to you? A. Well, Schwerin is a pretty smart fellow. If Mr. Schwerin had sent me that same telegram, I would have known exactly what to do. Q. What would you have done? A. I would have approached the owners of the Restorer either here, probably through this office here, and requested them to name a price per day for that vessel, including the time she had already been out there, either on the basis of such much per day and pay their expenses or combining the two. If the rate had been satisfactory, I would have said, 'All right, I will give you an agreement to that effect,' and that would have been binding. If they had asked me a different figure, that I thought outside of all reason, I would have said, 'I will give you so much per day and pay your expenses,' and if they declined I would have said, 'All right, gentlemen, pick up your anchor and go back to town.' Q. That is, if you had received the cablegram that Mr. Schwerin did? A. Yes. Q. Captain, during the salvage operations, and after the receipt of the cablegram of August 31st, did you in any manner restrict or intend to restrict the services of the Restorer? A. Not in the very least. Q. Did you limit or intend to minimize the services to be performed by the Restorer? A. Never had the slightest idea of such a thing. Q. In reference to the positions given to the three ships, what position did you give to the Restorer? A. Well, I should say the Restorer had about the best position of the three. Q. Why didn't you make arrangements to have the Manning tow the Manchuria to Honolulu? A. Well, she is a government ship to begin with. My impression was all along, from the time I received that cable, that the Restorer was under pay and at my service absolutely, and when I am paying for anything I make the best use of it. Q. You knew that the government's ship services were free, did you? A. Quite free; yes, sir. Q. Is that the reason you gave the tow to the Restorer? A. I gave it to her because I thought she was in my employ, and another thing she is the more powerful ship of the three. Q. In your opinion, could the Manning have performed the tow? A. Oh, yes; not quite as quickly as the Restorer, but it could have towed the Manchuria in the weather that prevailed at that time. Q. Could the Iroquois have done it? A. Yes; in my opinion, she could. We handle those ships with a great deal smaller tugs than the Iroquois."

The libelant's New York office was informed by the cable from its Honolulu agent of August 31st that:

"Metcalfe, the expert, questioned to-day as to arrangements for compensation; but Combe instructed to refer all compensation questions to home office. Metcalfe will say to-morrow what further service required."

And when, according to Metcalfe's understanding, it had been finally agreed between the parties in interest that compensation for the Restorer's services should be adjusted by them in New York, and he had continued her employment, which certainly excluded any idea of salvage remuneration for her future services, the libelant's New York office was notified by its Honolulu agent's cable of September 3d that:

"Metcalfe said this was satisfactory, and that Restorer would be kept by Manchuria."

If, notwithstanding all this, the libelant intended to claim a reward based on salvage principles, surely good faith required it to apprise Metcalfe of that fact. There was not only this bad faith on the part

of the libellant, but its action throughout was not only calculating and mercenary in the extreme, but was entirely lacking in those elements which often induce courts of admiralty to make awards at times greatly exceeding the expenses, losses, and actual value of the salvor's services. A salvor, said the court in the case of *The Howard*, 12 Fed. Cas. 630, 633—

"who, regardless of personal considerations, gallantly rushes into dangers to preserve the lives and property of others, when exposed to the horrors of shipwreck, or he who promptly goes forward, and contributes his aid when he believes his services will be beneficial in preventing impending loss, without stopping to inquire what amount in dollars and cents his exertions will bring to his own pocket, will always receive that liberal reward for his services which it is the policy of the law to allow, and which courts feel pleasure in awarding to generous and manly conduct; while he who holds back and quietly looks on at approaching ruin until his own services become indispensable to the preservation of the property he sees exposed, with the expectation that his reward will thereby be increased in proportion to the increased dangers from which the property is ultimately rescued, will find that he is disappointed in the realization of his golden hopes, and that a display of avarice at such a time renders him an object of contumely and reproach."

In line with these remarks and our conclusions, are the cases already cited, and *The Bello Corrunes*, 6 Wheat. 153, 5 L. Ed. 229; *The Boston*, 3 Fed. Cas. 932; *The Byron*, 4 Fed. Cas. 956; *The D. M. Hall*, 7 Fed. Cas. 770; *Hand v. The Elvira*, 11 Fed. Cas. 413; *The Mount Washington*, 17 Fed. Cas. 925; *Spreckels v. The State of California* (D. C.) 45 Fed. 649; *The Clandeboye*, 70 Fed. 631, 17 C. C. A. 300; *The Ragnarok* (D. C.) 158 Fed. 694.

The cause is remanded to the court below, with directions to strike from the judgment the bonus allowances, aggregating \$30,000, and the interest allowed thereon by said judgment and, as so modified, the judgment will stand affirmed; *Pacific Mail Steamship Company* to recover its costs on this appeal.

BULL et al. v. UNITED STATES SHIPPING CO. et al.

(Circuit Court of Appeals, Second Circuit. July 23, 1909.)

No. 286.

SHIPPING (§ 175*)—DEMURRAGE—LIABILITY OF CHARTERER.

The steamship *Eva* was chartered to carry a cargo of coal to be loaded at Philadelphia; the charter party providing for "customary steamer dispatch loading, steamer to take turn with other steamers loading coal." By the rules of the Greenwich coal pier, where she was to load, each vessel was required to register when ready to load, and was loaded in turn, unless she failed to dock when her berth was ready, in which case she lost her place and must re-register. The *Eva* registered, and her master was told by the charterer's agent that she could not be loaded for about a week. She then went to a shipyard to have some changes made in her bulkheads, which, however, were not necessary for her coal cargo, and could be suspended at any time on notice, and she could have reached the coal dock within an hour. When her turn for loading was reached, she was not notified; but another vessel was given her place apparently at the instance of the charterer, and she was delayed for several days. *Held*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that, after registering, she was not required to remain anchored near the docks, but was within her rights in utilizing the time while waiting for repairs, and was entitled to reasonable notice when her turn to load came, and that the charterer was liable for demurrage for the time she was delayed.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 572-574; Dec. Dig. § 175.*]

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Action by Archibald H. Bull and others, as owners of the steamship *Eva*, against the United States Shipping Company, the Berwind-White Coal Mining Company, and others, for demurrage. Decree for respondents, and libelants appeal. Reversed.

A decree of the District Court for the Southern District of New York dismissed the libel in an action of demurrage for the detention of the steamship *Eva* at Philadelphia beyond the time limit stipulated in the charter-party. The action was originally brought against the charterer, the United States Shipping Company, which on petition, under the fifty-ninth rule, brought in, as a party respondent, the Berwind-White Coal Mining Company, which latter company held a sub-charter in terms substantially identical with the original.

MacFarland, Taylor & Costello and Willard U. Taylor, for appellants.

Wing, Putnam & Burlingham and Henry E. Matteson, for appellee United States Shipping Co.

Wilcox & Green and Herbert Green, for appellee Berwind-White Coal Mining Co.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. Both charters contain the following:

"It is agreed that the lay days for loading and discharging shall be as follows, if not sooner dispatched commencing from the time that the captain reports his steamer ready to receive or discharge cargo, and custom house formalities are fulfilled: Customary steamer dispatch loading, steamer to take turn with other steamers loading coal, and the cargo to be taken from alongside by consignees at the port of discharge, free of expense and risk to the steamer, at the average rate of not less than three hundred (300) tons per running day (Sundays and holidays excepted), providing the steamer can deliver it at this rate. Also, that for each and every day's detention by default of said party of second part, or agent, ten cents U. S. gold per net register ton per day, day by day, shall be paid by said merchants, or agent, to said chartered owners or agents."

Pursuant to the written directions of the original charterer, dated October 29, 1907, the *Eva* proceeded to Philadelphia, arriving there November 1, 1907. Her master reported to the Berwind-White Coal Company as follows:

"I beg to notify you that the S. S. *Eva* is now in port and ready to receive her cargo and will come on her lay days forthwith.

"Respectfully yours,

H. R. Swift, Master."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

He also registered the *Eva* pursuant to the local port rules which had been adopted two months previously. On this day, November 1st, Chase, the general manager of the Berwind-White Company, who received the notice of the master of the *Eva*, informed him that they would not be ready to load the ship for a week—"say next Thursday." Roney, a witness for the libelants, testified that he was present at this conversation between the master of the *Eva* and Chase, and that the—"captain asked Mr. Chase when the cargo would be ready for his vessel and that Chase replied, 'The middle of next week.' Captain, as I remember, said that was rather indefinite and during the conversation Mr. Chase said 'by Thursday' or 'not before Thursday.'"

In the Berwind-White letter of November 9th to Mr. Rossen it is stated that the master of the *Eva* was informed that "it would be four or five days before the *Eva* could take berth." That this assurance was given is also admitted, in its essential particulars, by Chase who testifies as follows:

"He (the master) asked me at that time when I thought he would be loaded. I told him I could not tell exactly, there were some vessels there loading at that time, but it looked to me as though it would be next week. He said to me 'well, do you know when?' I said I suppose about the middle of the week."

The testimony shows that in view of the limited capacity for loading coal at Philadelphia it is seldom that a vessel receives quick dispatch. The *Eva* arrived about noon of November 1st and no loading berth was available until 5 o'clock of the afternoon of the 7th when the steamship *Queen Adelaide*, which took the *Eva's* place, was sent to the berth. It is manifest, therefore, that the master of the *Eva* was justified in assuming that his vessel was to lie idle for at least five and a half days—it was in fact nearly a full week.

Pursuant to the local custom of the port the master of the *Eva* registered her at 1:30 p. m. November 1st in the registry kept at the Greenwich coal pier. The rules requiring this to be done are as follows:

"1. All vessels must be registered by the proper officer in charge, in a book kept at the pier office for that purpose. Under no circumstances is a vessel entitled to register until ready to cargo. A vessel not registered will not be given a berth. * * *

"4. If from any cause whatever a vessel which has registered fails to dock when berth for cargo is ready, such vessel when ready to cargo must again register as newly arrived and take its turn according to the latest registration."

On arriving at Philadelphia the *Eva* proceeded to the Cramp, or Kensington, shipyard, a distance variously estimated at from 2 to 4 miles from the Greenwich pier, and tied up at the dock where she was given free wharfage. She went to the Kensington yard to receive her stores and make some repairs. This yard was within the port of Philadelphia and from there the *Eva* could have reached the coal pier in from half an hour to an hour. The repairs which the owner of the *Eva* desired to make consisted in replacing about two-thirds of a wooden bulkhead with steel. This substitution in no way affected her utility or capacity as a coal carrier. The change was not structural in character and was designed to enable her to carry asphalt with greater facility. When she reached Philadelphia she was ready to load and could have gone at

once to her berth had one been available. The repairs on the bulkhead could have been suspended at any moment and she could have been at the Greenwich pier within four or five hours after receiving notice that the vessel then occupying the coaling berth was about ready to vacate. That she would have been ready on Thursday afternoon there can be no doubt. She was in fact ready. Although vessels awaiting their turn frequently lie off the Greenwich pier it is not necessary that they should do so and in this case Manager Chase expressly states that they would accept a vessel lying at the Kensington yard "if she was in all respects ready."

The respondents insist that because the *Eva* was utilizing the days she was compelled to be idle in having a bulkhead repaired, she was not "ready" and that they were justified in having her name stricken from the registry and the *Adelaide* put in her place with a consequent delay of 10 days. It is not necessary to decide whether the name of the *Eva* was actually removed from the list; that question is wholly negligible in view of the fact that through the combined action of the respondents and the pier master the *Adelaide* which was registered $3\frac{1}{2}$ hours afterwards was given the *Eva*'s place. The fact of preference being admitted the *modus operandi* by which the result was accomplished is unimportant. This preference can be justified only upon the theory that the *Eva* was not ready because, and solely because, she was having a bulkhead changed during her enforced idleness. That there would be a delay at Philadelphia was contemplated by both parties when the charters were made.

The simple question, then, is were the charterers justified in arbitrarily determining, without notice to, or consultation with, the ship owners, that the *Eva* was not ready because she was having repairs made during the time she was waiting for her turn? We are of the opinion that the question should be answered in the negative. We think the testimony is overwhelmingly to the effect that when the *Eva* reached Philadelphia she was ready to receive cargo and would have gone directly to her berth had one been empty. She did not then begin to load because the berths were all occupied and proceeded to Cramp's shipyard relying on the statement of the charterer's agent that she could not be loaded until about Thursday of the following week. We think that the repairs which were being made could at any time have been discontinued and the *Eva* berthed upon receiving reasonable notice. That she was "ready" even upon the respondents' interpretation of that term, before a berth was vacant is proved beyond controversy. She was, indeed, ready on November 6th and could have come down from Kensington in an hour.

The respondents seem to proceed upon the theory that the *Eva*'s position was analogous to that of a ticket purchaser before a box-office, or an apprehensive depositor awaiting his turn to reach the teller's window in a suspected bank, who forfeits his place if he drops out of line. Such a contention leads to the conclusion that a vessel loading at the Greenwich pier must lie on the anchorage ground opposite with bunker coal on board and hatches swept out, and if she fails in these respects she is liable to be stricken from the list by an invisible hand guided by any hostile interest. We do not so understand the situation.

The registration of vessels was intended as a substitute for waiting in line. Once properly on the list it is no affair of the pier master, or the charterer, what the vessel does so long as she remains in port. The test of readiness is her ability to reach the loading berth in time. If she fails the loss is hers, and the gain that of the vessels below her on the list.

Rule 4, quoted above, contemplates exactly this penalty and no other. If the registered vessel fails to dock when the berth for cargo is ready then, and then only, must she re-register. The rule does not say that if she utilizes the time she is compelled to wait by cleaning, or painting, or making changes in her bulkheads she may be sent to the bottom of the list by the machinations of hostile interests. Any interpretation of the rule which gives to an individual the arbitrary power of determining by an ex parte examination the condition of readiness must inevitably lead to favoritism and fraud.

Of course, a vessel once registered, must for her own protection, keep watch of the conditions at the loading berth, but any miscalculation is at her own risk. If she fails to respond when summoned she loses her turn, but no one else has a right to assume in advance that she will lose her turn. Even in a case where the repairs are so extensive that the presumption is strong that the vessel will not be ready there is no occasion for judging the situation in advance. As we construe the rule it works automatically, when a berth is vacated the next vessel on the list is summoned, and if she does not appear the next is called, and so on. We have no doubt that the refusal to give the Eva her turn at the loading berth was an arbitrary act without justification in fact or law.

Who is responsible? The respondents argue that the pier master is alone to blame. He was not called as a witness. It is not easy to discover any personal motive on his part for discriminating against the Eva. Whatever action he took must have been at the instigation of some interested party. To hold the pier master solely in fault for the Eva's detention would leave her remediless and would probably do an injustice to that official. The testimony on this branch of the case is far from satisfactory, but, such as it is, it points directly to the sub-charterer as the responsible party. The master of the Eva testified that the pier master told him that he received his instructions to strike the Eva's name off the registration list from the shipper. Chase, the general manager for the shipper, testified that he knew of the repairs at the shipyard on November 2d and talked with the pier master on that day regarding the matter, but did not notify the master of the Eva that there was any question as to his status at the loading berth until Wednesday the 6th when he informed him that the Eva was not ready to receive cargo and her name had been taken off the list.

We cannot believe that the pier master without persuasion from some controlling source would have assumed the responsibility for such a highhanded and illegal proceeding. It is at least a fair presumption that the pier master received his information of the Eva's repairs from the manager of the Berwind-White Company, and that it was through its influence that the Eva lost her turn. If the libelants had been informed on November 2d that there was any question regard-

ing the *Eva's* right to retain her place it is probable that she would have abandoned the repairs if the matter could not have been arranged. But with full knowledge of the facts it seems inconceivable that the pier master would have insisted upon maintaining so indefensible a position. The shipper was, in a sense, the vessel's agent, he entered and cleared her at Philadelphia; if he did not actually connive at the unlawful preference given the *Adelaide* he remained silent when knowledge of the situation by the master of the *Eva* would, in all probability, have enabled him to explain the circumstances in time.

Counsel for the Berwind-White Company contend that the *Eva's* name was not stricken from the list. They say:

"The pier master simply treated the ship as not registered when he found she was repairing at the shipyard."

If counsel be correct, and the testimony seems to sustain their contention, there was nothing on the registry to indicate how the pier official was treating the *Eva*. Her master was a stranger, entirely ignorant of the local usages, and yet it is contended that the rights of his owners are to be destroyed because of a conclusion which the pier master had reached in his own mind but had failed to impart to the master either orally or in writing or by removing the *Eva's* name from the list. In other words, if the pier master was under no obligation to notify the ship, either directly or indirectly, it follows that vessels destined for the Greenwich pier are wholly at the mercy of an irresponsible autocrat; their rights depending upon the unknown and unascertainable condition of his mind. It may be that the pier master thought he had given sufficient notice when he informed the *Eva's* representative at the port expecting, of course, that he would immediately notify the representatives of the ship.

The testimony of Capt. Swift, uncontradicted by the pier master, that the latter told him that he was instructed by the Berwind-White people to take the *Eva's* name from the registry, the failure of Manager Chase to notify the *Eva* of the pier master's proposed action and the absence of any testimony indicating that the action of the pier master was induced by others, lead us to the conclusion that the agents of the Berwind-White Company are responsible for the *Eva's* unlawful detention.

The decree is reversed with the costs of this court, and the cause is remanded to the District Court with instructions to enter a decree for the libelants and if necessary to order a reference to determine the amount due.

NOTE.—The following is the opinion of Adams, District Judge, in the court below:

ADAMS, District Judge. This action was brought by Archibald H. Bull and others against the United States Shipping Company to recover for damages suffered because of delay in loading the steamer *Eva* at Philadelphia in November, 1907. After some formal allegations it is stated that in the month of October, 1907, the *Eva*, being about to conclude a voyage, libelants' agents made and concluded with respondents a charter-party which was annexed and made a part of the libel, marked Exhibit A. That charter-party provided for the use of the vessel and for compensation and contained this clause: "It is agreed that the lay days for loading and discharging shall be as follows, if

not sooner dispatched: Commencing from the time that the Captain reports his steamer ready to receive or discharge cargo, and Custom House formalities are fulfilled; customary dispatch loading, steamer to take turn with other steamers loading coal, and the cargo to be taken from alongside by consignees at Port of Discharge * * * and every days' detention by default of the party of the second part, or agent, so much per registered ton per day."

The Shipping Company's answer to that is practically that a charter-party was made as alleged and that the respondents sub-chartered such steamer Eva to the Berwind-White Coal Mining Company, copy of which charter is also annexed.

I may say here that the charter to the Coal Company was practically a copy, as far as conditions were concerned, of the original charter.

When the vessel arrived here she started for Philadelphia and in going up the Delaware River she passed the dock where she was to be loaded, which I judge was known to the master of the vessel. In passing a point further up and convenient to the office of the Berwind-White Company the master left the vessel, while she went on to Cramp's Shipyard in order to carry out a contract which had been made for work to be done on her. There is considerable conflict here as to what work was to be done under the contract, the libelants contending it was simply putting in a bulkhead and had nothing to do with the vessel herself; while the other parties contend that although it was not a part of the structure of the vessel it should be regarded as repairs. I suppose, strictly speaking, it was not repairs. There was something done for the improvement of the vessel to be subsequently used if an opportunity should offer when such exigency should arise. But while this contract was in force and while the vessel was going to Cramp's Shipyard in Philadelphia the master left the vessel and went and reported her "Ready" and upon that report the vessel obtained a status at the pier, under certain laws that have been stated and according to certain regulations made by a director of the wharves, which has been marked in this case Berwind-White Company's Exhibit E. These rules and regulations if they did not state the law as passed by the Legislature were at any rate recognized by these people, and by others going to Philadelphia as entirely proper for the governing of a vessel in this situation. Rule 1 provides that all vessels must be registered by the proper officer in charge, in a book kept at the Pier Office for that purpose. This Pier Office is the office that was passed by the vessel when on her way to Cramp's Shipyard. It was on a Pier in the lower part of Philadelphia at Greenwich Point. She passed those piers and went to Cramp's which is stated to be, and I suppose correctly, at least four miles away, and while there she was under the substantial control for the time being of the Cramp's people who were adding this bulkhead to the vessel.

I do not think that the vessel could be considered ready to load at that time. The Captain of the vessel states that he had some sort of understanding before the vessel went to Philadelphia that she would not be required for cargo for some little time, and that he was acting on that understanding when he allowed his vessel to go to Cramp's Shipyard. But he himself went to report that the vessel was ready, when she was not actually ready within the provisions of the rule I have just read, which provides that under no circumstances is the vessel entitled to register until ready to take her cargo. The Captain did register when she was not ready to cargo. She had passed the place for cargo and had gone to Cramp's Shipyard for the purpose of having this bulkhead changed. There is a good deal of conflict of testimony, but I have no doubt that the vessel could have stopped that work in the course of two or three hours and proceeded to her loading place. Nevertheless, when the Captain made his report she was not ready. She was then going to a place where a certain number of men had to work on her—forty or fifty it turned out—whose tools were aboard the vessel and were being used in the work of the improvement in having this bulkhead put in her. It seems to me that by proceeding that way the master obtained a status that he was not entitled to. If he had stated to the people who had charge of that Pier that he was going to a Shipyard for the purpose of making alterations or improvements on the vessel and could complete them on a short notice, and if some arrangement had been made with the Pier by which he could receive such notice as the

situation demanded, that would be different. But he reported that she was "ready" and when the Pier people discovered that she was at Cramp's Shipyard, not ready, but proceeding to make these improvements, they evidently struck her name from the list. The fact that she was obliged to re-register, seems to have been in conformity with the rules and regulations, or law, whichever we are pleased to call it, which says that a vessel not registered, will not be given a berth; also, that vessels must take their turn in loading in the order of their arrival and registry at the Pier Office.

It appears that the Berwind-White Company had coal in cars in the vicinity of the loading pier all the time which could have been put aboard this vessel when she reached there. She had to have a berth and in order to get that berth she had to fulfil the conditions required by the rule. As I have said, she was not in such condition, and when they found that she was not they struck her name off the list, so that she could not get the coal and there was no opportunity for the Berwind-White Company to deliver the coal to her until she could get a berth. They had the coal there to deliver to her and it seems to me they performed their full obligation with respect to the vessel and that the reason she was not loaded was because, instead of going to the Pier herself or anchoring off the Pier or somewhere in the vicinity and keeping some watch over the proceedings there and herself in touch with the people at the Pier, she went off and went to a dock where she had free wharfage, where she was to take in stores to be sure, but also where the alterations were to be made. She did not go out of the water, but she was far away from the pier where she was to be loaded and not in touch with the people. She relied upon the Berwind-White people for information in respect to the Pier. They were agents of the vessel and of course it was their duty to communicate any thing they knew about the vessel, but they could not control that pier. It was a pier entirely under the control of the Pennsylvania Railroad and the Berwind-White people could do no more than seek to influence the authorities by permission with respect to berths.

It seems to me, therefore, that the master lost his opportunity by going some distance from the Pier and there engaging in the operation of making additions to his vessel which prevented his being immediately ready. She was not ready, and the registration which he obtained was upon a misrepresentation and when that was ascertained, the Pier people were justified in striking her name from the list.

Of course I do not mean to reflect upon the master of the Eva. He appeared to good advantage on the stand and evidently thought he was doing his duty. I think he misconceived his duty in allowing his vessel to go to another part of the city, and leaving it at a place which would be inconvenient as far as the loading berth was concerned, and that led to the whole misunderstanding. If he had at once stopped his vessel and gone to the Berwind-White Company's office and told them his boat was there and waiting for orders and the Berwind-White people had said, "It doesn't make any difference, you can go to your Pier," then I could see how some charge might be made against the Berwind-White Coal Company. But when he went to the Cramp Shipyard for the purpose of making those alterations, not advising anybody that he was going or how long he would be kept there it seems to me he was taking chances for the vessel which have turned against them in this transaction, because when he lost his place and registration, he lost his turn and a turn was not available until the vessel was reinstated, and it was under that reinstated turn she was finally loaded and the loss of time, meantime was suffered. I fail to see how either the Shipping Company or the Berwind-White Company can be held liable.

I therefore dismiss the libel and petition.

HAUGER v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 13, 1909.)

No. 828.

1. CRIMINAL LAW (§ 427*)—EVIDENCE—DECLARATIONS OF ALLEGED CO-CONSPIRATOR.

Declarations of an alleged co-conspirator to a witness are inadmissible to prove the existence of the conspiracy as against another party thereto.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1012; Dec. Dig. § 427.*]

2. CRIMINAL LAW (§ 427*)—EVIDENCE—RES GESTÆ—DECLARATIONS OF CONSPIRATOR—CONFESSION.

In a prosecution of defendant for counterfeiting, the confession of an alleged co-conspirator while in jail to his keeper, implicating accused in a scheme to manufacture and pass counterfeit money, was inadmissible as res gestæ prior to or in the absence of competent testimony to establish the conspiracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1012; Dec. Dig. § 427.*]

3. CRIMINAL LAW (§ 424*)—EVIDENCE—CONSPIRACY—SUBSEQUENT DECLARATIONS OF CONSPIRATOR.

Declarations and confessions of an alleged co-conspirator after the offense had been committed and the parties had been arrested were inadmissible against accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1002-1010; Dec. Dig. § 424.*]

Admissibility, on trial of joint indictments of acts and declarations of conspirators and codefendants after accomplishment of object, see note to *Sorenson v. United States*, 74 C. C. A. 472.]

4. CRIMINAL LAW (§ 407*)—EVIDENCE—ADMISSIONS BY ACCUSED.

In criminal cases, alleged admissions by accused from his failure to deny incriminating statements made in his presence are subject to the same rules as applied to confessions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898-900; Dec. Dig. § 407.*]

5. CRIMINAL LAW (§ 407*)—EVIDENCE—STATEMENTS OF ANOTHER.

Where only portions of the confession of an alleged co-conspirator had been repeated to defendant, his failure to deny the same did not justify the admission of the entire confession of such co-conspirator.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898-900, 968; Dec. Dig. § 407.*]

6. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

Hearsay evidence is incompetent to establish any specific fact, the nature of which is susceptible of proof by witnesses who speak from their own knowledge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.*]

7. CRIMINAL LAW (§ 407*)—EVIDENCE—ADMISSIONS—STATEMENTS BY ANOTHER—FAILURE TO DENY.

Where defendant was under arrest and in charge of an officer in one room of his house, while another officer with defendant's wife searched the adjoining room, incriminating statements made by the wife were inadmissible against accused on the theory that he could have heard and did not deny them, since even if he heard, being under arrest, he might have felt that he was not at liberty to speak.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 898-900, 968; Dec. Dig. § 407.*]

*For other cases see same topic & NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. CRIMINAL LAW (§ 404*)—DEMONSTRATIVE EVIDENCE—COUNTERFEIT COIN.

In a prosecution for counterfeiting, counterfeit coin alleged to have been obtained by the witness from a police officer in Pittsburg, whose name he could not remember, and who said he obtained the same from M., whom the government claimed was an accomplice, and others obtained from various persons in the same place, whose names the witness could not remember, also claiming to have obtained them from M. before his arrest, was inadmissible against the defendant; there being no proof to connect him with them.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 404.*]

9. INDICTMENT AND INFORMATION (§ 71*)—SUFFICIENCY.

The true test of the sufficiency of an indictment is not whether it might possibly have been more certain, but whether it sufficiently apprises defendant of what he must be prepared to meet, and is sufficiently explicit to avail him on a subsequent plea of former conviction or acquittal.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 193, 194; Dec. Dig. § 71.*]

10. COUNTERFEITING (§ 16*)—INDICTMENT—DESCRIPTION OF MONEY.

An indictment charging accused with unlawfully, etc., making and forging a large number, to wit, 110 coins, in resemblance and similitude of the true and genuine coin theretofore coined at the mint of the United States, called a "dollar," contrary to the form of the statute, etc., was not objectionable for failure to charge the kind of dollar alleged to have been counterfeited, whether silver or gold.

[Ed. Note.—For other cases, see Counterfeiting, Cent. Dig. §§ 25, 26; Dec. Dig. § 16.*]

In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

John M. Hauger was convicted of counterfeiting, and he brings error. Reversed.

Brown & Blizzard and A. G. Hughes, for plaintiff in error.

Reese Blizzard, U. S. Atty., and E. M. Showalter, Asst. U. S. Atty.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. John M. Hauger, plaintiff in error, defendant below (and who will hereafter be called the defendant) was tried by jury and convicted in the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg, at January term, 1908, on an indictment charging him with making counterfeit United States coin. The indictment contained three counts, but the defendant was convicted only on the first count, which reads as follows:

"The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oath, present that John M. Hauger, heretofore, to wit, on the — day of October, in the year 1905, in the said district, and within the jurisdiction of said court, unlawfully and feloniously, knowingly did falsely make and forge a large number, to wit, one hundred and ten coins in the resemblance and similitude of the true and genuine coin, theretofore coined at the mint of the said United States, called a dollar, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The judgment of the court was that the defendant be imprisoned at hard labor for a year and a day, and that he pay a fine of \$110 and the cost of the prosecution. The defendant sued out a writ of error

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from this court, and the case is before us upon exceptions duly taken in the course of the trial and allowed by the court, and assignment of error based thereon. The bills of exception are 11 in number, but we do not deem it necessary to pass upon all of them in order to dispose of the case here. The first exception is based upon the admission of the testimony of John E. Washer, a witness offered in behalf of the United States, who gave in detail an alleged confession made to witness by one George Menear in the city jail of Pittsburg, Pa., on the 31st day of January, 1906; the said George Menear being at the time confined in the said jail under arrest on the charge of passing counterfeit money. Washer testified that Menear's confession to him was as follows:

"That his name was George H. Menear. That he lived at Terra Alta, Preston county, W. Va. That he was released from the penitentiary of Western Pennsylvania in the fall of 1905, and returned to Preston county, W. Va., soon after being discharged. That he went to the home of John M. Hauger, with whom he had been formerly acquainted and who was then living on what is known as the White Farm, near Norinith, Preston county, along about the 1st of October, 1905, and took supper. He and defendant got in his buggy and drove to Hutton Switch, a distance of one-half to three-quarters of a mile from the residence of the defendant, and that on that occasion they entered into an agreement or conspiracy to make and pass counterfeit coin. That soon after this visit the defendant, John M. Hauger, gave to the said Menear ten dollars (\$10) to go to Pittsburg and buy material for the purpose of making counterfeit coin, and that he (Menear) purchased said materials, consisting of plaster paris, metal, etc., and returned to the defendant John M. Hauger's home, where he and the defendant, Hauger, attempted to make counterfeit coins, at first meeting with poor success, but that they continued to experiment with the molds and material, and afterwards manufactured one hundred and ten (110) counterfeit silver dollars. That the said George Menear further said that the defendant, John M. Hauger, went to Oakland, Md., in the fall of 1905, and purchased from one John Davis a small portion of lead to be used in the making of said counterfeit coins, and also a small pair of scales, and that at the time said lead and scales were purchased the defendant, John M. Hauger, offered in payment of same to the said John Davis a silver dollar. That said Davis questioned the dollar, whereupon Hauger took it back, and Hauger told him about the matter when he came home, and refused to try to pass any more. That he, George Menear, had taken the counterfeit money so made and had gone to various towns and cities, among others, Rowlesburg, W. Va., Clarksburg, W. Va., Fairmont, W. Va., and Martinsburg, W. Va., where he had passed the said counterfeit coin, and that he had given to the defendant, Hauger, \$40 or \$45 of the profits arising from the making and passing of said counterfeit coin. That George Menear further said that on the same day that the defendant purchased the lead and scales from John Davis as aforesaid, he, the defendant, drew out of the bank \$25, and that there were with it a number of silver dollars, 10 or 12 silver dollars. That George Menear further stated to the said John E. Washer that the molds in which the said counterfeit coins were made were made in the upstairs of the house in which the defendant, Hauger, lived, and that he and the said defendant, Hauger, made said molds during the daytime, and that the counterfeit coins so manufactured were made downstairs in the kitchen at night, and that the said George Menear further states that on one occasion while so manufacturing said counterfeit coins in the kitchen that he and the said defendant Hauger killed a rat behind the wall paper on the kitchen wall by sticking a knife through the paper, and into the rat, and that they threw the rat out of the kitchen window. That the said Menear still further stated to said Washer that the molds in which the said counterfeit coins were so made were buried by himself and the defendant Hauger on the White Farm back of and near to the house in which the said Hauger lived at the time said coins were made on the bank of a small stream and near a big rock, and the said Menear designated by a plat or diagram the location where said molds were buried and could be found. He, the said

Menear, further stated to the said Washer, so he says, that the ladle used in the pouring of the metal in manufacturing said coins was in the defendant's house, and that a small bottle of chloride of silver was also left in the defendant's possession at the White Farm."

The defendant's counsel objected to the admission of this testimony, was overruled by the court, and duly excepted. Primarily the court seems to have admitted this statement of Menear on the ground that it was the declaration of a co-conspirator, for the court charged the jury:

"That the jury is instructed that, if they believe from the evidence that the defendant was an accomplice or co-conspirator with the witness George Menear for the making or passing of counterfeit coin, that any statement or confession made by Menear while conspiracy between him and defendant existed is evidence against the defendant, notwithstanding the fact that the witness Menear may not be allowed to testify as a witness on the trial."

We take it that the last clause of this instruction to the jury in which it is intimated by the court that Menear may not be allowed to testify as a witness on the trial is based upon the fact that Menear had been convicted of counterfeiting and had served a term in the penitentiary, and was, therefore, disqualified to be a witness.

It is not necessary, however, to discuss this proposition. The point which we shall consider is whether, under the circumstances, the alleged confession of Menear to Washer was admissible as the declarations of a co-conspirator. It is a well-settled principle of evidence that in a trial on an indictment for conspiracy after the unlawful agreement has been shown the acts and declarations of co-conspirators are admissible as a part of the *res gestæ*. By the act of conspiring together the conspirators have jointly assumed to themselves as a body the attribute of individuality, so far as regards the prosecution of the common design; thus rendering whatever is said or done by any one in furtherance of that design a part of the *res gestæ*, and therefore the act of all. For these reasons the conspiracy must be proved *prima facie* or such acts, and declarations are inadmissible. 3 Greenleaf on Evidence (16th Ed.) § 94, note 1. In this case there was an entire absence of evidence to prove the unlawful combination between Menear and the defendant. It is true that Menear stated to Washer, so Washer testified, that about the 1st of October, 1905, he, Menear, and the defendant entered into an agreement or conspiracy to make and pass counterfeit coin. But as to that fact the declaration of Menear was only hearsay. There is no rule which renders the declarations of an alleged co-conspirator, given secondhanded, admissible to prove the existence of the conspiracy. Such declarations are made competent only after the conspiracy has been shown to exist. In this view the alleged declarations of Menear were clearly incompetent. If, however, the unlawful combination between Menear and the defendant had been established so as to make the acts and declarations of Menear competent as evidence on the trial of the defendant, such acts and declarations of Menear as were committed or made in the course of the conspiracy and in furtherance of its object would have been admissible. The declarations of Menear which were admitted on the trial of this case were, as the record shows, after the overt act had been committed and the

purposes of the alleged conspiracy had been accomplished. For these reasons the said declarations were inadmissible as evidence against the defendant.

In this view of the case it was error to give the instruction above recited, and it was also error to refuse the following instruction to the jury which was requested by defendant's counsel:

"Instruction B. The court instructs the jury that the acts and declarations of a conspirator after an offense is committed may be received against the party making them, but not against his co-conspirators; and that if the jury believes from the evidence that the alleged conspiracy between defendant and George Menear had terminated at the time of the alleged confession of the said George Menear to John E. Washer, in Pittsburg, Pa., on January 31, 1906, and as detailed by said Washer, then the admissions and confessions of the said George Menear implicating the defendant cannot be considered as evidence against said defendant in this case."

It is argued, however, in behalf of the United States that the statements made by Menear to Washer were repeated by Washer to the defendant, and that defendant's answers at the time were competent to be used against him on the trial. Undoubtedly the declarations or admissions voluntarily made by a person in the course of conversation are admissible as testimony against him, but in criminal cases such declarations or admissions are admissible under the same rules as confessions. Only certain portions of the alleged confession of Menear are shown by the record to have been repeated to the defendant by Washer, and the fact that defendant may have said something when these portions were called to his attention, which tended to corroborate what Menear said, did not open the way to have the entire statement of Menear detailed in presence of the court and jury as evidence against the defendant. Aside from this, the Supreme Court of the United States has expressed itself in regard to the value of this class of testimony. In the case of *Dalton v. United States*, 63 U. S. 442, 16 L. Ed. 395, it is said:

"In all cases the testimony of admissions or loose conversations should be cautiously received, if received at all. They are incapable of contradiction. They are seldom anything more than vague impressions of a witness of what he thinks he has heard another say—stated in his own language, without the qualifications or restrictions, the tone, manner, or circumstances, which attended their original expression."

And we may say that, the defendant being at the time the conversation between him and Washer is alleged to have taken place under arrest and in Washer's custody, it is questionable whether what defendant said to Washer is competent at all. See *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568. As we have said, all of Washer's testimony detailing the alleged confession of Menear, except such portions of it as Washer states was the subject of conversation between him and defendant, is only hearsay. It is not necessary to refer to any rule or to cite authority in regard to the inadmissibility of hearsay testimony, but we will call attention to one leading case on that subject. *Queen v. Hepburn*, 11 U. S. 290, 3 L. Ed. 348. In this case Chief Justice Marshall, delivering the opinion of the court, says:

"That hearsay evidence is incompetent to establish any specific fact which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge."

And in that case it is said:

"It was very justly observed by a great judge that 'all questions upon the rules of evidence are of such vast importance to all orders and degrees of men; our lives, our liberty and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages and are now revered for their antiquity and the good sense in which they are founded.' One of these rules is that 'hearsay' evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover combine to support the rule that hearsay evidence is totally inadmissible."

So strictly have the courts guarded and applied the rule that hearsay has been held incompetent even in aid of human freedom.

Another exception is based on the fact that, when Washer had arrested the defendant and had placed him in custody of one John W. Davis at defendant's residence, Washer proceeded to search the residence, and was accompanied by defendant's wife. In the course of this search Washer and the defendant's wife went into the kitchen, a room adjoining the sitting room, in which the defendant and Davis were left. Washer further stated that while in the kitchen he asked Mrs. Hauger for the ladle and the bottle of chloride of silver which Menear had said were there, and she denied knowing anything about them whatever. Washer then testified that he found a bottle of chloride of silver in a box on a shelf in the kitchen, and Mrs. Hauger said that Menear told her that it was a bottle of medicine which he had been using for a sore hand, and had given it to her to keep for him. In further search, he, Washer, picked up a ladle, and said to Mrs. Hauger what is that, and her reply was, "Oh, well." Washer also stated on his examination that he did not know whether Hauger heard the conversation between himself and Mrs. Hauger but that he could have heard it, had he been listening. Defendant's objection to this testimony was overruled by the court, and it was admitted. The rule of evidence involved in this exception is based upon the silence of the defendant when his wife made the alleged declarations to Washer. Silence of a party in presence of a statement made by another may be put in evidence against him on the ground that from his silence his assent to what is said is inferred. To give such silence, however, effect as an admission, the party charged with it must have been in a position to explain. Before acquiescence in the language or conduct of others can be assumed as a concession of the truth of any particular statement, or of the existence of any particular fact, it must plainly appear that the language was heard or the conduct understood. Wharton's Criminal Evidence (9th Ed.) § 680. In commenting on this principle, Mr. Wharton cites the case of *Commonwealth v. Brailey*, 134 Mass. 530, in which Judge Morton, Chief Justice, says:

"Declarations made in the presence of a party, to which he makes no reply, are sometimes competent, as equivalent to tacit admission by him. This depends on whether he heard and understood them, whether he is at liberty to

reply, whether he is in custody or under any restraint or duress, and whether the statements are made by such persons and under such circumstances as naturally to call for a reply."

The conversation between defendant's wife and Washer was calculated, and no doubt did, prejudice the rights of defendant in the minds of the jury, and yet it was admitted to go to the jury when it was not clearly shown that defendant heard it. Even if he had heard what she said he was under arrest, and may not have felt that he was at liberty to speak. Further than this, we do not see that the defendant was called upon, under the circumstances, to make an explanation, for the wife said nothing connecting him, in any way, with the articles found. If, as stated by Washer, the wife told contradictory stories in regard to the bottle of chloride of silver, this fact should not have gone to the jury as evidence tending to establish defendant's guilt, and testimony of her ejaculation "Oh, well," upon the finding of the ladle is equally objectionable. In our opinion, therefore, defendant's objection to the testimony referred to in both of the exceptions we have considered should have been sustained, and that it was error in the trial court to admit it.

Another exception is based on the admission (over defendant's objection) of testimony by witness, Washer, as follows:

"The said witness exhibited before the jury certain alleged counterfeit coins, to wit, eight dollars in likeness and similitude of the silver dollars of the United States, who stated that he obtained those alleged counterfeit dollars from various persons in the city of Pittsburg. Two of alleged counterfeit dollars, he, the said witness Washer, claimed he obtained from a certain police officer in Pittsburg, whose name he did not remember, the said officer claiming to Washer that he had taken the two said dollars from the person of said George Menear on the 14th of December, 1905, that being the day said Menear was arrested, said Washer further stating that the remaining six alleged counterfeit dollars he (Washer) had obtained from various persons in Pittsburg, whose names he did not remember, but who told him (Washer) that they had received the said alleged counterfeit dollars from the said George Menear previous to the date of his arrest as mentioned above."

This testimony was clearly incompetent. There was nothing to show the connection of the defendant with the counterfeit coins exhibited to the jury by Washer. If it were taken for granted that there were circumstances tending to prove connection between the defendant and Menear in making and handling counterfeit money, there was no evidence that Menear ever had these coins in his possession, or had anything whatever to do with them. Washer stated that he obtained the coins, two of them, from a policeman in Pittsburg, whose name he did not know, and who told him at the time that he (the policeman) got them from Menear; that the other six were obtained from persons in Pittsburg, who Washer did not know, and who also told him that they got them from Menear. The statements of the persons from whom the coins were obtained were hearsay, and were incompetent as evidence upon the grounds which we have heretofore stated. We do not deem it necessary to further discuss the inadmissibility of this testimony; for, as we before said, it was incompetent, and its admission was therefore error.

We shall treat of but one other exception in the case, and that is the one founded on the refusal of the court to sustain defendant's de-

murrer to the indictment upon which he was convicted. We have set out the count heretofore in full. By the demurrer the defendant challenges its sufficiency. We think the court was right in overruling the demurrer.

The draftsman in framing this indictment has followed substantially the words of the statute. The defendant is advised of the crime for which he is called to answer, namely, that he unlawfully, feloniously, knowingly did falsely make and forge a large number, to wit: one hundred and ten coins in the resemblance and similitude of the true and genuine coin theretofore coined at the mint of the said United States called a dollar, etc. The true test of the sufficiency of an indictment is not whether it might possibly have been made more certain, but whether it sufficiently apprises defendant of what he must be prepared to meet, and that it be sufficiently explicit to avail the defendant upon subsequent plea of former conviction or former acquittal. Defendant's objection to the indictment was that it did not describe the kind of dollar alleged to have been counterfeited, whether a silver or gold dollar. Such description was not necessary. It would have been only evidential. Matters of evidence as distinguished from the facts essential to the description of the offense need not be averred. There was no error in overruling the demurrer. However, for the errors which we have before indicated, the judgment of the Circuit Court should be reversed to the end that venire de novo be had.

Reversed.

STAMEY v. HEMPLE.

(Circuit Court of Appeals, Ninth Circuit. January 3, 1910.)

No. 1,683.

1. FRAUDS, STATUTE OF (§ 131*)—CONTRACT RELATING TO LAND—OPTION—EXTENSION BY PAROL.

An oral contract, extending an option to purchase certain mining claims, and to waive a forfeiture in consideration of defendant's doing the assessment work on the claims required by law for the year 1907, was not within the statute of frauds, under the rule that, if an agreement required to be in writing under the statute is modified by a subsequent oral agreement, which does not in itself constitute a contract within the statute of frauds, the modification is valid, especially where it merely amounts to an extension of the time of performance of the written contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 284; Dec. Dig. § 131.*]

2. MINES AND MINERALS (§ 83*)—ACTION FOR BREACH OF CONTRACT—SUFFICIENCY OF COMPLAINT.

A complaint which alleges that plaintiff and defendant entered into a written contract by which plaintiff agreed to sell to defendant certain mining claims, payments to be made at stated times, and that in consideration of an extension by plaintiff of the time for making the final payment from October 1st to December 1st defendant agreed to do the assessment work for that year, but that he failed to complete the payment or to do the work, in consequence of which the claims were forfeited, relocated by others, and lost to plaintiff, to his damage to the extent of their value,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for which he asks judgment, states a cause of action for breach of the contract and for the recovery of damages in some amount, the true measure of which is a matter to be determined on the proofs.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 83.*]

In Error to the District Court of the United States for the Third Division of the Territory of Alaska.

Action by T. P. Stamey against S. A. Hemple. A demurrer was sustained to plaintiff's complaint, and he brings error. Reversed and remanded.

In an action to recover damages the plaintiff alleged in his complaint in substance the following: That on March 25, 1907, the plaintiff, being the owner of seven certain lode mining claims, entered into an agreement with the defendant for the sale thereof, and gave to the defendant an option to purchase the same for the sum of \$25,000, of which \$1,000 was then and there paid, \$4,000 was to be paid on June 25, 1907, and \$20,000 was to be paid on October 1, 1907; that a deed for said claim was executed by the plaintiff to the defendant, and deposited in escrow, to be delivered to the defendant at the time of the final payment; that on June 25, 1907, the defendant paid plaintiff the sum of \$4,000; that on or about October 3, 1907, the final payment being due and unpaid, the plaintiff demanded of defendant the payment thereof, and notified him that he was able, prepared, and willing to carry out all the terms of the option on his part to be performed, and that if said payment was not then made he would declare the forfeiture of all the rights of the defendant in and to said mining claims, and demand a return of his deed so held in escrow; that the defendant then stated to plaintiff that if the latter would waive the forfeiture and grant an extension of time to December 1, 1907, in which to make the final payment, he, in consideration of such extension of time, would do or cause to be done upon said mining claims the assessment work for the year 1907 as required by law; that thereupon the plaintiff and the defendant entered into an oral agreement, whereby the plaintiff waived the forfeiture of defendant's rights under said option and granted him until December 1, 1907, within which to make said final payment, and the defendant, in consideration of said waiver and said extension of time, promised to do or cause to be done upon said mining claims the assessment work for the year 1907, and the plaintiff did then and there waive such forfeiture, and did extend the time for the final payment to December 1, 1907, and notified the depositary to hold the deed until December 1, 1907, under the terms of said agreement; that the defendant failed, refused, and neglected to perform his part of the terms of said oral agreement, and did none of the assessment work which he so agreed to do upon the mining claims; that on January 1, 1908, owing to the defendant's failure to do said assessment work, all of said mining claims reverted to the public domain, and became open to relocation, and on said date were all relocated and appropriated, whereby the plaintiff lost all his right, title, and interest therein; that the plaintiff relied upon defendant's promise to do or cause to be done said assessment work, and he had no knowledge or information that the same had not been done, or that the defendant had failed to perform his part of said oral agreement, until on or about January 5, 1908, and that until the last-named date the deed remained in escrow; that the reasonable value of said mining claims is \$25,000, which sum is the measure of plaintiff's damages resulting from the failure of defendant to perform the terms of the said oral agreement; and judgment was demanded for that amount. A demurrer to the complaint was sustained for want of facts sufficient to constitute a cause of action, and thereupon judgment was entered dismissing the action. The plaintiff brings the case into this court, assigning error in the ruling of the court below in sustaining the demurrer.

R. F. Lewis, Richard C. Harrison, and Ostrander & Donohoe, for plaintiff in error.

Edmund Smith, T. C. West, and West & De Journal, for defendant in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The complaint is said to be demurrable on two distinct grounds: First, that the oral agreement to extend the life of the option is void as within the statute of frauds, so that there was no consideration for the defendant's promise to do the assessment work; and, second, that, conceding the contract to be valid, the measure of the plaintiff's damages was not the value of the mining claims which he lost.

If an agreement required to be in writing under the statute of frauds is modified by a subsequent oral agreement, which does not in itself constitute a contract within the statute of frauds, the modification is valid and binding upon the parties; and it is generally held that, if the subsequent oral agreement is merely for a change in the time of performance of a written contract, it is valid. 20 Cyc. 287; Ward v. Matthews, 73 Cal. 13, 14 Pac. 604; Scheerschmidt v. Smith, 74 Minn. 224, 77 N. W. 34; Cummings v. Arnold, 3 Metc. (Mass.) 486, 37 Am. Dec. 155; Stearns v. Hall, 9 Cush. (Mass.) 31; Whittier v. Dana, 10 Allen (Mass.) 326; Hurlburt v. Fitzpatrick, 176 Mass. 287, 57 N. E. 464; Kissack v. Bourke, 224 Ill. 352, 79 N. E. 619. Upon the doctrine of these decisions and the weight of authority, we are of opinion that the oral agreement set forth in the complaint in this case was not void as within the statute of frauds. If it was not void, it follows that there was no want of an adequate consideration for the promise of the defendant to do the assessment work on the mining claims. The consideration was the agreement of the plaintiff to waive the forfeiture and extend the time of performance of the contract for a period of 60 days.

As the demurrer was a general demurrer to the complaint for want of facts sufficient to constitute a cause of action, it is unnecessary to enter into a discussion of the question whether or not the facts which are set forth to show special damages are sufficient for that purpose, as in any view the plaintiff is entitled to recover damages in an amount equal to the value of the annual assessment work which the defendant had promised to do upon the mining claims, and the burden of proof would rest upon the defendant to meet the allegations and proof of special damages by showing that the plaintiff might have saved himself from the loss arising from the breach of the contract by a trifling expense or with reasonable exertions.

The judgment is reversed, and the cause is remanded for further proceedings.

NOTE.

[a] (U. S. 1901) Under Rev. St. Idaho, § 6007, which provides that no interest or estate in real property, other than leases for a term not exceeding one year, can be created or declared except by an instrument in writing, a written contract, giving an option to purchase real estate within a specific time, cannot be legally extended by a verbal agreement.—*Lawyer v. Post*, 109 Fed. 512, 47 C. C. A. 491.

[b] (Cal. 1887) Defendant, not having the money to pay for lands purchased, obtained an advance from plaintiff. The title was taken in plaintiff's

name for his security, and it was agreed that the advance should be repaid within a year. The agreement was verbal, and, although it was agreed that it should be reduced to writing, this was never done. Before the expiration of the year plaintiff agreed to extend the time six months. *Held*, that the fact that the contract had never been reduced to writing did not prevent its enforcement, since it was intended to be performed within one year, and the extension had been made within the year.—*Ward v. Matthews*, 73 Cal. 13, 14 Pac. 604.

[c] (Cal. 1896) Under the statute of frauds (Civ. Code, § 1624, subd. 6), requiring "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission" to be in writing, a valid extension of such a written agreement cannot be made by parol.—*Platt v. Butcher*, 44 Pac. 1060.

[d] (Ky. 1903) Ky. St. 1899, § 470, subsec. 6, provides that no action shall be brought to charge any person on any contract for the sale of real estate, unless in writing. A written contract for the sale of mineral rights in land provided for the payment of the consideration before a certain time, and that, if not paid, the contract should be void. The consideration not being paid at this time, the parties entered into a parol agreement extending the former contract. *Held* that, as the original contract was terminated by a failure to make payment as required, the parol agreement for extension of time was, under the statute, void because not in writing.—*McConathy v. Lanham*, 76 S. W. 535, 116 Ky. 735, 25 Ky. Law Rep. 971.

[e] (Me. 1883) Where parties to a written contract for leasing a mill, the rent being a certain sum payable for each 1,000 feet of lumber that should be sawed at the mill during the term, made an additional agreement to shorten the term originally agreed upon, a person who in writing guaranteed the first agreement and verbally assented to the second is not absolved from his liability upon the amended agreement by the effect of the statute of frauds.—*Smith v. Loomis*, 74 Me. 503.

[f] (N. Y. 1890) In an action for refusal to accept goods under a written contract of sale, which provided that the goods should be shipped and delivered within a certain period, it appeared that during that time the seller orally agreed with the purchaser to "carry" the goods for him for a reasonable time, and payment was not demanded, but no goods were set apart for or tendered him until after the expiration of the time specified in the original contract, and the goods finally set apart and tendered had not been shipped within that time. *Held*, that the oral agreement was either a modification of the written contract extending the time of delivery and date of payment, and required a tender of goods shipped within the contract period, or it was a new contract for the sale of other goods, rescinding the old one, and, being oral, was void under the statute of frauds, and plaintiff could not recover.—*Clark v. Fey*, 121 N. Y. 470, 24 N. E. 703, affirming (1889) 4 N. Y. Supp. 18.

[g] (Ohio, 1896) Where one purchased land, agreeing in writing that the vendor should have all timber suitable for lumber, to be cut and removed by a certain day, a subsequent verbal extension of the time by him for the cutting and removal was within the statute, and was not taken out thereof by the fact that the vendor relied on the extension, and delayed cutting the timber until after the original date specified.—*Clark v. Guest*, 54 Ohio St. 298, 43 N. E. 862.

[h] (Wis. 1887) Where a writing, evidencing a contract for the purchase of lands, shows that the contract signed by one party is to be completed by an acceptance of the other party within a limited time, it is incompetent to show by parol evidence that the time for its completion by such acceptance was orally extended.—*Athe v. Bartholomew*, 69 Wis. 43, 33 N. W. 110.

WINFREE v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals. Ninth Circuit. October 4, 1909.)

No. 1,663.

1. MASTER AND SERVANT (§ 87*)—DEATH OF SERVANT—EMPLOYERS' LIABILITY ACT—OPERATION.

The employer's liability act (Act Cong. April 22, 1908, 35 Stat. 65, c. 149) is not retroactive, and does not authorize an action for the wrongful death by the administrator of an employé engaged in interstate commerce against his master occurring prior to the time the act took effect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 138; Dec. Dig. § 87.*]

2. DEATH (§ 31*)—WRONGFUL DEATH—RIGHT TO SUE.

Ballinger's Ann. Codes & St. Wash. § 4829 (Pierce's Code, § 257), gives the right of action for wrongful death of an unemancipated minor to recover loss of earnings during his minority to the father, or, in case of his death or desertion of his family, to the mother, and not to the minor's personal representative.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35-46; Dec. Dig. § 31.*]

3. DEATH (§ 39*)—DEATH OF SERVANT—STATUTES—LIMITATION.

Act Cong. June 11, 1906, c. 3073, § 1, 34 Stat. 232 (U. S. Comp. St. Supp. 1907, p. 891), giving the right of action for the wrongful death of an employé engaged in interstate commerce to decedent's personal representative, limits such right of action to one year from the date of the injury complained of.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 54; Dec. Dig. § 39.*]

In Error to the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

Action by William H. Winfree, as administrator of the estate of Albert E. Phipps, against the Northern Pacific Railway Company. A demurrer was sustained to plaintiff's complaint (164 Fed. 698), and he brings error. Affirmed.

B. C. Mosby, for plaintiff in error.

Edward J. Cannon, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge. The plaintiff in error, as administrator of the estate of Albert E. Phipps, deceased, brought an action to recover damages from defendant in error, and in his complaint alleged that the said Albert E. Phipps, a minor of the age of 18 years and 5 months, while acting as a fireman upon a freight locomotive of the defendant in error in the state of Washington, met his death through the negligence of his employer; that the defendant in error was engaged in interstate commerce; that the decedent had not been emancipated, nor had his parents any knowledge of his employment; that they lived in the state of Wyoming; and that the action was brought for their benefit under the provisions of the act of Congress approved April 22, 1908 (35 Stat. 65, c. 149), an act relating to the liability of common carriers by railroad to their employés in certain cases. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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complaint set forth the particulars in which it was alleged that the defendant in error was negligent, and alleged that the decedent had no previous experience as fireman, and, by reason of his youth and inexperience, did not appreciate, and hence did not assume, the risks, hazards, and perils of the work assigned to him, and that the accident occurred without fault on his part. The defendant in error demurred to the complaint, and the demurrer was sustained on the ground that the act of Congress so referred to has no retroactive application. The plaintiff in error pleading no further, judgment was entered against him.

The sufficiency of the complaint is the sole question which is presented for our determination. The plaintiff in error contends that the act of 1908, being a remedial measure, should be construed as retroactive, unless such a construction is precluded by its terms. It is not necessary to cite authorities to the well-settled rule that a statute will not be given a retroactive effect by construction unless the Legislature has so explicitly expressed its intention to make it retroactive as to leave no reasonable doubt thereof. In the act in question (35 Stat. 65) it is provided that every common carrier engaged in interstate commerce shall be liable in damages for injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of the carrier. There is nothing in the terms of the act to show that it was the intention of Congress to affect rights of parties as to any injury or death that had occurred before it went into effect. It is not to be presumed that Congress intended to impose civil liability upon carriers founded upon transactions which at the time of their occurrence gave no rise to a legal demand against them. In *Twenty Per Cent. Cases*, 20 Wall. 179, 187, 22 L. Ed. 339, the court said:

"Courts of justice agree that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied, and, pursuant to that rule, courts will apply new statutes only to future cases unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive action."

The statute in question, while it is remedial in the sense that it affects the remedy in accident cases, is not of the nature of those remedial statutes which have received a liberal and expansive application at the hands of the courts, such as statutes intended to remedy a mischief, to promote public justice, to correct innocent mistakes, to cure irregularities in judicial proceedings, or to give effect to the acts and contracts of individuals according to the intent thereof. It is a statute which permits recovery, in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available, defenses which in this instance existed at the time when the contract of service was entered into and at the time when the accident occurred. In *Society, etc., v. Wheeler et al.*, 2 Gall. 104-139, Fed. Cas. No. 13,156, Judge Story said:

"Upon principle every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new

duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities."

Tested by these principles it seems clear that the act of 1908 is in none of its features retroactive.

But the plaintiff in error contends that, irrespective of the statute, the complaint states a common-law cause of action against the defendant in error upon the distinct charges of negligence which are therein set forth. In answer to this it is sufficient to point to the fact that the complaint in this case is brought to recover the damages that resulted to the parents of the decedent from the loss of his earnings during his minority, and that the statute of Washington (section 4829, Ballinger's Ann. Codes & St. [Pierce's Code, § 257]) gives the right of action in such a case to the father, or, in the case of his death or his desertion of his family, to the mother, and for injury or death of a ward, to his guardian, and that by the laws of that state, no such right of action accrues to a personal representative. *Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620; *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822; *Manning v. Tacoma R. & P. Co.*, 34 Wash. 406, 75 Pac. 994. It is true that by Act Cong. June 11, 1906, c. 3073, 34 Stat. 232 (U. S. Comp. St. Supp. 1907, p. 891), a right of action was given to the personal representative in a case of this nature, and that law was in force at the time of the death of the decedent, but it cannot be said that this action is brought under its sanction, because all actions thereunder were required to be brought within one year from the date of the injury complained of.

The judgment is affirmed.

EASTERN OREGON LAND CO. v. BROSNAN et al.

SAME v. SIMPSON.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1909.)

Nos. 1,694, 1,695.

ADVERSE POSSESSION (§ 7*)—AGAINST WHOM PRESCRIPTION MAY BE CLAIMED— PUBLIC LANDS.

Possession of land, although in admitted subordination to the United States, from which the person in possession is seeking to obtain title, may nevertheless be adverse to every one else, and, when continued for the statutory period, may be set up in bar to an action by one claiming under a prior grant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 33-40; Dec. Dig. § 7.*]

In Error to the Circuit Court of the United States for the District of Oregon.

Huntington & Wilson and E. S. Pillsbury, for plaintiff in error.

W. H. Brooke and F. M. Saxton, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ROSS, Circuit Judge. These cases were argued and submitted together. Each is an action of ejectment brought to recover the possession of a certain tract of land situated in Malheur county, Or. The answer in each case put in issue the plaintiff's alleged title, and, among other things, set up in defense the statute of limitations.

It is conceded that in each case the sole question arose out of the plea of the statute of limitations, which was sustained in the court below. While the evidence went to show that in each case the defendants and their predecessors in interest held adversely to the plaintiff for the statutory period, it is stipulated that they did not so hold against the government of the United States, but, on the contrary, during such possession, sought title to the land from the government.

It does not seem to be questioned, certainly the general rule is well settled, that adverse possession of land, though held in admitted subordination to the title of the government, may nevertheless be adverse to every one else. *Missouri Valley Land Co. v. Wiese*, 208 U. S. 234, 28 Sup. Ct. 294, 52 L. Ed. 466; *Iowa Railway Co. v. Blumer*, 206 U. S. 482, 27 Sup. Ct. 769, 51 L. Ed. 1148. The point made on behalf of the plaintiff in error, however, is that, to render a possession adverse under the law of the state of Oregon, it must be held under a claim of title against the whole world; that the Oregon statute upon the subject is so construed by the Supreme Court of that state in the cases of *Beale v. Hite*, 35 Or. 176, 57 Pac. 322, 58 Pac. 102, *Altschul v. O'Neill*, 35 Or. 202, 58 Pac. 95, and *Altschul v. Clark*, 39 Or. 321, 65 Pac. 991, and that in such a matter the federal courts will always be governed by the decision of the highest court of the state.

It is true that at the time of the filing of the brief of the plaintiff in error, and at the time of the oral argument of these causes, the cases of *Beale v. Hite*, *Altschul v. O'Neill*, and *Altschul v. Clark* stood as the law of Oregon in respect to the character of adverse possession required by the Oregon statute; but by the very recent decision of the Supreme Court of that state, made in the case of *Boe v. Arnold* (decided June 1, 1909) 102 Pac. 290, the previous cases of *Beale v. Hite*, *Altschul v. O'Neill*, and *Altschul v. Clark* were expressly overruled—the court concluding its opinion in these words:

"In view of the authorities cited, and especially in the light of the views so lately expressed by the highest tribunal of the nation, we now hold that one claiming title to the land by adverse possession for a period of 10 years as against all persons, but recognizing the superior title of the United States government, and seeking in good faith to acquire that title, may assert such adverse possession as against any person claiming to be the owner under a prior grant."

This leaves the general rule above alluded to applicable to the present cases, with the necessary result, in view of the record, that the judgment in each case must be affirmed.

Ordered accordingly.

CORRINGTON et al. v. WESTINGHOUSE AIR BRAKE CO.

(Circuit Court, S. D. New York. October 2, 1909.)

1. PATENTS (§ 240*)—INFRINGEMENT—IMPROVEMENT OF PATENTED DEVICE.

Infringement of a patent is not avoided by improvements on the patented device, although they may be patentable, which do not affect the principle of operation, function of the parts, or results obtained.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 379; Dec. Dig. § 240.*]

2. PATENTS (§ 107*)—ABANDONMENT—ABANDONMENT OF APPLICATION.

The abandonment of one application for a patent on the filing of another for the same device does not preclude the patentee from showing the actual date of his invention to meet a claim of anticipation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 150; Dec. Dig. § 107.*]

3. PATENTS (§ 110*)—DATE OF APPLICATION—SECOND APPLICATION FOR SAME DEVICE.

A second application for a patent, which describes the same device as a former one, which is abandoned with the acquiescence of the Patent Office, will be treated as a continuance of the first, and as relating back to the date of its filing, for the purpose of a claim of prior public use more than two years before the second application was filed, but less than that time before the first was filed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 153; Dec. Dig. § 110.*]

4. PATENTS (§ 101*)—CONSTRUCTION—SPECIFICATIONS—CLAIMS.

A claim of a patent is not invalid, as for a function and not a mechanism, because it claims generally a means for doing a certain thing, provided the mechanism is fully described in the specification, which must be read in connection with the claim, and as a limitation thereof, whether specifically referred to therein or not.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 141; Dec. Dig. § 101.*]

5. PATENTS (§ 241*)—INFRINGEMENT—IDENTITY OF DEVICES.

Mere result or effect is not the test of infringement, as the patentee is not entitled to every mechanical device which produces the same result, but there must be also a substantial identity in the mode of operation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 380; Dec. Dig. § 241.*]

6. PATENTS (§ 244*)—INFRINGEMENT—COMBINATIONS.

A patent for a combination is not infringed by the use of any or all of the parts, unless the combination is also used.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 385; Dec. Dig. § 244.*]

7. PATENTS (§ 245*)—INFRINGEMENT—COMBINATIONS.

The fact that a substituted element in a patented combination performs an additional function does not necessarily prevent its being an equivalent in the combination, or the entire combination in which it is used from being the equivalent of that of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 386; Dec. Dig. § 245.*]

8. PATENTS (§ 328*)—INFRINGEMENT—FLUID PRESSURE BRAKE APPARATUS.

The Corrington patent, No. 762,282, for a fluid pressure brake apparatus, was not anticipated, and is valid, and the claims are not limited to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

precise mechanism described in the specifications, but are entitled to the benefit of equivalents. As so construed, *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by Murray Corrington and the Corrington Air Brake Company against the Westinghouse Air Brake Company for alleged infringement of United States letters patent No. 762,282, dated June 14, 1904, application filed September 28, 1903, granted to Murray Corrington for "fluid-pressure brake apparatus," and for an injunction and an accounting. The bill of complaint was filed March 6, 1907, the answer May 6, 1907, and the replication June 3d following. On final hearing. Decree for complainants.

Choate & Larocque (William G. Choate and Murray Corrington, of counsel), for complainants.

Thomas W. Bakewell and J. Snowden Bell (E. A. Wright, Thomas W. Bakewell, and J. Snowden Bell, of counsel), for defendant.

RAY, District Judge. The letters patent in suit No. 762,282, granted June 14, 1904, on application filed September 28, 1903, to Murray Corrington, of New York City, for "fluid-pressure brake apparatus," relates, says the patent, "to improvements in fluid-pressure brake mechanism, and has for its object, more particularly, the better control of railway vehicles by enabling an engineer to hold his train under a more certain and continuous brake control than is feasible with the existing brake systems." It also says:

"It is intended to describe and claim herein, broadly, mechanism for accomplishing the results set forth, to which the apparatus described in my application heretofore filed and that described in another to be filed are subordinate."

The patent contains 14 claims, some of which are much broader than others. Claim 1 seems to be the broadest. At least it is very broad, and reads as follows:

"1. In a fluid-pressure brake system, the combination, with a train-pipe normally charged with pressure, of apparatus on an engine and apparatus on a car capable of operation by a reduction of train-pipe pressure to apply brakes and means under control of the engineer for alternately holding brakes applied on the engine while releasing brakes on the car, and vice versa."

Claims 3 and 5 are also broad claims. They read as follows:

"3. The combination with a brake-cylinder, an auxiliary reservoir, and a triple valve, on a car, of a brake-cylinder, an auxiliary reservoir, and a valve device automatically operative to apply brakes, on an engine, and a valve mechanism capable of operation by the engineer for controlling said apparatus on car and engine, and for applying and releasing brakes, at one time alternately and at another time conjointly between engine and car. * * *

"5. In a fluid-pressure brake system, the combination, with a triple valve and a brake-cylinder on a car, a valve device automatically operative to apply brakes and a brake-cylinder on an engine, of means capable of control by the engineer for operating said triple and automatic valve device to application and release or normal positions and similarly controlled means, independent of the movement of the engine-valve device, for alternately releasing and applying brakes on the engine while the triple on the car is, respectively, in positions for applying and for releasing brakes."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Claims 7 and 8 read as follows:

"7. In a fluid-pressure brake system, the combination of an automatic valve device operative by a reduction of pressure in a brake-pipe to admit pressure into a brake-cylinder, an unobstructed passage leading to said cylinder, which is independent of said automatic valve device, and means operated by the engineer for admitting pressure to the cylinder through said passage and for controlling said pressure after its admission independently of the position of said automatic valve device.

"8. In a fluid-pressure brake system, the combination, with a brake-cylinder and a valve device automatically operative to apply brakes, of a valve-seat, a free and unobstructed passage leading from said valve-seat to said cylinder, and a valve capable of operation by the engineer and independent of the brake-valve proper for controlling the flow of pressure through said passage and at the same time controlling all exits from said cylinder, whereby any desired pressure may at any time be admitted to said cylinder and maintained or increased or decreased at will."

Claims 1 to 6, inclusive, seem to be the broadest claims. Claims 7 and 8, quoted, are of the narrower class. In his specifications, the patentee says:

"From what I have said above it is apparent that my apparatus herein illustrated and described is capable of operation as an engine-brake system in connection with the regular automatic-brake system upon the cars in either of the following manners:

"First. It may be operated merely as part of the regular automatic-brake system, setting the brakes on the engine at the same time they are set upon the cars and releasing on the engine and cars at the same time before recharging the reservoirs.

"Second. The engine-brakes may be operated to apply at the same time that brakes are applied on the cars, then held in application while the auxiliary reservoir on the engine is recharged, while brakes on the cars are released and reservoirs recharged.

"Third. The brakes on the engine may be applied and the pressure varied up or down at will without applying brakes on any of the cars. This may often happen to be very advantageous in switching, or when it is desired to steady the train without waste of time or of air involved in applying and releasing throughout the train by movement of the handle, 62.

"Fourth. The brakes may be set on engine and cars, and then the pressure in the engine-cylinders either held constant or increased or reduced at will while holding the brakes applied on the cars.

"Fifth. The brakes may be applied on engine and cars alternately, holding them on the engine while releasing and recharging on the cars, and then, after reapplying on the cars, either reducing the pressure on the engine-brakes to the minimum or releasing on the engine entirely. This will doubtless be of great advantage for controlling the train, particularly on a grade where the brakes may be applied throughout the train, then released on the engine until the time comes for recharging reservoirs, when the brakes may be set upon the engine with the maximum force permitted, while the brakes are released and the reservoirs recharged upon the cars, when, after reapplying on the cars, the engine-brakes may be again released until the time arrives for the next recharging on the cars. This alternate operation of the engine-brakes and the car-brakes, particularly on a grade, will allow the train to be held under continuous brake-control without risk of overheating the wheels either on the engine or on the cars.

"I count it one of the principal features of my apparatus, in connection with the standard apparatus on the cars, that I produce an alternate brake system capable of operating either conjointly or alternately between engine and cars, holding engine-brakes on while releasing and recharging on cars, and then while holding brakes applied on the cars releasing on the engine."

The defendant says that defendant's apparatus does not infringe; that claims 3, 5, and 6, and 7 to 14, inclusive, do not apply, even in

terms, to defendant's apparatus; second, that the patent in suit is void, for the reason that claims 1 to 6, inclusive, are anticipated by prior knowledge and use and prior patents and publication; third, that, under the state of the art, the claims must be strictly limited to the specific apparatus therein shown and described, viz., one essentially characterized by the presence of a "free and unobstructed passage" from the straight air brake valve and the triple valve, respectively, to the brake cylinder, and by the absence of any obstruction, in the form of an intermediate mechanism between said members; fourth, that the resemblance between defendant's E. T. equipment, notably as to the engineer's automatic brake valve, is due to the fact that Corrington has copied and appropriated prior devices originated by the defendant and covered by its patents; fifth, that the complainant, Corrington, filed an application May 16, 1903, and abandoned it, and the complainants cannot avail themselves of such prior filing date, but must be limited to the filing date of September 28, 1903, on which application the patent in suit was granted, and that so limited anticipation is established.

Complainants' Claims.

In a fluid-pressure brake system, we have (claim 1) in combination with (1) train-pipe normally charged with pressure, (2) of "apparatus" on an engine and "apparatus" on a car capable of operation by a reduction of train-pipe pressure to apply brakes, and (3) "means" under control of the engineer for alternately holding brakes applied on the engine while releasing brakes on the car, and vice versa. Any apparatus on an engine and any apparatus on a car capable of being operated to apply brakes by reducing the train-pipe pressure is broadly claimed, if in combination with any means under the control of the engineer which will hold the brakes on the engine while releasing the brakes on the car, which means are also broadly claimed.

Claim 2 has a train-pipe "mechanism" on the engine and also on a car, but they must be automatically operative to apply brakes on reducing the pressure in the train-pipe. "Mechanism" is substituted for "apparatus" and "means." The brakes are released and held alternately on engine and car at one time, and at another time this mechanism or means may apply and release brakes on the engine and car at the same time. The automatic feature and this last-mentioned action seem to distinguish claim 2 from claim 1.

Claim 3, in place of "mechanism" on a car, specifies a brake cylinder, an auxiliary reservoir, and a triple valve on a car, and, in place of "mechanism" on an engine, specifies a brake cylinder, an auxiliary reservoir, and a valve device automatically operative to apply brakes, on an engine. The "means" or "mechanism" operative by the engineer consist of "a valve mechanism," which not only controls the "said apparatus" on both car and engine, but also apply and release brakes as specified. This is descending more to detail by specifying in what the "means," the mechanism, and the apparatus consist.

In claims 7 and 8 we have in a fluid-pressure brake system the combination of an automatic valve device operative by a reduction of pressure in the brake-pipe to admit pressure to a brake-cylinder, an unobstructed passage leading to said cylinder, which is independent of the

automatic valve device. The means operative by the engineer must admit pressure to the brake-cylinder through this "unobstructed passage," and also control the pressure after its admission independently of the position of the automatic valve device. Much stress is placed on the use of the words "unobstructed passage." They are found in the specifications, as well as in some of the claims. In the specifications we find:

"At all times and under all circumstances the engineer has complete control of the pressure in the engine-brake cylinders by reason of the free and open passage, 79, with which nothing in the whole valve structure is permitted to interfere, being placed under control of the valve, 71, permitting either the admission or exhaust of pressure to or from the cylinders, or its retention at any desired amount according as the valve, 71, is moved to 'application,' release, or 'lap.'"

I take it that if we have a fluid-pressure brake system, consisting of pump, etc., for compressing air, a train-pipe for conducting this air the length of the train, any sort of apparatus or mechanism on the engine, and any sort of apparatus or mechanism on the car or cars which are capable of operation by a reduction of the train-pipe pressure in the train-pipe, first on the engine and then on the car or cars, which are capable of operation by a reduction of the train-pipe pressure (the train-pipe being normally charged with pressure) to apply the brakes to the wheels of the engine and cars, and also any sort of means or mechanism or apparatus which is under the control of the engineer for holding the brakes, applied by the reduction of the pressure in the train-pipe, first on the engine and then on the car or cars, or first on the car or cars and then on the engine, or on both at the same time, in combination, it is claimed. In short, it seems to me that the patent claims a combination device (applied to engine and cars and controlled by the engineer), which will do this thing or these things, and that he broadly claims all means and all mechanism which in such a combination, so applied, will so operate in a fluid-pressure brake system, provided they are under the control of the engineer. The broad language of the claims is not, however, to control the determination of their validity and true scope, as we shall see. All this is to be settled by a reference to the specifications, whereby they are to be limited. I do not understand that the operativeness and utility of the device (as a whole) are questioned. Indeed, they cannot be. Compressors, train-pipes, valves for controlling the pressure of compressed air or releasing it altogether, under the control of the engineer, and brake-cylinders, were all old. The engineer could set the brakes on the entire train, including engine, by manipulating a valve or valves, and also release them. There was a time when (by the devices or combination of devices known) the engineer could not by the same apparatus set and release brakes on the entire train, including engine, and then release on the engine, leaving the rest of the train with set brakes, or release on the train, leaving the engine with set brakes, etc. One question is: Was the complainant Corrington the first to devise—invent or devise—a combination for doing this thing. He was not the first to conceive the idea of doing this, for such a mode of braking an entire train had been desired for many years.

The complainant Corrington insists that he made the broad invention of the patent in suit in two forms: (1) The apparatus whose results may be effected by the operation of an automatic brake valve and a straight air or "independent brake valve" and their handles; and (2) the apparatus whose results may be effected by the operation of an automatic brake valve only, and its handle. The first of these he mentions as the two-handle apparatus, and says he explained it to Mr. Burgess February 19, 1901, and that it has, by adapting and perfecting the same, become the apparatus particularly illustrated in the patent in suit and in the complainants' exhibit structure or "consolidated valve." The second he mentions as the one-handle apparatus, and says he explained this to Mr. Burgess on March 1, 1901, and that by adapting and perfecting same it became the apparatus of one-handle structure, exhibit drawing of June 5, 1903 (see C. R. p. 1349), and also the apparatus of his subordinate application now in interference in the Patent Office with defendant's first or principal application for a patent on its E T apparatus. Corrington says he determined to cover his complete invention by two patents—the first "to be based primarily upon the two-handle apparatus, but having claims of sufficient scope to cover broadly both mechanisms"; the second patent to be based upon the one-handle apparatus only. This seems to say that the claims of the patent in suit cover two inventions, only one of which is described in the patent in suit.

We can hardly sustain the defense of anticipation on the theory that the prior art shows devices which, if they had been combined, with simple changes and additions necessary to effect the combination, would have produced the mechanism and operation and results of the patent in suit, substantially. There might be an absence of patentable invention in such a case, but there would not be anticipation necessarily. I have examined the prior art, as shown by patents and publications, to ascertain if it discloses the mechanism, in combination, and ideas of the patent in suit, and am of the opinion it does not. I am of the opinion, and find, that Corrington, with a definite idea and purpose which he sought to accomplish, utilized much that was in the prior art, but that he was compelled to and did depart therefrom materially when he came to make the necessary changes in structures, simple though they now may seem, required to accomplish his purpose. He sought new and useful results, and he obtained them by new combinations and changes amounting to patentable invention; and I do not think his broad claims can be or are materially narrowed by the use of the words "unobstructed passage" in some of the later claims of the patent. Neither do I think that defendant can avoid the charge of infringement on the ground it has obstructed passage 79 by an intermediate mechanism, unless by so doing it has made a new device, working on a different principle, and performing new functions, and bringing about different, or at least better, results. If that passage 79 has been obstructed in any sense by any part of defendant's alleged infringing device, but the obstruction is of such a character that it does not interfere substantially with the flow or passage of pressure when desired, or required, so that the obstruction is of no consequence, is not detrimental, or, on the other hand, is a positive improvement, noninfringement is

not sustained. The improvement may be patentable as an improvement, and still infringement not be avoided. See cases hereafter cited.

The questions are: Did the patentee, Corrington, have a broad invention? Has defendant appropriated and used that invention, with minor changes or additions, or even substantial additions, in some part of the combination, which do not affect the principle of operation, function of the parts, and results attained? In complainant's apparatus the pressure admitted into passage 79 flows directly to and into the brake cylinder, while in defendant's E T apparatus the pressure, after being admitted to passage 79, or its equivalent passage, flows into an intermediate cylinder and operates a piston to open a valve which admits the same degree of pressure into the brake cylinder. It is pressure from the main reservoir in both cases which is admitted into the brake cylinder, and the amount desired in the brake cylinder is always determined, in both cases, by the amount admitted to or released from passage 79, or its equivalent. This is clearly an equivalent, and an infringing apparatus, if the complainant has valid, broad claims. Those claims are to be construed in the light of the prior art and the specifications of the patent in suit. They may be confined to the specific devices shown, or they may not be; but the prior art is always a limitation on broad claims. The complainant's patent, and all the claims thereof, are presumed to be valid; and the burden is on the defendant to show anticipation by clear, convincing, and satisfactory evidence. The defendant claims that it, or those under whose license and authority it is acting, had made this invention or combination, or at least the alleged infringing device or apparatus, and put it in actual public use and operation, more than two years before the complainant, Corrington, made his invention and applied for a patent therefor. If Corrington made his invention and then abandoned it to the public before filing an application for a patent, or actually made his invention more than two years before he filed his application, and it went into actual public use more than two years prior to the filing of the application, he lost his right. If Corrington actually made the invention at a certain time, and while he was experimenting and perfecting it, acting with due diligence, some other person made the invention and put it into use, priority of invention would not depend on the time of filing applications, unless Corrington delayed beyond the statutory time.

It appears that Corrington filed his first application for this invention on the 16th day of May, 1903, and subsequently filed a new application, and then and thereafter canceled or withdrew his first application. October 31, 1903, he informed the Patent Office that he abandoned his first application, "said abandonment to take effect upon the allowance of the later application, No. 174,946" (serial number). This does not preclude him from showing the actual date of his invention, where anticipation is alleged and claimed. If he made his inventions February 19, 1901, and March 1, 1901, respectively, and filed his first application May 16, 1903, and his second or last application September 28, 1903, for the same invention, and thereafter withdrew his first application, his first filing was not within two years of his invention, and, of course, his second filing was not. The defendant says the alleged an-

icipating apparatus, Exhibit 12, was put into actual and public use in the United States April 17, 1902, and between June 1, and September 1, 1901, as to Exhibit 11, or the D. M. & N. Ry. combined automatic and straight air equipment. The use of apparatus, Exhibit 12, is claimed to have been 14 months after the complainant's alleged invention, and that of apparatus, Exhibit 11, 3 to 4 months thereafter. The last application of Corrington was filed September 28, 1903, or 1 year and about 5 months subsequent to April 17, 1902, and 2 years and 28 days subsequent to September 1, 1901. As the first application was filed May 16, 1903, this was 1 year and about 1 month subsequent to April 17, 1902, and 1 year, 11 months, and 15 days subsequent to June 1, 1901, the commencement of the summer of 1901.

A contention has arisen as to the right of the complainant, Corrington, to date his application back to that of his first application; that is, is May 16, 1903, to be regarded as his date of filing in case prior public use of the alleged anticipating device is found to have commenced "in the summer" of 1901—that is, somewhere between June 1, 1901, and September 1, 1901. I think the Corrington application, for the purposes mentioned, is deemed to have been filed on the 16th day of May, 1903; the second filing being a continuation of the first. His letter and statement was acquiesced in by the Patent Office, by silence at least, and the application was granted, and the patent issued. *L. E. Waterman Co. v. Forsyth et al.* (C. C.) 121 Fed. 103, affirmed 127 Fed. 1020, 61 C. C. A. 653; *Tooth Crown Co. v. Richmond* (C. C.) 30 Fed. 775; *Colgate v. W. U. Tel. Co.*, 4 Ban. & A. 36, Fed. Cas. No. 2,995; *Graham v. Geneva Mfg. Co.* (C. C.) 11 Fed. 138; *Godfrey v. Eames*, 1 Wall. 317, 17 L. Ed. 684; *Victor Talking Mach. Co. v. Am. G. Co.*, 145 Fed. 350, 76 C. C. A. 180. I see no reason why this should not be the policy of the law. If this be so, no rights were lost by reason of the alleged prior public use more than two years prior to the last application for the patent in suit.

Defendant insists that the broad claims, 1 to 5, do not, of themselves, define any novel means for accomplishing the results set forth in the patent, and that they are bad as being for functions or results, citing *In re Gardner*, 140 O. G. 258, 259. The defendant quotes from that decision:

"One cannot describe a machine which will perform a certain function, and then claim the function itself, and all other machines that may be invented by others to perform the same function."

This is undoubtedly true. But claims are always read in connection with the specifications and refer thereto. Here "mechanism" and "apparatus" are named in the claims and pointed out in the specifications; and in claims 3 to 5, inclusive, we have "brake cylinder," an "auxiliary reservoir," and a "triple valve" on a car in combination with a "brake cylinder," an "auxiliary reservoir," and a "valve device automatically operative to apply brakes," on an engine, and a "valve mechanism capable of operation by the engineer for controlling said apparatus on car and engine, and for applying and releasing brakes, at one time alternately and at another time conjointly between engine and car." As to each claim we must understand that we have an engine and a

car and a fluid-pressure brake system. In claim 3 we have, specifically named, a brake-cylinder, and in combination therewith an auxiliary reservoir and a triple valve, on a car, and in the same combination an auxiliary reservoir and a valve device automatically operative to apply brakes, on an engine, and, in the same combination, a valve mechanism capable of operation by the engineer for controlling said apparatus on car and engine, and for applying and releasing brakes, at one time alternately and at another time conjointly between engine and car. This tells what the valve mechanism is for and how it must operate, and we necessarily turn to the specifications for a particular description of the valve mechanism and other things mentioned which require description. The specifications say:

"Referring to the drawings, Figure 1 is a vertical section through a valve mechanism embodying my improvements," etc.

The patentee then goes on and gives a full and quite detailed and comprehensive description of his valve mechanism embodying his invention. Not only are the construction and arrangement of parts shown and described, but the mode of operation and results. I cannot see that this is a claim for a function. I do not think that a patentee perils his claim by telling therein what certain mechanism is for, and what it will and must do, provided he fully describes that mechanism in the specifications. In short, he claims certain mechanism devised to perform certain functions and obtain a certain result by certain operations, and this mechanism is described in the specifications. No one contends that an idea may be patented, or that functions may be patented. Means to carry out an idea, and which in operation perform certain functions, may be patented. In *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, claim 2 of the patent then being considered is quoted at page 553 of 170 U. S., at page 715 of 18 Sup. Ct. (42 L. Ed. 1136), and claims 1 and 4 at page 561 of 170 U. S., at page 718 of 18 Sup. Ct. (42 L. Ed. 1136); and, while it was contended that they were claims for a function or functions, the court held they were not.

The respective claims of this patent are not followed by the words "substantially as set forth," or "substantially as described"; but they are to be read with the specifications nevertheless. *Seymour v. Osborne*, 11 Wall. 516, 547, 20 L. Ed. 33. It was there said:

"Where the claim immediately follows the description of the invention, it may be construed in connection with the explanation contained in the specifications, and when it contains words referring back to the specifications it cannot be properly construed in any other way."

This case is cited and approved in *Westinghouse v. Boyden, etc., Co.*, *supra*. But, while resort may be had to the specifications, this may not be done to enlarge or expand the claim, only to limit it. *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344.

Claims 1 and 2, however, present more difficulty. The claims are broadly for "means" and "mechanism" to do certain things, perform certain functions, and obtain certain results. In claim 1 the claim is for

"apparatus" on an engine and "apparatus" on a car capable of operation by a reduction of pressure "to apply brakes" and "means" for, etc. That such expressions are too indefinite, see *Ex parte Holt*, 29 O. G. 171, *Ex parte Wilkin*, 29 O. G. 950, and *Ex parte Demming*, 26 O. G. 1207, unless used to denote appliances which are no part of the invention. *Ex parte Stoughton*, 43 O. G. 1345; *Ex parte Stanbridge*, 43 O. G. 1345. But later cases seem to settle the law differently. These claims are not for functions, or principles, or modes of operation, but for "apparatus" and "mechanism" and "means" fully described in the specifications which immediately precede the claims. I think words in the claim referring to the specifications are entirely unnecessary. It is understood that the one refers to the other. Words of reference to the specifications, "if not expressed in the claim, must be implied, else the patent in many cases would be invalid as covering a mere function, principle, or result, which is obviously forbidden by the patent law, as it would close the door to all subsequent improvements." *Mitchell v. Tilghman*, 19 Wall. 287, 391, 22 L. Ed. 125, cited and approved in *Hobbs v. Beach*, 180 U. S. 400, 21 Sup. Ct. 409, 45 L. Ed. 586. Within the authorities, I think claims 1 and 2 sufficient and valid, read in connection with the specifications, as they must be, and that they are not for functions or results. *Brush Electric Co. v. Electric Imp. Co. (C. C.)* 52 Fed. 965, 974-976; *Telephone Cases*, 126 U. S. 1, 8 Sup. Ct. 778, 31 L. Ed. 863; *Hobbs v. Beach*, 180 U. S. 383, 400, 21 Sup. Ct. 409, 45 L. Ed. 586; *Tilghman v. Proctor*, 102 U. S. 707, 709, 26 L. Ed. 279.

It becomes a question, therefore, as to the breadth of the claims of the patent in suit. Are they to be construed strictly in accord with the specifications, and confined to the particular devices therein named and described, or are the complainants entitled to the benefit of the law of equivalents? I think it clear that the complainants are so entitled. I find no words that confine the patentee to the specific devices or mechanism described, and excluding equivalents. These claims are broad and valid as such, and are narrowed to the "apparatus," the "mechanism," and the "means" described in the specifications and their equivalents. Hence, in so far as the defendant has departed from the apparatus, etc., described, by the substitution of equivalents, it is an infringer. In so far as it has changed mere form and arrangement of parts, it has not thereby avoided infringement. If the defendant has adopted and used the principle and idea of the patent in suit, and also the general construction or means and mechanism, so that by substantially the same means operating in substantially the same way, all in the same combination, it obtains the same result, it is an infringer, even if something be added to its construction, its mechanism, and apparatus which is an improvement. It may have a patent for its improvement; but it cannot use the Corrington invention without license so to do. *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 273, 9 Sup. Ct. 299, 32 L. Ed. 715; *Burr v. Duryee*, 1 Wall. 531, 572, 17 L. Ed. 650; *Hobbs v. Beach*, 180 U. S. 383, 400, 401, 21 Sup. Ct. 409, 45 L. Ed. 586.

In *Hobbs v. Beach*, *supra*, 180 U. S. 400, 401, 21 Sup. Ct. 416, 45 L. Ed. 586, the court said:

"Without determining what particular meaning, if any, should be given to these words, we are of opinion that they are not to be construed as limiting the patentee to the exact mechanism described, but that he is still entitled to the benefit of the doctrine of equivalents, and that it is still true, as observed in *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 273, 9 Sup. Ct. 299, 302, 32 L. Ed. 715, 'where an invention is one of a primary character, and the mechanical functions performed by the machines are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same results are infringements,' although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine. The Horton machine not only accomplishes the same result as the Beach device, but accomplishes it by the employment of the same combination of the same elements. The mere fact that the continuous strip is introduced between the dies from a different direction is immaterial. The fact that the Horton device contains no mechanism for turning the strip into the inside of the corner merely indicates that it does not perform all the functions of the Beach patent. But it is no less an infringement if it performs its primary function in practically the same way. We are not concerned with the subordinate differences in the mechanism, least of all with the different names given by Horton to parts of his machine similar to the corresponding parts in the Beach patent. As the two machines are alike in their functions, combination, and elements, it is unnecessary to go further and inquire whether they are alike or unlike in their details."

In *Westinghouse v. Boyden Power Brake Co.*, 170 U. S., at pages 568, 569, 18 Sup. Ct., at pages 722, 723, 42 L. Ed. 1136, these principles are very plainly declared, viz.:

"An infringement," says Mr. Justice Grier in *Burr v. Duryee*, 1 Wall. 531, 572, 17 L. Ed. 650, 'involves substantial identity, whether that identity be described by the terms "same principle," same "modus operandi," or any other. * * * The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term "equivalent." We have no desire to qualify the repeated expressions of this court to the effect that, where the invention is functional and the defendant's device differs from that of the patentee only in form, or in a rearrangement of the same elements of a combination, he would be adjudged an infringer, even if, in certain particulars, his device be an improvement upon that of the patentee. But, after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reach the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no practical value. To say that the patentee of a pioneer invention for a new mechanism is entitled to every mechanical device which produces the same result is to hold, in other language, that he is entitled to patent his function. Mere variations of form may be disregarded, but the substance of the invention must be there. As was said in *Burr v. Duryee*, 1 Wall. 531, 573, 17 L. Ed. 650, an infringement 'is a copy of the thing described in the specification of the patentee, either without variation, or with such variations as are consistent with its being in substance the same thing. If the invention of the patentee be a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service or produces the same effect in the same way, or substantially the same way. * * * That two machines produce the same effect will not justify the assertion that they are substantially the same, or that the devices used are, therefore, mere equivalents for those of the other.'"

In defendant's alleged infringing combination it has added to one of the elements what may be called an intermediate cylinder having pistons and valves, and, of course, some added details of construction that go with it, and which are said to perform valuable and important func-

tions in certain cases and under certain conditions, but which do not change the mode of operation and results of the device as a whole. In no other respect is there substantial change that need be mentioned. That defendant's apparatus, taken as a whole, would fully anticipate the claims of the patent in suit, the invention claimed, if earlier, cannot be questioned. Defendant contends that it was earlier, and that anticipation based thereon should be found. This I have decided adversely to defendant's contention. I find no patent which anticipates. The Patent Office did not find any.

The record shows that Corrington's application was not loosely and hastily considered, and granted as a matter of course, or without due consideration of the prior art, or to get it out of the way. This is not, of course, much of an argument, but is a consideration of some value. The added pipes, valves, pistons, ports, etc., do not avoid infringement, unless they change the mode of operation of the combination considered as a whole. There may be added results also; but these do not avoid infringement, provided the result sought and obtained by Corrington is the main result sought by the defendant and obtained by the apparatus of defendant, containing substantially the same mechanism combined and operating in substantially the same way. Mere result or effect is not, however, the test of infringement, and the patentee of a prior invention is not entitled to every mechanical device which produces the same result. He must have mechanical means to produce that same result which operates in the same way, or substantially the same way. *Burr v. Duryee* and *Westinghouse v. Boyden Power Brake Co.*, *supra*. The claims are for combinations, and not for any one specific device or thing in the combinations, and in such case there must be an infringement of the combination. If infringement of each claim is alleged and relied on, there must be infringement of that combination. *Rowell v. Lindsay*, 113 U. S. 97, 101, 102, 5 Sup. Ct. 507, 28 L. Ed. 906; *The Corn Planter*, 23 Wall. 181, 224, 23 L. Ed. 161. In *Rowell v. Lindsay*, the court said:

"The patent being for a combination, there can be no infringement, unless the combination is infringed."

In *Prouty v. Ruggles*, 16 Pet. 336, 341, 10 L. Ed. 985, the court said:

"This combination, composed of all the parts mentioned in the specification, and arranged with reference to each other and to other parts of the plough in the manner therein described, is stated to be the improvement, and is the thing patented. The use of any two of these parts only, or of two combined with a third, which is substantially different, in form or in the manner of its arrangement and connection with the others, is therefore not the thing patented. It is not the same combination if it substantially differs from it in any of its parts. The jogging of the standard into the beam, and its extension backward from the bolt, are both treated by the plaintiffs as essential parts of their combination for the purpose of brace and draft. Consequently, the use of either alone, by the defendants, would not be the same improvement, nor infringe the patent of the plaintiffs.' This was quoted with approval in *Rowell v. Lindsay*, *supra*, and the court added: 'But this rule is subject to the qualification that a combination may be infringed when some of the elements are employed and for the others mechanical equivalents are used which were known to be such at the time when the patent was granted.'"

To infringe the combination, the defendant must use the elements thereof in combination, and all of them, or their equivalents, and the

combination must operate in substantially the same way to produce substantially the same result. In *Rowell v. Lindsay*, *supra*, the court said:

"For, where one patented combination is asserted to be an infringement of another, a device in one, to be the equivalent of a device in the other, must perform the same functions."

But this does not mean that where one part, or one element, of a combination, not only performs the same function or functions of the corresponding element in the patent, but some added function, which does not change the mode of operation of the entire combination, equivalency is not made out. The fact that a substituted element performs the same and also an additional function does not necessarily prevent its being an equivalent in the combination, or prevent the combination containing such substituted element being the equivalent of the combination of the patent in suit and alleged to be infringed by the former combination. To hold otherwise would enable persons to successfully infringe almost any combination patent by substituting an element in the combination of the patent which, without changing the combination, or its mode of operation, or the results obtained, in essentials, still performs some added function, which may be immaterial, or which may be an improvement. As said, when such change is made, if the added function is immaterial, infringement is not avoided, and if it be an improvement, and does not change the mode of operation, or principle of operation, while the improvement may be patentable, still infringement is not avoided.

I regard the changes in defendant's alleged infringing devices or combinations of this character. After a careful study of the evidence and structures and modes of operation, I reach the same conclusion from every standpoint. The defendant could not, of course, avoid the charge of infringement by merely obstructing the passage referred to, so long as he did not really impede the passage of pressure there-through from the main reservoir to the brake cylinder. This defendant's devices do not do, when such pressure is allowed to flow. Adding a device at the point mentioned, which may be made to stop the flow of pressure, and which can be used to control or regulate, does not avoid the charge of infringement. It has been a lengthy and tedious task to wade through the mass of so-called expert testimony, covering more than 1,000 printed pages, much of which is mere argument and special pleading, and not at all explanatory, or a statement of opinions and the reasons therefor, and the able and voluminous briefs covering something like 300 printed pages. However, this court has done the best it could, and has arrived at the conclusion that the claims of the Corrington patent, No. 762,282, are valid and infringed by the defendant.

The burden of proving infringement is on the complainant; but, as stated, the burden of showing the invalidity of the claims, or of showing anticipation, prior use, etc., is on the defendant. In interpreting the claims the court should always incline to that construction which will uphold them. See, generally, *Winans v. Denmead*, 15 How. 330, 341, 14 L. Ed. 717. One of defendant's witnesses, more than once, in

substance, admits that defendant's devices infringe, if the broad claims are valid.

Much has been said in regard to cylinders, brake-cylinders, pressure chambers, and the like. It is noted that certain specific devices used in the various combinations, complainants' and defendant's, which answer the same purpose and perform the same functions in the combinations, are given different names. This is immaterial, as we are to look to what the thing does, not what it is named or called in the combination. Thus, whether a cylinder or chamber used to contain and store the pressure, and from which it is distributed or released for actual use in applying or releasing brakes, is called an auxiliary reservoir, a storage chamber, a distributing reservoir, or a pressure chamber, is immaterial, if used for one and the same purpose in all the combinations. So a patentee may use an inapt expression in his specifications; but if he tells truly the function, etc., of the thing mentioned, and describes it so that there is no uncertainty or ambiguity, his patent is to be treated the same as though his use of words had been the most select and apt possible.

I am constrained to hold that the claims of the patent in suit are valid and infringed, and there will be a decree accordingly, and for an injunction and an accounting, with costs.

WESTINGHOUSE ELECTRIC MFG. CO. v. CONDIT ELECTRICAL
MFG. CO.

(Circuit Court, S. D. New York. July 13, 1909.)

PATENTS (§ 326*)—SUIT FOR INFRINGEMENT—VIOLATION OF INJUNCTION.

A defendant *held* in contempt for violation of an injunction against infringement of a patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613-619; Dec. Dig. § 326.*]

In Equity. Suit by the Westinghouse Electric Manufacturing Company against the Condit Electrical Manufacturing Company for infringement of patent. On motion to punish for contempt in violating injunction. Motion sustained.

Kerr, Page & Cooper, for complainant.

C. V. Edwards, for defendant.

LACOMBE, Circuit Judge. I find nothing in the opinion of either Court of Appeals which will warrant the conclusion that by securing an edge contact only of the carbons defendant can differentiate its device from those which have already been held to be infringements. The injunction has been violated, but the circumstances show that no intention to disobey the court was present; defendant honestly believing it could in that way most expeditiously test a new point in which it felt confidence. The fine will, therefore, be substantially nominal, \$100—half to the United States.

Order accordingly.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ÆOLIAN CO. v. SIMPSON-CRAWFORD CO.

(Circuit Court, S. D. New York. July 16, 1909.)

PATENTS (§ 328*)—INFRINGEMENT—PIANO PLAYER.

The Wright patent, No. 596,730, for a piano player, *construed*, and *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by the Æolian Company against the Simpson-Crawford Company for infringement of patent. On *final hearing*. Bill dismissed.

J. Edgar Bull, for complainant.

James Whittemore and Edward Rector, for *defendant*.

PLATT, District Judge. This is a patent suit for infringement of claims 5 and 6 of Wright patent, No. 596,730. They are as follows, viz.:

Claim 5: "In a musical instrument, the combination of pneumatically-actuated operating devices, a main shut-off valve, a spring-pressed, auxiliary bellows or pneumatic, a pressure-regulating valve controlled thereby, and an independent controlling valve, substantially as described."

Claim 6: "In a musical instrument, the combination of pneumatically-actuated operating devices, a main shut-off valve, 37, for cutting off the wind-pressure when the instrument is not in use or the paper is being re-rolled, and controlling valves, 42 and 43, one of said controlling valves being connected to and actuated by a spring-pressed, auxiliary bellows, 46, and the other of said controlling valves being capable of an independent action to provide a direct connection between the pneumatic devices and main bellows when desired, substantially as described."

The defense is noninfringement.

We will first look for a moment at the patent in suit. We are at once struck with the fact that the patentee makes a general résumé of the prior art before specifying how he thinks he has improved it. He says that his improvement applies to automatic musical instruments of the *class* controlled by rolls of perforated paper, and that he seeks to provide compact, simple, and efficient pneumatic-actuating devices for pianos or *similar instruments*. (Italics here and elsewhere are my own.) His very words show that he was delving in an art with which he was familiar, and that he aimed at making old things better, and had no notion that he was presenting a startling or epoch-making invention. Long afterwards the exigencies of the situation stimulated the expert to invest the patentee with an expanse of thought which is hidden from such intelligence as the writer can bring to bear upon the matter.

It is obvious that the complainant's only hope of success depends upon its ability to persuade the courts into a very broad construction of the patent. It is earnestly contended that Wright was the first person to present means by which the performer on an automatic *piano* could at his pleasure and instantly, accent the music which the piano was interpreting. The patented device is insistently and repeatedly called the "Wright regulator," and one of its elements is called "an

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

automatic pressure regulator." That element is to be found in the cuckoo bellows, which it is admitted had been used for the same purpose in organs, but that here for the first time it was applied to the keys of an automatic piano.

In the Parker patent, 560,303, a similar device is used in a piano to regulate the wind pressure in the wind chest in the passage which leads to the motor devices for winding the music sheet. It is doubtful if it would show invention to transfer the Parker device to the passage which leads to the piano keys. It befogs thought to constantly harp upon such expressions as "striker pneumatics," "primary pneumatics," "secondary pneumatics," and "pneumatically-operated actuating devices." To my mind, it is unimportant, when one is regulating wind pressure, whether he cares for it in the passage which leads to piano keys, or to pipes, or to reeds, or to a rewinding motor. In each case the same wind pressure is regulated, and a hand-controlled valve is brought into the combination, which will let in, on the instant, an abundance of extra pressure, and in like manner can instantly prevent the introduction of such extra pressure. And so, for my part, I can think no good of the patent, if we are to look at it in a general way as a pressure-regulating device and nothing more.

It would also seem that lugging in the "shut-off valve, 37," is adding an element which has no mechanical connection or correlation with the regulating device of which so much is made. There is no connection between them, no common purpose to be subserved, no coercion, no community of interest. Each works out its own sweet will, and to attempt to unite them is aggregation, not combination, if we are to give the patent the construction which the complainant desires.

Hurrying along past these and other serious objections to acquiescing in complainant's views, we come to the "auxiliary reservoir" proposition, an answer to which seems, beyond peradventure, to be decisive of the issues herein. Let us settle what the element is which in claim 5 is called "a spring-pressed auxiliary bellows or pneumatic" and in claim 6 "a spring-pressed auxiliary bellows, 46," which is connected to and actuates a controlling valve (No. 43 of claim 6, and shown in Fig. 7, and called in claim 5 "the pressure-regulating valve"). We find the device in Fig. 4, viz., the cuckoo bellows, No. 46. The patentee tells about it in that part of his specifications beginning at line 117 on page 2 and ending at line 18 on page 3, viz.:

"The arrangement of controlling valves which I preferably employ is most clearly illustrated in Figs. 4 and 7. As shown, 35 indicates a passage which may be connected to a bellows or any ordinary air-pumping device and which opens into a valve chamber, 36. Mounted in the valve chamber, 36, is a main shut-off valve, 37, which may be actuated from a rock shaft by means of a link, 38. When the instrument is not in use, or when the paper is being re-rolled, the main shut-off valve, 37, will be closed, which will prevent the air being drawn from the main vacuum chamber, 15, and the instrument from playing. Opening from the valve chamber, 36, are ports, 40 and 41. The port, 40, is controlled by a slide valve, 42, which may be actuated by a link, 44. When the slide valve, 42, is opened, a direct connection between the main vacuum chamber and the bellows may be provided, and this valve will be opened only when it is desired to produce unusually loud or brilliant effects. Co-operating with the port, 41, is a regulating slide valve, 43, which is connected by a link, 45, to the upper arm of a bellows or pneumatic, 46. The

bellows, 46, is normally distended or drawn upward by means of a coiled spring, 47. By means of this construction it will be seen that the *spring-pressed bellows, 46, will act as a regulating device to control the suction or pressure exerted by the main bellows, and will also form a reservoir or reinforcing device for producing chords or notes requiring an unusual volume of wind.*"

Saying that the bellows are auxiliary shows (and the patentee admits this in the last underscored words) that the bellows themselves are intended to do something more than to act as a regulating device. The scale to which the bellows are drawn shows them much too large for that single purpose. Earlier in the specifications he had said that before his application the connection between the keys and the pumping bellows had been direct. He had found that such an arrangement did not work, because it was impossible to maintain an exactly constant air pressure by the bellows, which would naturally vary as the power applied to the bellows varied. Different chords or notes required different amounts of wind, and a direct connection did not provide for any reserved capacity of wind. Let me quote from page 2, line 8 et seq.:

"To overcome these objections I have combined pneumatic playing devices constructed according to my invention with a controlling valve, which is connected to and actuated from a supplemental spring-pressed bellows or pneumatic. By means of this construction a uniform air pressure will be maintained, and the spring-pressed bellows or pneumatic will form a supplemental reservoir, which will act automatically to supply the wind pressure required to produce heavy chords or notes."

Now, after Wright had shown in his drawings a bellows capable of acting as a supplemental reservoir, and had talked about it as such in his specifications, and had taken pains to emphasize it as "auxiliary" in his claims, it would strike the general observer that he meant what he said, and expected the bellows itself to act as a reinforcing device, and that his words aptly described his thought.

The complainant insists that he neither said nor meant any such thing. It would seem, though, that its expert thought so when the *prima facie* case was being made out. Defendant then showed that the little cuckoo bellows of the alleged infringement was incapable of holding enough air in reserve to amount to anything. Complainant's expert was therefore compelled to find in the patent in suit a storage reservoir somewhere outside which the cuckoo bellows could "*form.*" He thought he found it in the air passage leading from the pumping bellows to the point where, by closing valve No. 43, the cuckoo bellows shut off any further flow of air in that direction. I cannot believe that the patentee had even a suspicion of such an idea when he was talking about his cuckoo bellows as auxiliary, and as forming a reinforcing device for *furnishing* an extra amount of wind when needed. He certainly capped the climax by neglecting to illustrate in his drawings a complete presentation of the storage reservoir which the expert has lately discovered.

We cannot go on forever. It all comes down to this: If the cuckoo bellows of the patent is, in and of itself, a helper, by storing up within itself air against need, the defendant does not infringe. If it is simply a regulating bellows, not containing within itself the function of stor-

ing up air against need, it is not novel. I am so thoroughly convinced of the force of the first proposition that I hope to be excused from extended discussion of the second one, upon which my own views are equally pronounced, as must be evident from sporadic outbursts appearing here and there throughout this memorandum.

Let the bill be dismissed.

WINCHESTER REPEATING ARMS CO. v. PETERS CARTRIDGE CO.

(Circuit Court, S. D. New York. July 16, 1909.)

No. 9,518.

PATENTS (§ 328*)—INFRINGEMENT—PAPER SHELL CARTRIDGE.

The Gardner patent, No. 563,157, for a paper shell cartridge, as voluntarily narrowed by the patentee to meet objections of the Patent Office, held not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by the Winchester Repeating Arms Company against the Peters Cartridge Company for infringement of the Gardner letters patent, No. 563,157, for a paper shell cartridge. Bill dismissed.

George D. Seymour and Edmund Wetmore, for complainant.
Frank T. Brown and Francis A. Hopkins, for defendant.

PLATT, District Judge. This patent is for an improvement in paper shell cartridges. These cartridges are fitted into a metallic cap, and the object of the invention is to so arrange the metal cap as to prevent the paper shell from breaking off at or near the main edge of the cap, thus getting rid of the trouble of extracting the mutilated paper tube by hand, and also to save the paper tube intact, so that it can be reloaded and used again.

In explaining it, the patentee says that his invention consists in a paper shell cartridge composed in part of a paper tube and a drawn sheet-metal cap which is continuously upset around the circumference, so that the metal of the cap may yield sufficiently to take the strain from the tube. He says that it further consists in "certain details of construction" as later described and "pointed out in the claims." He then says that it is obvious that the metal may be adapted in a great variety of ways to yield enough to prevent the tearing of the paper tube, and mentions "annular circumferential grooves rolled in it," or "longitudinally or diagonally arranged crimps formed in it," or "upset to form a band of letters or characters; * * * the only requirement being that the metal shall be upset in some form that will permit it to yield a little at or near the point where the tube enters it."

He takes as an illustration a cartridge in which the metal cap has several annular circumferential grooves located in planes at right angles to the longitudinal axis of the cartridge. These grooves, he says, permit the metal cap to yield in both directions, longitudinally and diametrically, so that the paper of the tube will not be abruptly broken off

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at or near the point where it enters the cap, and he has found that the principal yielding is longitudinal. He says that it will be noted that the grooves of his illustration extend continuously around the cap, which would not yield if they were interrupted. He further says that, if he were to use crimps, letters, or characters, it would be necessary to have them *joined together*, so as to have the effect of a continuous upsetting of the metal. His first claim calls for a metal cap which is "continuously upset around its circumference," and the second claim calls for a metal cap with "one or more annular circumferential grooves located in a plane or in planes at a right angle to the longitudinal axis of the cartridge."

We are now concerned, of course, with what Gardner disclosed and claimed. It is unimportant what later investigation may have shown the facts of the case to be. His idea plainly was that to obtain the objects of his invention it would be necessary, in upsetting the metal of the cap, to maintain a continuous and connected upsetting clear around the cap. He does not use the word "connected"; but all that he does say implies its use. The file wrapper and contents emphasize this view. He began with very broad claims, calling for a cap "constructed to be yielding at or near the point where the paper tube enters it," or "with one or more circumferential grooves which permit it to yield slightly." The claims were rejected on Jackson, 390,082, Thompson (British), 5,275, and Laws, 131,104.

The patentee thereupon recast his specifications and claims into their present form, and on May 20, 1896, sent the resultant along to the Patent Office, with a few words of argument at the end. The "reference" which he discusses is evidently the British patent to Thompson, 5,275, in which are shown diagonal depressions in a metal cap, which are, however, placed side by side, and do not actually connect. He argues to the examiner that the plain surfaces between these diagonal depressions will prevent the cap from yielding, so as to relieve the strain upon the tube. This, it is argued, is the object which the patentee is after in upsetting his metal cap, which contemplates a continuous upsetting of the cap, "*such, for instance, as the grooves of the cap shown in the drawing.*" (All italics in this opinion are mine.) Look at his next sentence:

"If grooves are not employed, but characters are employed, they will be *connected* by upsetting the metal between them, so as to link them all together, as has *now* been set forth in the specification."

He started with the idea of making any disposition of the metal in the cap which would permit it to yield so as to save the paper tube, and, meeting resistance by the examiner, he voluntarily narrowed his disclosure and claims, so as to make it necessary to continuously upset the metal clear around the cap in his first claim, and more narrowly still in the second claim, viz., to upset the metal in annual circumferential grooves located in a plane at right angles to the longitudinal axis.

The law compels him to abide by the consequences of his own voluntary act. His remedy lay in appeal to higher authority when he encountered the examiner's resistance. From the present viewpoint, it

would seem that in the light of the prior art he was entitled to broader claims than he accepted; but he cannot enlarge them now on that account. To do so would work the rankest kind of injustice on our citizens, who are, as a general rule, law-abiding, peace-loving and honest. He had his day in court when the Patent Office made objections, and he must accept with such grace as he can muster up the position which he made for himself.

Construing the claims of the patent in the way suggested, it will be obvious to one who examines the alleged infringing structure, as exemplified in "Complainant's Exhibit Peters' Ideal Shell," that it does not infringe. The metal shell is not "continuously upset around its circumference," nor has it "one or more annular circumferential grooves located in a plane or in planes at a right angle to the longitudinal axis of the cartridge." The diagonal depressions are side by side and distinctly separated, just as they were in the Thompson British patent, and there are no annular circumferential grooves at all. Broken parts of rings appear on the metal cap, separated by considerable expanses of plain metal, and, although the broken parts of one ring appear where the expanse of plain metal shows between the parts of the other, there is nothing in the construction which sanctions the illustration of the dovetailing of brick in a wall. The brick of a wall, when laid for use, form a homogeneous whole, and the broken parts of these rings are widely separated by plain metal, which will obstruct the yielding function so indispensable to the patent.

This ends the case on the merits, from my point of view. It is giving the complainant the benefit of a number of contested propositions which come up in advance of the merits, viz., the right of complainant to sue as a corporation, and the proof of sale of the alleged infringing cartridge within the district. I have decided the case on its merits, because it seems to me that it would be better to have the real issue settled speedily.

It was not incumbent upon the defendant to take upon itself the burden of showing that it did not infringe; but, on the whole, from a patent viewpoint, when we find that defendant's shell, after firing, is not lengthened, and that it is beveled on the interior at the end near which the paper shell might break, it is far from clear that, even construing the patent as complainant wishes, there is any infringement. The talking points story shows that some one connected with the defendant had a notion for a time that there was infringement; but the fact that he thought so did not make it so.

Let the bill be dismissed.

DONALDSON v. MARBOLITH STONE CO.

(Circuit Court, S. D. New York. August 16, 1909.)

PATENTS (§ 328*)—INFRINGEMENT—INJUNCTION—PROCESS OF MOLDING CONCRETE.

A qualified preliminary injunction granted, restraining infringement of the Stevens patent, No. 624,563, for a process of molding concrete.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit for infringement of letters patent No. 624,563, for a process of making artificial stone, granted to Charles W. Stevens May 9, 1899. On motion for preliminary injunction. Granted, with qualifications.

O. Ellery Edwards, Jr., for complainant.
William H. Janes, for defendant.

HAND, District Judge. As this patent has been once held valid in the Eastern district of New York, I shall assume its validity here. The defendant raises the question of this adjudication upon the assertion that the suit was essentially uncontested, and the decree of no better force, upon a controversy between other parties, than if it had been taken pro confesso. To the disposition which I shall make of this motion, it will not be necessary to decide this question; and I shall, therefore, as I have said, treat the patent as valid without any consideration whatever upon the merits.

The question is resolved into one of infringement, which involves an interpretation of the extent of the patent itself. The only claim now in question is claim 1, which is for the process of molding a liquid concrete upon a mold of "relatively dry sand," which shall "absorb the surplus moisture from the compound, thereby converting the latter into a solid, or nonliquid, form." The process is therefore to convert the compound into a solid by absorbing the surplus moisture in dry sand. In the specification nothing is said of the character of the sand which is to insure the absorption, except that it be "relatively dry"; and it is quite clear that no mixture is contemplated, but that the proper action of the sand is to accomplish the process.

Upon this motion I must accept as true the statement of Mr. Boswell that the compound which he actually used consists of a base of sand, or pulverized earth—which of the two I do not care—mixed with a petroleum oil having 25 per cent. of paraffine and with powdered talc. The absorbent quality of this mixture is a matter of dispute. From certain experiments done before me, it appeared that there was a great difference in degree between the absorptive power of the sand which the complainant uses and the compound which the defendant uses. The complainant, in his replying affidavits, asserts that he has made other experiments which show contrary results.

However, even the decision of this question is not necessary to the decision of this motion, which may be reduced to a very narrow dilemma. Sellars' patent (No. 244,321) was taken in 1881, and was for a composition for molds. The composition was sand mixed with paraffine, or any waxlike substance not affected by the concrete, and was expressly stated to be used for the molding of concrete, so that finer casting should result. Now Sellars' mold was either absorbent of water, or it was not. Mr. Boswell says it was; but I need not so decide, nor do I. It is enough, if it were not less absorbent than the defendant's molds. Clearly, Stevens' patent cannot take from Sellars the right to use his prior composition. Such absorption as takes place in sand treated with paraffine or other similar material is not an infringe-

ment, and Stevens' patent must be so construed as to exclude the absorption which takes place in Sellars' mixture.

But sand soaked with paraffine and talc is no more absorptive than sand soaked with a like amount of paraffine alone. The complainant's dilemma, therefore, is this: Either Sellars' mold is relatively nonabsorbent, and a fortiori so is the defendant's, or Sellars' mold is absorbent, and the absorptive character of the complainant's mold, which constitutes his patent, must be limited to that greater degree of absorption which comes from untreated sand. In either case it is only necessary for the defendant to use a mold no more absorptive than Sellars' and that is sand mixed at least with 6 parts of paraffine and other similar substance to 100 of sand. I have no means of determining how the talc compares with paraffine in contributing to the imperviousness of the mixture, but I believe it is a material within the uses described by Sellars. If the defendant uses 6 per cent. of paraffine and talc together, he will be only using Sellars' patent, and that he may do. It may perhaps be that talc is not an alkaline wax-like substance; but I believe it will fairly come within the meaning of Sellars' patent. If, however, the complainant can show that it does not so answer, I will compel the defendant to use 6 per cent. of paraffine, without including the talc to make the required percentage.

Therefore let a writ go pendente lite as follows: Enjoining the defendant from using as a mold any sand unmixed with at least 6 per cent. of paraffine and talc. The paraffine may be suspended in oil if the defendant so wishes. It is quite true that the defendant denies the use of any mold other than such as Sellars used; but the denials which, on injunction pendente lite, prevent further inquiry, are those only which go to the existence of the legal right, and not such as concern the propriety of the equitable remedy alone. In this case, if the defendant is to be taken at his word, no harm can come from the writ as suggested. If he means to use other mixtures, the complainant is entitled to the relief sought under common rules.

UNION PAC. R. CO. v. CUNNINGHAM et al.

(Circuit Court, D. Nebraska, North Platte Division. July, 1909.)

1. COURTS (§ 328*)—JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE.

In a suit by a railroad company to quiet title to a specific portion of its right of way which lies more than 100 feet from its tracks, and has never been used in the operation of its road, the amount in dispute for the purpose of determining the jurisdiction of a federal court is the value of the land in controversy, and not the value of the company's right to operate its road.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 890-896; Dec. Dig. § 328.*]

Jurisdiction of circuit courts as determined by the amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.]

2. QUIETING TITLE (§ 4*)—FEDERAL COURTS—EQUITY JURISDICTION—REMEDY AT LAW.

The grant by Congress to the Union Pacific Railway Company of right of way for its road over the public lands vested such company with title

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in fee simple to the right of way appropriated thereunder, subject to defeasance by abandonment only, and the company or its successor, having an adequate remedy by ejectment against one who has taken possession of a portion of its right of way, cannot maintain a suit in equity to quiet title thereto.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 6; Dec. Dig. § 4.*]

3. COURTS (§ 371*)—FEDERAL COURTS—EQUITY JURISDICTION—REMEDY AT LAW.

In view of the provision of Rev. St. § 723 (U. S. Comp. St. 1901, p. 583), that suits in equity shall not be sustained in the federal courts in any case where a plain adequate and complete remedy may be had at law, a state statute authorizing the legal owner of real estate to maintain an equitable action to quiet his title against another party in possession cannot confer jurisdiction of such a suit on a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 907; Dec. Dig. § 371.*]

In Equity. On pleas to the jurisdiction.

Edson Rich, E. H. Crocker, and John A. Sheean, for plaintiff.

William E. Shuman, Hoagland & Hoagland, and John J. Halligan, for defendants.

W. H. MUNGER, District Judge. In this case the complainant filed its bill in this court, asking to have its title and right to the possession of a certain tract of land described by metes and bounds, constituting a fraction over one and one-half acres, quieted in it, and a cloud cast upon its title by a deed executed by the defendant Roy B. Tabor, as trustee, to the defendant Wilson M. Cunningham, removed therefrom.

The bill alleges that complainant is a railroad company, operating a line of road from Council Bluffs, in the state of Iowa, to Ogden, in the state of Utah; that Congress granted to its predecessor over the public lands a right of way consisting of 400 feet, 200 feet on each side from the center of its main track; that the land in question is a part of the outer 100 feet on the south side of its track; that the deed from the defendant Roy B. Tabor to the defendant Wilson M. Cunningham described by metes and bounds a portion of said southern 100 feet. The defendants Roy B. Tabor, trustee, and the city of North Platte, have each filed a plea to the jurisdiction of the court, based upon the ground that the amount in controversy does not equal the sum or value of \$2,000. The defendant Wilson M. Cunningham has filed a plea to the jurisdiction of the court on the ground that he is, and was, at the time of the commencement of the suit, in the sole and exclusive possession of the premises in question; that, by reason thereof, complainant has a complete and adequate remedy at law by ejectment. Complainant has filed replications to the pleas of the defendants Tabor and Cunningham, testimony has been taken by the respective parties in respect thereof, and a stipulation has been filed that the testimony so taken may be used upon the hearing of each of the said pleas. The plea of the city of North Platte was not filed until after said testimony was taken, and there is no stipulation that it shall apply in support of such plea. From the evidence it clearly appears that the land in controversy is situated more than 100 feet away from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the center of the main track of the complainant's road. Complainant has a side track between its main track and a portion of the land in controversy, but such side track appears to be more than 80 feet distant from any of the land in question.

Upon the question as to the value of the land in controversy, it is claimed on the part of the complainant that, as the strip of ground is a part of its right of way, the amount in controversy is to be determined by the value to complainant of the right to operate its trains between Council Bluffs and Ogden, which is shown to be several millions of dollars annually. On the part of defendants, it is contended that, as the particular tract in question is in no manner used or required by complainant at this time in the operation of its road, the amount in controversy is the value only of the particular tract in question, which is shown by the evidence to be worth not to exceed at most \$500.

In support of its contention, complainant cites and relies chiefly upon the case of *Louisville & N. R. Co. v. Smith et al.*, 63 C. C. A. 1, 128 Fed. 1. That case was one in which the owners of certain lands over which the railroad's right of way was operated were contending that the railroad company had no right across their lands, were insisting upon their right to cultivate their land to the end of the ties of the track, and were refusing and preventing the railroad company from going upon the land to repair its track, so that it could be operated as a railroad. The railroad company brought an action to enjoin the defendants from such interference and to quiet its title to the right of way. It was held in that case that the acts and threatened acts of the defendant were such as to prevent the future operation of the road across said land; in other words, that, if defendants were permitted to continue their action, the effect would be to carve a strip out of the line of road over which the railroad company would be prevented from operating its trains, and in that case it was said that the matter in controversy was not that strip of ground, but was the right of complainant to operate its road across the tract of land, and hence that the amount in controversy was the value to complainant of its right to operate its road. No such question is involved in this case. The undisputed testimony shows that complainant has in no manner ever occupied or used the strip of land in question; that it has for upwards of 20 years been occupied by individuals; that a road has been continuously used by the public between the strip of land in controversy and complainant's tracks. While it is true that complainant's title to its right of way cannot be divested by the use and occupation of a portion thereof by individuals for any period of years, yet such unmolested use and occupation are circumstances showing that complainant is not disturbed in the full right to operate its trains the entire length of its road, and hence that such right is not the subject-matter in controversy. The subject-matter in controversy is the right to the possession of the particular tract in question, and it is the value of such tract that determines the jurisdiction of the court. *Cowell v. City Water Supply Co.*, 121 Fed. 53, 57 C. C. A. 393; *Oregon R. & N. Co. v. Snell* (C. C.) 125 Fed. 979; *Smith v. Adams*, 130 U. S. 175, 9 Sup. Ct. 566, 32 L. Ed. 895. As the tract of land in controversy does

not exceed in value the sum of \$500, it follows that the plea to the jurisdiction filed by the defendant Roy B. Tabor must be sustained.

In support of the plea filed by Wilson M. Cunningham, the evidence clearly shows that at the time the action was commenced he was in the actual and exclusive possession of a portion of the tract described; that he and his immediate predecessors had had possession and had the same inclosed by a fence for a number of years, and it is claimed that complainant has an adequate remedy at law by ejectment. It is said on the part of the complainant that, as it has merely an easement to the property, it has not such title as gives a right of action by ejectment. The act of Congress in question, however, gave to complainant more than a mere easement. It conveyed the legal title or fee to the right of way, subject to be defeated by abandonment only. Hence complainant has such title upon which it can base an action of ejectment. *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267-271, 23 Sup. Ct. 671, 47 L. Ed. 1044. Complainant having the legal title, and the defendant being in possession, complainant has a complete and adequate remedy at law, and cannot, under section 723 of the Revised Statutes, invoke in the federal court its equitable jurisdiction. *U. S. v. Wilson*, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. Ed. 110; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873; *Boston & C. Mining Co. v. Montana Ore Co.*, 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626; *Gombert v. Lyon (C. C.)* 80 Fed. 305; *Jones v. MacKenzie*, 122 Fed. 390, 58 C. C. A. 96; *Adoue v. Strahan (C. C.)* 97 Fed. 691; *Gordan et al. v. Jackson (C. C.)* 72 Fed. 86; *Giberson v. Cook et al. (C. C.)* 124 Fed. 986.

It is, however, insisted by complainant that, as under the state statute the owner of the legal title may maintain an action in equity to quiet title as against a party in possession, such right may be maintained in the federal courts, and cites in support thereof the case of *U. S. v. Leslie (C. C.)* 167 Fed. 670. New rights created by state statutes, which did not exist at common law, may be enforced in the federal court, if agreeable to the practice and procedure of such court. Thus, while at common law, the owner of the fee title to real estate could not maintain an action to quiet title unless he was in possession, such right may be maintained in the federal court under the state statute, where no one is in possession. But a state statute which authorizes a suit to quiet title by a party out of possession against a party in possession cannot be maintained in the federal court, as section 723 of the Revised Statutes (*U. S. Comp. St. 1901*, p. 583) provides "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law." That the state statute authorizing the owner of real estate to maintain an equitable action to quiet his title against a party in possession does not enlarge the jurisdiction of the federal courts of equity was held by this court in *Gombert v. Lyon (C. C.)* 80 Fed. 305, by the Supreme Court in *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873, and *Boston, etc., Mining Co. v. Montana Ore Co.*, 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626, and by courts in this circuit in *Sanders v. Devereaux*, 60 Fed. 311, 8

C. C. A. 629, Frey v. Willoughby, 63 Fed. 865, 11 C. C. A. 463, Gordan et al. v. Jackson (C. C.) 72 Fed. 86, Adoue v. Strahan (C. C.) 97 Fed. 691, and Giberson v. Cook et al. (C. C.) 124 Fed. 986. It would thus appear that the complainant has an adequate remedy at law by ejectment. The deed in question from Tabor to Cunningham of the strip in question shows upon its face that it conveys a portion of complainant's alleged right of way, and was executed by a stranger to the title. Such being the fact, it does not cloud complainant's title in a manner to call for the aid of a court of equity. Phelps v. Harris, 101 U. S. 370, 25 L. Ed. 855; Mackall v. Casilear, 137 U. S. 556, 11 Sup. Ct. 178, 34 L. Ed. 776. Therefore the plea of the defendant Cunningham is sustained.

For these reasons, complainant's bill is dismissed, without prejudice to bringing an appropriate action at law in the proper forum

THE POCOMOKE.

(District Court, S. D. New York. October 19, 1909.)

SALVAGE (§§ 15, 48*)—EXISTENCE OF PERIL—EVIDENCE.

A barge loaded with coal towed from or near Sandy Hook by two tugs. *Held*, on conflicting evidence, that the barge was not in danger, and there was no basis for a salvage claim. Also *held*, that as the leading tug's master knew there was no necessity for salvage service, as in truth there was none, the fact of a distress flag being displayed did not create a situation which called for such service.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 28, 124; Dec. Dig. §§ 15, 48.*]

(Syllabus by the Judge.)

In Admiralty. Libels by Leta D. Potter and others and by William B. McElwee and others against the barge Pocomoke. Libels dismissed.

Foley & Martin, for libellants.

James J. Macklin, for claimant.

ADAMS, District Judge. The first of the above entitled actions was brought by Leta D. Potter, the owner and master, and the other members of the crew of the tug boat Reliance to recover salvage for an alleged service in rescuing the barge Pocomoke from the dangers of the sea on the 23d day of December, 1908. The second action was brought by William B. McElwee, as owner and master, and members of the crew of the tug Hercules to recover for similar services.

The first libel alleges that the Reliance left Staten Island for Sandy Hook to cruise for business and on the way out discovered the tug Albatross in a disabled condition; that at the same time the crew discovered a barge laboring heavily at anchor and about 300 yards off False Hook Buoy on the Oil Spot with its flag flying union down; that the Reliance spoke the Albatross, asking if she needed assistance and the reply was that she could get up the harbor without any; that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Reliance then made for the barge which she found was laden with coal and in such a position that the seas were breaking heavily over her; that the Reliance went within hailing distance of the barge, which proved to be the Pocomoke, and after considerable difficulty got her hawser fastened to the port bow of the barge; that the master of the barge requested the tug to push the barge head to the sea as much as possible as he was afraid the sea would wash off his hatch covers; that at this time the barge was in an exceedingly dangerous condition laboring heavily; that the sea was breaking heavily under the stern of the barge and she was lying on shoal ground; that had assistance not arrived promptly, in all probability the barge would have gone ashore and broken up before assistance could have reached her or would have bilged where she lay; that at the time the tug came up with the barge, she had her anchor out, which was dragging, and the captain of the Reliance was informed by the master of the barge that the barge had dragged her anchor for a considerable distance; that another tug, the Hercules, was there, and upon the tugs making fast the master of the barge slipped his anchor and both tugs commenced towing the barge into deep water and proceeded in the South Channel where the tugs hauled up on the course; that the tugs at first put out 7 inch hawsers of about 125 fathoms; that while bound in, owing to the fact that the barge's rudder was broken, she took a long shear and parted the hawser of the Reliance and that tug put out a new hawser of 100 fathoms and the towing continued; that upon reaching smooth water, the Reliance let go her hawser and went back alongside of the barge and the Hercules continued the towing upon a hawser; that the tugs were engaged in the work from 8 a. m. to 2 p. m.; that the services rendered were salvage services of a high order of merit and had it not been for the timely assistance of the tugs, the barge and in its cargo in all probability would have been lost; that the Reliance is a large and powerful tug of the value of \$15,000; that the value of the barge is \$24,000 and its cargo of coal \$3,500.

The libel of McElwee, owner of the Hercules, and of her crew, is practically the same. She alleges that she was also bound to Sandy Hook and discovered the Reliance engaged in making fast to the Pocomoke and went to her assistance and made fast to the barge's star-board bow; that the value of the Hercules is about \$15,000. In other respects there is no material difference in her libel.

The answer of the barge to the libel of Potter et al., after some admissions and denials, is as follows:

"Eighth: And for further answer to said libel and upon information and belief claimant alleges, that said Barge Pocomoke being in tow of the Steamtug Albatross, owing to thick weather anchored in the South Channel in a good and safe place on the morning of December 23d, 1908, and said Steamtug Albatross proceeded a short distance away, also anchoring, but while said steamtug was so moving to a place of anchorage her hawser got in her wheel, thus temporarily disabling her. That at about 8:30 o'clock on the morning of the day aforesaid, the weather clearing and growing better the said Steamtug Albatross started for New York in order to have the hawser or line in her wheel removed and then to return for the said barge or two other barges that had been left at anchor further away by the said Steamtug Albatross.

That while said Steamtug Albatross was so proceeding for New York, the Steamtug Reliance spoke the said Steamtug, and the Captain of the Steamtug

Albatross asked as to what compensation the master of the said Steamtug Reliance desired for conveying a message to those on the said Barge Pocomoke, and the Master or pilot of the said Steamtug Reliance having asked an extraordinary price, the master of the said Steamtug Albatross informed him not to touch the said barge, nor to go near her, as she was all right and that he need not convey any message, and that said barge did not need any assistance from him or any other tug; but that instead of obeying the instructions from the said master of the said Steamtug Albatross, the said Steamtug Reliance proceeded to the said barge and informed those in charge, that he had been sent by the master of the said Steamtug Albatross to tow the said barge from her anchorage (she only having one anchor out at all the time while she was so at anchor, and two spare anchors that she did not need and did not use), but being informed that the said Steamtug Reliance was not capable of towing the said barge he stated that another tug was coming to his assistance, and the master of the said barge only permitted the said Steamtug Reliance and the Steamtug Hercules which subsequently showed up to take hold of the said barge, because of the representations made as aforesaid, that he was directed by the master of the Steamtug Albatross to tow the said barge into New York, and that said Steamtug towed the said barge Pocomoke to Clifton, Staten Island, without any difficulty or trouble, excepting that a small and worn out hawser attached to the Reliance parted.

Claimant also avers that the anchor which was used by the barge was slipped and buoyed, but that the buoy for some cause, disappeared.

Claimant also alleges that the barge's rudder was broken, which had occurred before the barge anchored as aforesaid and that the said Steamtug Reliance on the way in with the said barge when alongside of her made fast on her starboard side.

Claimant also alleges that said barge was anchored where there was plenty of water and that she was not dragging or moving in any way and that she was in a place of perfect safety, and did not need the assistance of either of said Steamtugs."

The answer to the McElwee libel is practically the same as that just mentioned.

The testimony shows that the Albatross started from Norfolk, Virginia, on the 20th of December with 3 barges in tow, the Pocomoke, the Annie Embrey and the Dendron. The Albatross was a large sea-going tug, 139 feet long and of about 800 horse power. The Pocomoke was the leading barge, the others following. The hawser between the Pocomoke and the tug was 10 inches in circumference and 225 fathoms in length, that between the Pocomoke and the second barge was a 7 inch hawser about 200 fathoms in length and that between the second and third barges was another 7 inch hawser and of about 225 fathoms in length. The weather was good upon starting but in the afternoon of the 22nd about 5 o'clock it commenced to snow, with the wind from the north north-east. At that time the tow was just above the gap at Barnegat and there being no place to put in, continued on. About 11 o'clock that night the last two barges broke adrift, the hawser parting between the first and second barges. The master of the tug slowed down and kept on with the Pocomoke. About 4 o'clock a. m., the 23d, he reached the Scotland Light Ship. It was still snowing heavily and when the Narrows in the channel were reached, the master concluded that it was not safe to go on because he could not see on account of the blinding snow and he anchored the Pocomoke about 150 yards of the south end of the Main Ship Channel in about 40 feet of water. While there he got the hawser in the wheel of his tug, which he shortly afterwards anchored. The storm at the time had

abated considerably and stopped snowing about 4:30 o'clock. The master worked on the hawser and shortly afterwards he managed to chew it in two and then he came on to the city. He saw before he left however that the barge was well anchored and in no danger. He displayed a distress signal, a flag with the union down, while waiting, and before the wheel was relieved of the hawser. On the way he met the Reliance going down and some conversation ensued in which he says he told the Reliance "not to touch the barge, that she was all right, to let her alone, to let her lie there."

The account given by the master of the Reliance of this conversation is somewhat different. He said:

"Q. Where did you meet the Albatross? A. Down in Swash Channel. Q. Coming up towards New York? A. Yes, sir. Q. How close did you come to her? A. Passed right along within hailing distance. Q. Did you speak to the captain of the Albatross first or did he speak to you first? A. I asked him if he wanted assistance; he said no, he could get up himself; I asked him if he wanted me to go and get the barge; he said my boat didn't have power enough; I told him I had another boat coming and I went right along. Q. You didn't wait for any more conversation? A. For no more conversation, that is all."

The master of the Hercules said he met the Albatross shortly afterwards. According to his account the following conversation took place:

"Q. You got out yourself and followed Captain Potter down the Bay? A. Yes, sir. Q. On the way down you passed the Albatross? A. Yes, sir. Q. Did you have a talk with him? A. Yes. He hailed me and asked what I would charge to go to the barge and tell him he would send the tug Hollenbeck down to him. Q. What answer did you make? A. From \$200 to \$2,000. Q. Why was that? A. So that I could get a good price for doing the work or so we could get the barge without having anybody else interfere."

The master of the Albatross said with respect to the conversation with the master of the Hercules, which tug he met shortly afterwards:

"Q. How soon after the Reliance? A. About 10 or 15 minutes difference in the two. I asked him what he would charge to convey a message to the captain of the barge and tell him I would send the O. L. Hollenbeck down for him—I knew she was up in the Harbor. All I could hear him say was that he wanted \$200 for the message, he was still going and out of hearing of one another. Q. Did you have a chance to answer him? A. I did not have a chance to answer him, I blew to him after that."

Shortly afterwards he met the Hollenbeck going out with a tow, but he did not speak to him because it then had cleared off and there was no necessity.

After going to New York, the master of the Albatross, about noon, heard that the Pocomoke had been picked up and towed in, or was then being towed in, and that evening he went out for his other two barges which he brought in the next morning. They were 10 or 12 miles down the beach from where he had anchored the Pocomoke and he found them without difficulty. They had ridden out the storm and being smaller and weaker barges than the Pocomoke and more exposed, the fact that they were saved without difficulty is significant that the Pocomoke could not have been in any danger. She was practically new a couple of years before and in much better condition than the other barges.

The Pocomoke was substantially uninjured. When her rudder, which had been broken the night before, was repaired, she was towed on to Boston and back to New York, and at the time of taking the testimony needed no further repairs.

The master had intended going for her after the other two barges were picked up and as the weather continued fine, there can be no reasonable doubt that he then would have found her uninjured.

On the morning of the 23d tows of scows went to the dumping grounds, a considerable distance beyond the place where she was anchored, passed out of New York as usual in good weather and such fact is persuasive that the Pocomoke was safe.

When the Reliance and the Hercules reached the Pocomoke, the masters of the tug informed the latter that they were sent by the Albatross to tow the barge in. It appears that there was no warrant whatever for such a statement. It was on the faith of it, however, that the master of the barge accepted the services, and it appearing that they were not sent, the claim falls to the ground.

The claim that the barge was in danger was an essential part of the libellant's case, but their testimony fails to establish it. A telegrapher at Sandy Hook gave some strong statements in favor of the libellants, but I do not credit his testimony. It is inconsistent and far from being convincing.

The conduct of the parties most interested leads to the opposite conclusion. The master of the barge for example was content with using the smaller of the two anchors which he had on board. He had also a kedge anchor which he could have resorted to if necessary but did not deem it requisite to use any except the small anchor.

When first anchoring the master put out 45 fathoms of chain. Finding she was working back a little he gave the barge 40 fathoms more, which held her securely. This was the only drifting that occurred to the barge.

The Weather Bureau shows that the weather was improving from early morning when it was blowing from the north or north-east, 26 miles an hour, up to between 7 and 8 o'clock when its force was 17 miles. It then decreased to 12 miles between 8 and 9 o'clock and 10 miles between 9 and 10 o'clock. The observation was taken about 19 miles from the place of anchoring but there can be little doubt that the description given was reasonably accurate for the latter place.

There is almost nothing in this action to recommend it as a salvage case unless it is that the Pocomoke had a distress signal flying when the tugs approached her to offer assistance. That, however, does not really amount to anything because the first of the tugs was told in going down the bay that the barge did not need assistance. Such notification was equivalent to advising both of them as they were working together and was not overcome by the signal inasmuch as the notification was in accordance with the facts which the signal was not. It appears that the master had displayed the signal when his tug left him. He says that he exhibited it to cause the Albatross to return and that after she was gone he instructed a deck hand to take it in. This the deck hand failed to do and it remained displayed but it was without significance under the circumstances.

The libels are dismissed.

In re McDONALD.

(District Court, D. Massachusetts. November 13, 1908.)

No. 13,494.

1. BANKRUPTCY (§ 184*)—LIENS—INVALIDITY FOR WANT OF RECORD.

Under Rev. Laws Mass. 1902, c. 198, § 1, which requires a chattel mortgage to be recorded at the place where the property is situated and also where the mortgagor resides, and provides that unless so recorded it shall be invalid "against a person other than the parties thereto," a mortgage not so recorded is invalid against the trustee in bankruptcy of the mortgagor by virtue of Bankr. Act July 1, 1898, c. 541, § 67a, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 184.*]

2. BANKRUPTCY (§ 184*)—LIENS—VALIDITY AS AGAINST TRUSTEE—EFFECT OF ESTOPPEL OF BANKRUPT.

The mortgagor in a chattel mortgage described himself as "of Boston," and, the property being there situated, the mortgage was recorded there only. The mortgagor subsequently became bankrupt, and the property was sold by the trustee, subject to the mortgagee's rights in the proceeds. In proceedings to establish his lien, the trustee offered proof showing that when the mortgage was given the mortgagor was a resident of Winthrop. By the state law the mortgage, not having been recorded at the place of the mortgagor's residence, was invalid "against a person other than the parties thereto." *Held*, that under Bankr. Act July 1, 1898, c. 541, §§ 67a, 70e, 30 Stat. 564, 566 (U. S. Comp. St. 1901, pp. 3449, 3452), which provide that "claims which for want of record * * * would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate" and that "the trustee may avoid any transfer by the bankrupt * * * which any creditor * * * might have avoided," the trustee was not estopped by the recital in the mortgage to show that the bankrupt was not a resident of Boston.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 184.*]

In Bankruptcy. On petition for review of order by the referee disallowing petition by the R. H. White Company to establish a lien upon proceeds of certain personal property.

Hutchins & Wheeler and Harry L. Sampson, for R. H. White Co.
Edward N. Goding, trustee, pro se.

DODGE, District Judge. The R. H. White Company, petitioner for review, lent the bankrupt \$2,000 upon the security of a chattel mortgage given it by him, dated January 8, 1908, and covering the furniture, fixtures, wines, liquors, etc., in his place of business, which, as is stated in the mortgage, was at 19 Hawley street, in Boston. The mortgage described the bankrupt as "of Boston." It was recorded January 10, 1908, at the office of the city clerk of Boston. It was never recorded anywhere else.

On March 13, 1908, the bankrupt filed the voluntary petition upon which adjudication was ordered in these proceedings. In his petition he described himself as "of Winthrop," and represented that for the greater portion of the preceding six months he had had his principal place of business at Boston.

The property described in the mortgage remained at all times in the bankrupt's possession, and, having come into the possession of his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

trustee, has been sold by order of court, at the trustee's instance, free of incumbrances. The R. H. White Company, which has never received any payment of or on account of its loan, claims \$2,000 of the proceeds of sale by virtue of its mortgage; it having been agreed, when the order for sale was issued, that \$2,000 of the proceeds should be subject to the mortgage lien, if the validity thereof as against the trustee should be established.

At the hearing upon its petition the R. H. White Company called as witnesses its treasurer and the bankrupt himself. From their uncontradicted evidence it appears that the bankrupt, having obtained the consent of the company to lend him the money upon a mortgage of the property, had the mortgage drawn, took it to the company's office, there executed it in the treasurer's presence, was told by the treasurer, upon seeing that it described him as "of Boston," that it must be recorded at the city hall, undertook to have it recorded there, did so, brought it again to the treasurer after such record had been made, and left it with the treasurer after receiving the \$2,000 to be loaned him upon it. It further appeared without contradiction that the treasurer had no knowledge regarding the bankrupt's place of residence at the time, except from the recital in the mortgage, relied upon that recital, and did not find out until after the bankruptcy that there was any reason to suppose the recital not in accordance with the fact.

On cross-examination, the trustee asked the bankrupt where he did in fact live when the mortgage was given. Subject to the mortgagee's objection that he was estopped to deny that he lived in Boston, as the mortgage recited, or to show that he lived anywhere else, he answered that he was a resident of Winthrop at the time. The referee has so found; and that the fact was so, if proof of it is admissible against the mortgagee, there is no dispute. The referee has further found, and there is no attempt to dispute the finding, that the omission to record the mortgage at Winthrop, as well as at Boston, was not due to any want of good faith on either side. It must therefore be regarded as due to the fact that the mortgagor, overlooking or not knowing the necessity of a record at Winthrop if he lived there, and believing the recital that he was of Boston, where he did business, sufficiently accurate for the purposes of the mortgage, was silent as to his residence at Winthrop, and thus misled the mortgagee. That the mortgagee was misled, and by the representation of the mortgagor, as above, there seems to be no question.

The mortgage should have been recorded, if the mortgagor lived at Winthrop and had his principal place of business at Boston, on the records of both those municipalities, in order to comply with Rev. Laws Mass. c. 198, § 1. Not having been so recorded, and the property having meanwhile remained in the mortgagor's possession, it was invalid at the time of his bankruptcy "against a person other than the parties thereto," as the same section provides.

A chattel mortgage, under which no possession has been taken, and which is invalid, except as between the parties, for want of record such as the Massachusetts statute above cited requires, is invalid by the law of Massachusetts against the mortgagor's trustee in bankruptcy, appointed under the present bankruptcy act. *Haskell v. Mer-*

rill, 179 Mass. 120, 60 N. E. 485; *Humphrey v. Tatman*, 198 U. S. 91, 93, 25 Sup. Ct. 567, 49 L. Ed. 956; *Goodrich v. Dore*, 194 Mass. 493, 80 N. E. 480. If invalid against the trustee by the local law, it is invalid against him under the bankruptcy act as construed by the Supreme Court of the United States. *Humphrey v. Tatman* (above cited) 198 U. S. 92, 95, 25 Sup. Ct. 567, 568, 49 L. Ed. 956. The want of a proper record of the mortgage, therefore, if a fact properly in the case and unexplained, concludes the mortgagee and requires a decision in the trustee's favor. This the mortgagee does not dispute; but it contends that as against it the trustee is estopped, under the circumstances shown, to deny that the bankrupt lived in Boston when the mortgage was given, or to assert that he then lived in Winthrop. If this contention is sound, whatever might be the result if the trustee were not thus estopped, there is no insufficiency in the record of the mortgage which can appear as a fact in the case, and the mortgagee's claim to the property as against the trustee is under a mortgage not shown to be invalid by the local law.

That an assignee or trustee is bound by the representations and estoppels of the debtor is a recognized general principle in bankruptcy, or at least was so up to the time the present bankruptcy act (Act July 1, 1891, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), was passed. See *Lowell, Bankruptcy*, p. 228, § 313, and cases cited. *Allen v. Whittemore*, 8 Ben. 485, Fed. Cas. No. 241, one of the cases there cited, decided under Act March 2, 1867, c. 176, 14 Stat. 517, is in some respects similar in its facts to the present case. A bill of sale of personal property, conditional upon the payment by the grantee of notes which he had given in payment for the property, recited that he lived in Burlington, Vt.; and he had set himself up as of Burlington when he purchased the property. The mortgage was recorded in Burlington. After his bankruptcy, the last note remaining unpaid, the property or payment of the note was demanded from his assignee by one who held the note and the grantor's title. The assignee resisted the demand on the ground that the bankrupt really lived in Colchester when the bill of sale was given, that it had never been recorded in Colchester, that by Vermont law its conditions were void for want of record at his residence, and that the property, therefore, belonged to him absolutely at his bankruptcy. But it was held that the trustee was estopped to deny that the bankrupt resided where he had represented himself to be residing when the bill of sale was delivered.

In the present bankruptcy act, however, express provisions are found which must necessarily tend to restrict the application of the general principle referred to, under circumstances like those of this case. By sections 67a and 70e "claims which for want of record * * * would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate," and "the trustee may avoid any transfer by the bankrupt of the property, which any creditor of the bankrupt might have avoided." It is true that "creditors," in the sections quoted, does not necessarily include all creditors without distinction, and that when, as in *York, etc., Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, the local law limits the

right to avoid a lien, valid between the parties, to such creditors only as have fastened upon the property by some specific lien while the want of record continues, and no creditor has taken any such step, the lien is valid against the trustee. But by the local law which governs the present case, if it was not recorded as that law required, the mortgage was invalid against all creditors not parties to it, without distinction. The plain language of the Massachusetts statute affords no ground for any distinction between creditors who have and creditors who have not "fastened upon" the property. Nor is there any recognition of such a distinction in the Massachusetts decisions which hold a mortgage not properly recorded invalid against a trustee in bankruptcy. According to the local law, therefore, the trustee, if allowed to prove the want of record, could have avoided this mortgage, for the reason that the lien it created would thereby have been proved invalid against the claims of the bankrupt's creditors in general.

The powers with which sections 67a and 70e vest the trustee are powers not given an assignee under the act of 1867. When, as in this case, the facts are otherwise such as to permit a trustee under the present act to exercise those powers, I do not think the general principle that he is bound by the bankrupt's representations and estoppels can be invoked to prevent their exercise. As between him and a creditor relying on the want of record and the mortgagee, the creditor would not be estopped merely by a representation which the bankrupt had made to the mortgagee. The creditor's rights depend, not upon recitals or representations of the mortgagor as to his residence, but upon the fact of such residence. *Stewart v. Platt*, 101 U. S. 731, 737, 25 L. Ed. 816. If a creditor would not be so estopped, neither is the trustee, in view of the language used in section 70e. The trustee is not a "party" to the mortgage, by the law of Massachusetts. *Haskell v. Merrill*, 179 Mass. 120, 125, 60 N. E. 485. Nor, where his powers under section 70e are concerned, can he be so regarded under the present bankruptcy act. See *In re Shaw* (D. C.) 146 Fed. 273, 278.

Section 70e, it is true, vests the trustee with "the title of the bankrupt"; and it is true, also, under the present act, for many purposes, that he "takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to the equities impressed upon it in the hands of the bankrupt." *Thompson v. Fairbanks*, 196 U. S. 516, 526, 25 Sup. Ct. 306, 49 L. Ed. 577; *York, etc., Co. v. Cassell*, 201 U. S. 344, 352, 26 Sup. Ct. 481, 50 L. Ed. 782. But all this is always subject to the qualification expressly stated in *Thompson v. Fairbanks*, 196 U. S. 526, 25 Sup. Ct. 310, 49 L. Ed. 577, "except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act." See, also, *First National Bank v. Staake*, 202 U. S. 141, 149, 26 Sup. Ct. 580, 50 L. Ed. 967.

It follows that the referee's order disallowing the mortgagee's petition must be approved and affirmed.

In re STANDARD OAK VENEER CO.

(District Court, E. D. Tennessee, N. E. D. June 21, 1909.)

1. CORPORATIONS (§ 682*)—FOREIGN CORPORATIONS—SOLVENCY—ADMINISTRATION OF ASSETS—STATE STATUTES—VALIDITY.

Acts Tenn. 1877, p. 45, c. 31, § 5, authorizing foreign corporations to do business within the state, and providing that, while the property of such corporations shall be liable for debts as the property of natural persons, resident creditors shall have priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts, over all simple contract creditors, while constitutional, as an exercise of the state's power to prescribe conditions on which a foreign corporation might enter its territory, in so far as it gave the claims of Tennessee creditors priority over those of other foreign corporations, was unconstitutional in so far as it attempted to give the claims of Tennessee creditors of a foreign corporation doing business within the state priority over those of natural persons.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2662; Dec. Dig. § 682.*]

2. CORPORATIONS (§ 682*)—FOREIGN CORPORATIONS—DISTRIBUTION OF ASSETS—PRIORITY.

Acts 1877, p. 45, c. 31, § 5, giving Tennessee creditors of a foreign corporation doing business in that state priority over the claims of other non-resident corporations in the distribution of the corporation's assets, gives Tennessee creditors a constitutional priority in the distribution of the assets of a foreign corporation over other foreign corporations likewise engaged in business in Tennessee in compliance with its statutes, where such foreign corporation has retained its principal place of business in the state of its creation, especially where its claim is based on transactions conducted through such foreign office.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2662; Dec. Dig. § 682.*]

3. CORPORATIONS (§ 682*)—FOREIGN CORPORATIONS—DISTRIBUTION OF ASSETS—COMPLIANCE WITH STATE LAWS—EFFECT.

Acts Tenn. 1877, p. 44, c. 31, authorizing foreign corporations to do business within the state, as amended by Acts Tenn. 1891, p. 264, c. 122, and Acts Tenn. 1895, p. 123, c. 81, did not make a foreign corporation doing business in Tennessee, on compliance with such act, a de facto resident of that state, with all the rights of a domestic corporation, in such a sense as to make it a Tennessee creditor, within Acts Tenn. 1877, p. 45, c. 31, § 5, giving resident creditors priority in the distribution of the assets of a foreign corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 682.*]

4. CORPORATIONS (§ 634*)—EXISTENCE—DOMICILE.

A corporation can have no legal existence outside the boundaries of the sovereignty by which it is created, and must dwell in the place of its creation, though its residence in one state creates no insuperable objection to its power to transact business in another, provided the laws of such other state permit it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2497-2502; Dec. Dig. § 634.*]

5. CONSTITUTIONAL LAW (§ 43*)—FOREIGN CORPORATIONS—BUSINESS WITHIN STATE—STATUTES—CONSTITUTIONALITY.

A foreign corporation, having complied with Acts Tenn. 1877, p. 44, c. 31, and its amendments, authorizing foreign corporations to do business in Tennessee under certain circumstances, subjected itself to the jurisdiction of the state in accordance with the terms prescribed by such act, and hence could not object that section 5, giving to natural resident persons

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

priority in the distribution of the assets of a foreign insolvent corporation, was unconstitutional, as a denial of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 43.*]

6. CORPORATIONS (§ 682*)—FOREIGN CORPORATIONS—INSOLVENCY—PROTECTION OF RESIDENT CREDITORS—NATIONAL BANKS—RESIDENCE.

Under Rev. St. § 5134 (U. S. Comp. St. 1901, p. 3454), providing that the articles of association of a national bank shall state the place where its operations are to be carried on, designating the state, territory, or district, and the county, city, town, or village, a national bank, the articles of which fixed its principal place of business at Johnson City, Tenn., should be regarded as a resident of that state, within Acts Tenn. 1877, p. 45, c. 31, § 5, giving to resident creditors of an insolvent foreign corporation priority in the payment of debts over all other creditors.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 682.*]

7. BANKRUPTCY (§ 9*)—STATE LAWS—VACATION.

The rule that the enactment of the federal bankruptcy act superseded all state insolvency or bankruptcy laws relating to persons or acts declared by Congress to be subjects of bankruptcy, applied merely to the administration of the state laws in proceedings in the state courts, and did not prevent the enforcement in federal bankruptcy proceedings of general priorities recognized by the state laws and conferred by state statutes as substantive rights, not depending on the resort to particular remedies accessible only in proceedings in the state courts, and where such priorities are not in conflict with the express priorities declared by the bankruptcy act.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 9.*]

8. BANKRUPTCY (§ 9*)—STATE STATUTES—INSOLVENCY LAWS.

Acts Tenn. 1877, p. 45, c. 31, § 5, conferring on resident creditors priority in the distribution of assets of foreign corporations doing business in Tennessee, was not a state insolvency law, but a statute prescribing conditions on which foreign corporations might do business within the state, and was therefore not superseded or affected by the bankruptcy act.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 9.*]

9. CORPORATIONS (§ 682*)—FOREIGN CORPORATIONS—INSOLVENCY—PROTECTION OF RESIDENT CREDITORS.

Claims by receivers of a foreign corporation for expert accountant's services rendered to a foreign insolvent corporation doing business in Tennessee was a claim due to the receivers personally, and not to the corporation for whom they acted, within Acts Tenn. 1877, p. 45, c. 31, § 5, giving to resident creditors of a foreign corporation priority of payment over claims due to foreign corporations.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 682.*]

In Bankruptcy. On petition of the receivers of William E. Uptegrove & Bro. to review order of referee.

J. Norment Powell, for City Nat. Bank.
Johnson & Miller, for receivers.

SANFORD, District Judge. I am of the opinion that the referee correctly held that in the administration of the estate of the bankrupt, the Standard Oak Veneer Company, a New York corporation engaged in business in Tennessee in compliance with chapter 31, p. 44, of the Acts of 1877, and its amendments, the claim of the City National Bank of Johnson City, a corporation under the national banking act, with its place of business at Johnson City, Tenn., was, under section 5 of the act of 1877, entitled to priority over the claim of the receivers.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of William E. Uptegrove & Bro., a New York corporation, which had also complied with the act of 1877 and its amendments; both the bank and the Uptegrove Company being simple contract creditors of the bankrupt, and the claim of the Uptegrove Company arising under loans made to the bankrupt from the New York office of the Uptegrove Company, where its principal office or place of business was located.

The act of 1877 provides (section 5, p. 45) that, while the property of all foreign corporations coming under its provisions shall be liable for debts as the property of natural persons:

"Nevertheless, creditors who may be residents of this state shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple contract creditors. * * *

In *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432, it was held that, while this provision of the act was unconstitutional in so far as it gave the claims of Tennessee creditors of a foreign corporation priority over those of natural persons who were citizens of other states, it was a constitutional exercise of the power of the state to prescribe the conditions upon which a foreign corporation might enter its territory for purposes of business, in so far as it gave the claims of Tennessee creditors priority over those of other foreign corporations not doing business in Tennessee under the act, or under any statute directly bringing them within the jurisdiction of the courts of Tennessee.

I am of opinion that it likewise gives Tennessee creditors a constitutional priority in the distribution of the assets of a foreign corporation over other foreign corporations likewise engaged in business in Tennessee in compliance with its statutes, where such foreign corporation has retained its principal office and principal place of business in the state of its creation, and where its claim is based upon transactions conducted through such foreign office. Without determining whether a foreign corporation engaged in business in this state, which had established its principal office and place of business in the state, might be regarded as a *de facto* resident of Tennessee in such sense as to make it a Tennessee creditor, within the meaning of the act of 1877, as to claims arising in the conduct of such business in Tennessee, I think it clear that it was not intended by the Tennessee statutes that a foreign corporation complying with the terms of the statute before doing business in Tennessee should thereby become *de jure* a Tennessee corporation within the meaning of the act of 1877, so as to place it on an equality with Tennessee creditors in all claims arising against another foreign corporation doing business in Tennessee under that act and its amendments.

While I do not think the determination of this question is necessarily controlled by the cases holding that foreign corporations which have complied with similar statutes do not cease to be citizens and residents of the states of their original creation within the meaning of statutes regulating the jurisdiction of Circuit Courts of the United States, the real question being solely one of intention of the Tennessee Legislature as expressed in the statutes in question, yet, after careful consideration of these statutes, I find no expression of intention that a foreign corporation complying with their requirements should thereby

ipso facto at the same time acquire a new residence in Tennessee and lose its original residence in the state of its creation, so as to share with Tennessee creditors of another corporation in the priorities given in favor of Tennessee creditors and against foreign creditors. In *Blake v. McClung*, 172 U. S. 239, 247, 19 Sup. Ct. 165, 168, 43 L. Ed. 432, the Supreme Court said:

"Looking at the purpose and scope of the Tennessee statute, it is plain that the words 'residents of this state' refer to those whose residence in Tennessee was such as indicated that their permanent home or habitation was there, without any present intention of removing therefrom, and having the intention, when absent from that state, to return thereto—such residence as appertained to or inhered in citizenship."

It is true that in the act of 1877 it was provided (section 3, p. 45) that foreign corporations complying with the act "shall be deemed and taken to be corporations of this state, and shall be subject to the jurisdiction of the courts of this state, and may sue and be sued therein in the mode and manner * * * directed in the case of corporations created or organized under the laws of this state," and that in the amendment of 1891 (Acts 1891, p. 264, c. 122) it was again provided in section 4 "that when a corporation complies with the provisions of this act it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this state, and subject to the jurisdiction of the courts of this state just as though it were created under the laws of this state." However, in the amendment of 1895 (Acts 1895, p. 123, c. 81) section 4 of the act of 1891 was amended so as to read as follows:

"That when a corporation complies with the provisions of this act, said corporation may then sue and be sued in the courts of this state, and shall be subject to the jurisdiction of this state as fully as if it were created under the laws of the state of Tennessee."

The significant feature of this amendment is that the previous provision of the act of 1891 that a corporation complying with its provisions should become, "to all intents and purposes, a domestic corporation," was omitted.

Construing the original act of 1877 and its amendments in their entirety, and in the light of the title of the act of 1877, describing it as an act to declare the terms on which foreign corporations may carry on business, and purchase, hold, and convey property in this state, and in view of the amendment of 1895, omitting the earlier provision that such foreign corporations shall become, to all intents and purposes, domestic corporations (the Uptegrove Company having complied with this act, it is to be noted, in 1898, three years after the passage of the amendment of 1895), I think it clear that it was not intended that a foreign corporation, by complying with these acts, should necessarily acquire a "permanent home or habitation" in this state, or be treated as a domestic corporation for other purposes than that of jurisdiction in the courts of the state, and that it was not intended that such foreign corporation, upon compliance with the acts, should become, ipso facto, a domestic corporation for all purposes, and should thereby, as a matter of law, both acquire a residence in Tennessee and lose its foreign residence, so as to entitle it to share in the assets of other foreign cor-

porations on an equality with Tennessee creditors under section 5 of the act of 1877.

In *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768, the Supreme Court, after quoting the statement in *Bank of Augusta v. Earle*, 13 Pet. 519, 588, 10 L. Ed. 274, that "a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created," and "must dwell in the place of its creation, and cannot migrate to another sovereignty," although "its residence in one state creates no insuperable objection to its power of contracting in another," said:

"This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the state by which it was created, although it may do business in other states whose laws permit it."

Not only is there nothing in any of the Tennessee acts which indicates any intention to deprive the foreign corporations complying with their requirements of their original, inherent, and inalienable character as foreign corporations and residents of the states of their original creation, but, on the contrary, the provision of section 5 of the act of 1891 (page 265) that, when such corporation has no agent in this state upon whom process may be served, it may be proceeded against by an attachment to be levied upon its property and publication as in other attachment cases, indicates affirmatively that the Legislature did not contemplate that by a mere compliance with the terms of such statute the foreign corporation would acquire a residence in this state or necessarily have a resident agent herein, and hence provided that in such cases it might be proceeded against by attachment substantially as in the case of a nonresident.

I therefore hold that the Uptegrove corporation, by complying with the Tennessee statutes, did not thereby, by operation of law, become a Tennessee corporation and resident of the state within the meaning of the provision of the act of 1877 relating to the distribution of the assets of other foreign corporations similarly situated. I furthermore hold, under the facts in this case, that, not having become *de jure* a resident of the state, it did not become *de facto* such resident, even if a foreign corporation having an inherent and inalienable residence in the state of its creation could ever become at the same time a *de facto* resident of this state within the meaning of the act of 1877, upon which question no opinion is at this time expressed.

2. I have had, however, some doubt whether, under the qualified rule stated in *Blake v. McClung*, *supra*, the denial to a foreign corporation, subjected to the jurisdiction of the Tennessee courts under the act of 1877 and its amendments, of equal participation in the assets of other foreign corporations, is an unconstitutional deprivation of its rights under the provision of the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws. I have, however, concluded on this point that, while a serious question might be raised in the case of a foreign corporation which had previously come within the jurisdiction of the state under valid legislation, this constitutional provision can have no application where the

exclusion from equal rights with Tennessee creditors is contained in the very act under which the foreign corporation complaining of the exclusion has subjected itself to the jurisdiction of the state, upon the ground that, where the state denies such equal right in the very statute exercising its undoubted authority to prescribe the terms upon which foreign corporations shall do business within the state, such denial is constitutional as against all foreign corporations who under such statute are thereafter admitted to do business within the state.

3. Upon the question which I suggested in argument, as to whether the City National Bank was to be regarded as a Tennessee creditor within the meaning of the act of 1877, I have concluded that as the principal place of business under its articles of association was fixed at Johnson City, Tenn., in pursuance of the express provisions of the national banking act (Rev. St. § 5134 [U. S. Comp. St. 1901, p. 3454]), it is to be deemed a resident of Tennessee within the meaning of the act of 1877. Furthermore, it was so treated in the proceedings before the referee, and is so described by the receivers in their petition for review, and, I think, correctly.

4. It is also urged in behalf of petitioners that, although section 64b (5) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]) provides that in the administration of the bankrupt's estate priority shall be given to "debts owing to any person who by the laws of the state or the United States is entitled to priority," the provision of the act of 1877 should be regarded as an insolvency law in reference to foreign corporations, which was superseded by the federal bankruptcy act, and that hence the priorities which it gives should not be recognized. While, however, it is true that the enactment of the federal bankruptcy act superseded all state insolvency or bankruptcy laws relative to persons or acts declared by the Congress to be subjects of bankruptcy, so that no further proceedings could be had under such state laws (1 Remington on Bankruptcy, p. 993, § 1628), yet this rule relates merely to the administration of the state laws in proceedings in the state courts, and does not prevent the enforcement in the federal bankruptcy proceedings of any general priorities recognized by the state laws, where such priorities are conferred by the state statutes as substantive rights of priority not dependent upon the resort to particular remedies accessible only in proceedings in the state courts, and where such priorities are not in conflict with the express priorities declared by the federal bankruptcy act itself or otherwise in conflict with its provisions. 2 Remington on Bankruptcy, p. 1346 et seq., §§ 2194, 2198. Furthermore, the rule relied on by petitioners can have no application to the statutes in question, which are not, strictly speaking, state insolvency laws within the general rule of suspension, but merely statutes prescribing the conditions upon which foreign corporations may enter the state for purposes of business.

5. I am of the opinion, however, that the referee was in error in allowing the claim of the bank priority over the claim of the receivers of the Uptegrove Company for the item of \$374.10, arising out of services rendered the bankrupt after they had been appointed receivers of the Uptegrove corporation by an expert accountant in their employment. This item is not a claim of the Uptegrove corporation, but is a

claim of the receivers, who appear from this record, inferentially at least, to be citizens and residents of the state of New York; and, in so far as the Tennessee statute would give Tennessee creditors priority over such claim, its provisions would be unconstitutional under the decision in *Blake v. McClung*.

An order will accordingly be entered, modifying the order of the referee in so far as priority is given to the claim of the bank over the claim of the receivers under the above-mentioned item of \$374.10, but confirming the order of the referee allowing the claim of the bank priority over that of the receivers in all other respects.

THE EDMUND MORAN.

(District Court, S. D. New York. October 14, 1909.)

COLLISION (§ 66*)—TUG AND TOW—EVIDENCE.

A collision between a navigating tug and a canal boat in tow on a hawser occurred off the Battery. No defence was offered by the tug excepting one of inevitable accident, claimed to have arisen through the breaking of a wire cable forming part of the steam steering gear. *Held* that the testimony showed lack of care in the examination of the cable from which plain defects arose, and the defence could not be sustained.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 66.*]

(Syllabus by the Judge.)

Action by John Newman and others against the steam tug Edmund Moran. Decree for libellants.

James J. Macklin, for libellants.

Carpenter, Park & Symmers, for claimant.

ADAMS, District Judge. This action was brought by John Newman, owner of the canal boat Bronx, and Thomas Hamilton, her master, to recover against the tug Edmund Moran, the damages they suffered through the sinking of that boat and the loss of the master's personal effects on board, by collision with the tug off the Battery on the 14th of May, 1908. The boat had her stern cut off, causing damages to her owner, in an alleged amount of \$1,750, and the master suffered from the accident, it is said, the sum of \$150. The boat was in tow on a hawser of the tug Glencove and proceeding slowly around the Battery to Newtown Creek, Long Island. There was no fault on the part of the Glencove or the tow and the Moran is clearly liable unless her claim of inevitable accident is sustained. She alleges as follows:

"VIII. About 6:15 P. M. May 15th, 1908, the weather being clear and little or no wind, the steamtug 'Edmund Moran' left the Battery Landing bound for the steamtug, 'Eugene F. Moran,' which was coming in from sea with a tow. The tide was flood and the wind northeast. When the 'Edmund Moran' left the Battery Landing she was heading to the westward. The wheel of the 'Moran' was put to starboard in order to go out into the river. A competent pilot was in charge of the navigation of the 'Edmund Moran'; a deckhand was forward upon the lookout. The 'Edmund Moran' left the Battery Landing with her wheel partly to starboard and proceeded under one bell. After

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the said steamtug 'Edmund Moran' had passed under the stern of a Pennsylvania steamtug with a barge alongside on her port side, the steamtug 'Glencove' was somewhat to the southward of the 'Edmund Moran' between the Battery and Governors Island proceeding up the East River. The 'Glencove' had three canal boats in tow, two of which were on two hawsers in the first tier and one boat made fast close behind the second tier. After passing the Pennsylvania steamtug the wheel of the 'Edmund Moran' was put to port in order to go under the stern of the 'Glencove's' tow. The 'Moran' was proceeding slowly under one bell. The 'Moran' failed to answer her port wheel and didn't sheer to starboard, whereupon bells were immediately given to stop and reverse and an alarm signal was given. The bells to stop and reverse were answered immediately. Before the headway of the 'Moran' was entirely stopped she struck the last boat in tow of the 'Glencove' causing her to sink. This canal boat was laden with coal. The collision occurred nearer the New York shore than Governors Island. An immediate examination was made of the steering gear of the 'Moran' when it was found that the wire or cable connection running from the steering engine to the chain on the port side, which was placed in a box, was broken. This wire or cable was made of a large number of small wires. The wire was new having only been used upon the boat but one month and there had been no indication of any inherent defects in it. The steering gear of the 'Moran' had been regularly inspected two or three times a week and there was no apparent defect in the steering gear. In answer to the alarm signals of the 'Moran' the Revenue Cutter 'Calumet' came alongside and made fast to the 'Moran' and towed her back to the Battery Landing.

IX. Said collision was not produced by any negligence or fault upon the part of the 'Edmund Moran' or those in charge of her, but was wholly produced by the perils of the sea and was an inevitable accident. There was no apparent defect in the steering gear of the 'Moran' which could be observed by any inspection. That the breaking of said steering gear was due to a latent defect and was not caused or produced by any negligence upon the part of the said 'Moran' or those in charge thereof."

The cable was $\frac{3}{4}$ of an inch in diameter and $2\frac{1}{4}$ inches in circumference, and was no doubt of ample size. It was bought on March 23d and put on the boat within 2 or 3 days. It was therefore less than 2 months old at the time of the accident and should have been in good order, as the life of these cables was generally at least 4 months. It was composed of six strands of seven wires each making in all 232 wires. The interior was of hemp. It broke in a box opposite the engine room on the port side, through which it passed in going to the quadrant of the rudder.

It was stated by the Moran that the cable was examined twice a week, Mondays and Thursdays, sometimes Fridays, by the mate and a deck hand, by opening the boxes, turning the wheel hard-a-starboard and then hard-a-port and running the fingers along the wires to determine if there was any rough surface. Those called on behalf of the Moran said there were no defects observable in the cable.

A witness, however, of some experience, the superintendent of a shipyard, was called by the libellant, who examined the cable in court and said that he found evidences of weakness in several places, which he pointed out. He said:

"You can see by the outside where it gets worn by traveling on the sheaves; it is shown by the appearance, and also by the feeling. * * * It appears to have been worn for some time. Q. What is there to tell you that? A. The wear—the wear of the rope; that is the amount of wear on the strands; on the wire itself. * * * Q. Will you point out where it is, showing us a defective condition? A. Yes, sir. Here is one place here between these little strands, the outside strands of the wire. Q. Well, the wire didn't part where

you have got your finger, did it? A. No, but it shows that it has been worn; and this point where it has parted was its weakest point. * * * Q. You rub your fingers over this cable where there is a great deal of oil and grease? A. Yes, sir. Q. And you think you can find something connected with it to show that it was worn; what is that something? A. Well, the wearing of the rope itself shows that it has considerably more wear at these points. Q. Does it turn up any rough edges about it; do you feel any rough edges where this wear has taken place? A. Yes sir, on these strands; some of them are very rough. Q. Which strand are you testifying about? A. Right where the rope is greased. Q. Where do you find any edges turned up on those strands; you put your finger on the spot where you say the outside is right in the immediate locality of where the strand parted before the collision, and tell me where there is any indication of defective condition of this rope? A. Here is a place right (indicating the place); and here is another one, and here is another one; the wire is parted here, and here is another one. Q. What did you find there; you have indicated that you found this and that and the other; what did you find? A. I found the wire broken. Q. Will you point out to the court where those wires are broken? A. Yes, sir, these strands at this point here, are all broken; that is, the wires; and here is another one; there are two or three broken there, and here are two or three. Q. What do you call what is broken? A. The center strand of the wire; the wires that make up the strands. Q. You mean the center wire under the strand? A. Yes sir. Q. Do you know how many wires make up the whole rope? A. I don't know just how many there are. Q. How many do you think there are? A. Around two hundred or more.

By the Court: Q. How far is the place that you think is defective from the place where it broke? A. It appears to be about ten feet."

An inspection of the cable offered in evidence fully sustains this testimony. It is a clear case of *Res ipsa loquitur*.

I doubt very much if the examination was made once or twice a week, as claimed, but in any event, the defects which must have existed were not discovered. The claimant admits that cables of this character need constant watchfulness and doubtless when that is given they can be safely used but in its absence they are liable to break and cause damage.

There will be a decree for the libellants, with an order of reference.

LYONS v. WESTWATER.

(Circuit Court, W. D. Pennsylvania. October 7, 1909.)

No. 42.

BILLS AND NOTES (§ 96*)—CONSIDERATION—ACCOMMODATION NOTES—LIABILITY TO RECEIVER OF PAYEE.

A national bank, desiring to increase its capital, found it necessary to dispose of 300 shares of the increased stock before it could do business on the increase. In order to deceive the Comptroller, it induced L. to give his note for the price thereof, which was passed into the assets of the bank, and the stock issued to one of the bank's officers, the certificate being held by the bank, the intention being to sell the stock as occasion offered and apply the proceeds to the note. L. received nothing for the note, paid no interest thereon; the dividends from the unsold stock received by the officer holding the stock being applied thereto. L. having failed in business, and it being necessary to substitute other paper for the note, one of the bank's officers procured defendant, who had no knowledge of the preceding facts, to execute his note to the bank on the cashier's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

agreement that he should not be liable thereon, the cashier as part of the transaction writing defendant a letter reciting that it was expressly understood that defendant should not be liable on the note and that the bank would return the same to defendant on request without payment. Defendant renewed the note from time to time, paid no interest thereon, and received no dividends on the stock. *Held*, that the bank's receiver was not entitled to enforce the note against defendant; there being no showing that it was necessary to pay creditors after the enforcement of stockholder's liabilities.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 165; Dec. Dig. § 96.*]

Action by Robert Lyons, as receiver of the Cosmopolitan National Bank, against James Westwater. On plaintiff's motion for a new trial and for judgment non obstante veredicto. Motion denied.

McCleave & Wendt, for plaintiff.

E. Y. Breck, for defendant.

BUFFINGTON, Circuit Judge. This is a motion by plaintiff for a new trial and for judgment non obstante veredicto. We find no sufficient grounds to warrant a new trial. No motion for continuance was made when the letter from the cashier was put in evidence, and we have no assurance now that any additional testimony bearing on such letter could be produced on a retrial.

The suit was brought by Robert Lyons, receiver of the Cosmopolitan National Bank, against James Westwater, to recover the sum of \$37,500, being the amount of a note of his which was found among the assets of the bank on the appointment of Lyons by the Comptroller of the Treasury. On the trial it appeared that prior to the note in suit the bank desired to increase its capital stock from \$200,000 to \$500,000. Under the law this increase had to be subscribed and paid in before the bank would be permitted to do business on such increased capital. The increase was all subscribed for save 300 shares. To enable it to do business the bank, without the knowledge of the Comptroller, through some of its officials, had one Lyon give his note to it for \$37,500; that being the price of 300 shares at \$125 per share. This note was passed into the assets of the bank, and thereupon the latter issued to one of its officers its certificate for the unsubscribed for 300 shares. This certificate was held by the bank; the intention being to sell the stock as occasion offered and apply the proceeds to the payment of the Lyon note. Lyon received nothing for his note and paid no interest upon it; the dividend from the unsold stock being received by one of the bank officials and applied thereto. In this way the Comptroller was deceived, and led to issue a permit to the bank to do business on the basis of increased capital. Later on Lyon failed, and the bank examiner and Comptroller required the directors to have his note paid or substitute some good paper therefor. Thereupon McKinnie, one of the bank's officers, applied to Westwater, the defendant, who was a warm personal friend of his, but who was in no way interested in the bank and had no knowledge whatever of the preceding facts, and what happened is stated in the testimony of the two. McKinnie said:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"I told him I would like to have him accommodate by making a note for \$37,500. We had a note in the bank for \$37,500 we had to take out, and that we had 300 shares of stock that lay there in the bank; that, as soon as we could sell it, we would pay the note, and that there would be no liability to it; that we would hold him harmless from liability. I told him I would have the cashier give him a letter to that effect."

Westwater said:

"I was over here on a matter of business, stopping at the hotel, when Mr. Frank McKinnie came to me and asked me to make a note for \$37,500 in favor of his uncle, Mr. Bean, as a matter of accommodation to him; that he wanted to use the note in the bank; and that he would have the bank send me a letter notifying me that I was not held responsible on that note. It was a mere accommodation, and I was not to be held responsible on that note. I told him with that understanding I would do it for him; gladly do it for him. I made out the note, or he did. I signed it. Then he had his uncle, Mr. Bean, sign it, as the note was payable to Mr. Bean, and the next day after I got home to Columbus, Ohio, I received a letter from the cashier of the bank regarding the note."

The letter of the cashier was as follows:

"Mr. James Westwater, Columbus, Ohio. "Pittsburgh, Pa., Feb. 23, '09.
 "Dear Sir: Your note for \$37,500, for four months, to the order of H. R. Bean, received from Mr. McKinnie this A. M. It is explicitly understood that there is no liability attached to you for this note, the same being used by Mr. McKinnie as a substitute for another note. We hereby agree to return the same to you at any time on request without payment being made for the possession thereof. Very Truly Yours, D. J. Richardson, Cashier."

Westwater renewed the note from time to time until the note in suit was given. Other than as stated by him above he had no knowledge of prior transactions, that Lyon had given a note, or that McKinnie was bail upon it. He paid no interest at renewals, the bank applying the dividends on the 300 shares of its own stock it held to such interest payment. On the trial there was no proof that the proceeds of this note was or will be required to pay creditors. Under the authorities (*Bushnell v. Leland*, 164 U. S. 684, 17 Sup. Ct. 209, 41 L. Ed. 598; *Studebaker v. Perry*, 184 U. S. 258, 22 Sup. Ct. 463, 46 L. Ed. 528; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476; *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168; *McCormick v. Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. Ed. 817), the Comptroller having exclusive power to levy assessments on stockholders for the payment of creditors, this court having no power to determine whether an assessment is necessary and the proof being that the creditors have already been paid 50 per cent. of their claims from the assets, that assets still remain unliquidated, and that the Comptroller has only assessed the stockholders 45 per cent., we are justified, in the absence of all proof on the subject, in assuming that the fruit of a judgment in this case would not be used for the payment of creditors, but in relief of stockholders and to reimburse them for the assessment the Comptroller has laid to liquidate the indebtedness of the bank. Now, it is clear that if the bank had sought to enforce this note prior to the receivership, and no rights of creditors were involved, it could not have done so. Westwater was not a party to, or indeed had any knowledge of, the original wrong which the bank, through its officers, had consummated. No questions of knowledge by the bank or ratification by it of acts of its officers

were involved so far as he was concerned. The acts had been done. The bank was doing business on the enlarged capital. It had issued a certificate for the stock to its own officer. It was applying the dividends on this stock to the interest of the Lyon note. It was enjoying the fruits of its officers' acts. Manifestly under such conditions it could not have recovered on this note from Westwater. And the receiver "takes subject to all claims and defenses that might have been interposed against the insolvent corporation." *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Fisher v. Simons*, 28 U. S. App. 95, 64 Fed. 311, 12 C. C. A. 125; *Casey v. La Société*, 2 Woods, 77, Fed. Cas. No. 2,496. Banks as well as individuals are bound to be honest, and, as it would have been highly inequitable for this bank prior to the receivership to have collected this note for its stockholders, it is equally inequitable to do so after the receivership.

We accordingly deny the receiver's motion for judgment non obstante veredicto, and direct the clerk to enter judgment in favor of the defendant.

UNITED STATES v. TRAYNOR.

(District Court, E. D. Tennessee, S. D. March 20, 1909.)

No. 3,130.

1. BAIL (§ 79*)—BREACH OF CONDITION OF RECOGNIZANCE—RELIEF FROM LIABILITY—FEDERAL STATUTE.

Under Rev. St. § 1020 (U. S. Comp. St. 1901, p. 719), which authorizes a federal court to remit the penalty of a forfeited recognizance "whenever it appears to the court that there has been no willful default of the party," etc., such remission may be made, although the term has expired at which final judgment was taken on the recognizance under a writ of scire facias.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 79.*]

2. BAIL (§ 79*)—FORFEITURE OF RECOGNIZANCE—RELIEF FROM LIABILITY.

The sureties on a criminal recognizance held entitled to a remission of a part of the penalty for which judgment was taken against them on its breach where the defendant was afterward rearrested, convicted, and served his sentence.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 350-369; Dec. Dig. § 79.*]

On Application of Sureties for Remission of Judgment on Recognizance.

Jas. R. Penland, U. S. Atty.
Bright & Early, for Traynor.

SANFORD, District Judge. 1. I am of the opinion that under Rev. St. § 1020, re-enacting Act Feb. 28, 1839, c. 36, § 6, 5 Stat. 322 (U. S. Comp. St. 1901, p. 719), the court has authority in its discretion to remit the whole or any part of the penalty of a recognizance in a criminal case forfeited by breach of condition, even although the term has expired at which a final judgment was taken on the forfeited recognizance under a writ of scire facias. While it is true that, gen-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

erally speaking, all final judgments of a court pass beyond its control, unless steps be taken to set aside, modify, or correct them during the term at which they were entered, except in certain cases where correction of a judgment may be made at a subsequent term under a writ of error *coram vobis* (*Brooks v. Railroad Co.*, 102 U. S. 107, 26 L. Ed. 91; *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797), I think that an exception is made in the case of a forfeited recognizance by the broad and unqualified provision in Rev. St. § 1020, that the penalty may be remitted "whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced." There is nothing in this statute indicating any intention to limit the power of the court in this matter to the term at which a judgment is rendered, and, in view of the use of the broad and unrestricted term "whenever," I think the statute must be construed as vesting discretion in the court so long as the enforcement of the penalty remains otherwise within the control of the court, and therefore that so long at least as the money collected under the execution remains in the registry of the court and has not been covered into the United States Treasury the court is authorized to remit the penalty in whole or in part.

While it is true that it was said by Attorney General Cushing in 1854, in 6 Opin. Atty. Gen. 408, that, after the proceedings under a forfeited recognizance had "reached the final point of return of execution to judgment in *scire facias*," they had passed beyond the point at which the court could remit, this was merely said *arguendo* in determining the question as to whether in the case before him upon which he was expressing an opinion the President had the right of pardon, and, while the act of 1839 (5 Stat. 321, c. 36) is cited in his opinion, no reference is made whatever by him to its broad and unrestricted provisions nor is any reason given for the opinion expressed by him. On the other hand, it was subsequently held by the District Court for the Western District of Pennsylvania in 1863, in *United States v. Duncan*, 2 Pittsb. Rep. 328, Fed. Cas. No. 15,004, in a case where, as appears from the facts, a final judgment had been rendered against the bondsmen under a *scire facias* two years before the application made by the bondsmen for a remission of the judgment, that the court might extend such relief after judgment, even although it had become a debt of record against the defendant in favor of the United States, under the provisions of the act of February 28, 1839 (5 Stat. 321, c. 36), which was held to be simply in affirmance of the common-law power of the court. This appears to be the only case directly in point upon this question, although in the later case of *United States v. Barger* (C. C.) 20 Fed. 500, decided by the same District Court in 1884, it was held that a forfeiture might be set aside during the term at which it was entered, being then still under the control of the court, thereby implying that it could not be set aside after such term. Yet as this was not expressly held and no reference was made to the *Duncan* Case, the latter case cannot be said to have been overruled by a mere implication which, even if expressly stated, would, at most, have been a dictum.

I am further advised that in at least two unreported cases in this court the same conclusion was reached by Judge Clark, it being held by him, as I am informed, in the case of *United States v. Wilson*, and in another case from Fentress county, that the court had authority to remit a judgment of this character even at a subsequent term to that at which it had been rendered.

2. Upon the merits of this application, I am of the opinion that while the bondsmen were negligent in failing to give heed to the scire facias which had been served upon them and in failing to appear in court at the May term, 1907, to show cause why the conditional judgment that had been taken in December, 1906, under the recognizance, should not be made final, nevertheless, as it does appear that the defendant was arrested under an alias capias after the forfeiture had been declared on the bond and subsequently appeared, and, under sentence of the court, served out his term of imprisonment, the case is one in which the court should in its discretion remit part of the penalty of the bond. As was said by Chief Justice Marshall in *United States v. Feely*, 1 Brock. (U. S.) 255, Fed. Cas. No. 15,082, it is not the object of a recognizance "to enrich the treasury."

An order will therefore be entered remitting all that portion of the original judgment under the scire facias except such sum as is necessary to satisfy and discharge all costs accrued upon the scire facias, including the costs incident to this application, and also all costs which accrued in the criminal prosecution of the defendant Traynor, and directing that the remainder of the sum collected from the bondsmen under the execution, and now in the registry of the court, after paying such costs, be refunded to the bondsmen or to their attorneys of record.

In re SOPER.

(District Court, D. Nebraska, Hastings Division. June 26, 1909.)

1. BANKRUPTCY (§ 399*)—EXEMPTIONS—PREFERENTIAL TRANSFER OF PROPERTY.

Where a bankrupt made chattel mortgages within four months prior to his bankruptcy, which were surrendered by the mortgagees as preferences, the effect was to restore the property to the bankrupt's estate as if no mortgage had ever existed upon it; and the bankrupt may claim his exemption therein, free from any claim of the mortgagees, and the mortgages are not revived as to the property so selected.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 399.*]

2. BANKRUPTCY (§ 400*)—EXEMPTIONS—DUTY OF TRUSTEE TO DELIVER EXEMPT PROPERTY.

It is the duty of a trustee in bankruptcy, who has set off to the bankrupt personal property selected by him as exempt, pursuant to an order of the referee, and reported the same, to which report no exception was taken, to deliver possession of such property to the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.*]

In Bankruptcy. On review of action of referee.

F. A. Mulfinger, for bankrupt.

Tibbets, Morey & Fuller and Paul Boslaugh, for trustee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

THOMAS C. MUNGER, District Judge. Lewis A. Soper filed a petition in voluntary bankruptcy, and an order of adjudication was duly made, and thereafter a trustee was appointed. The bankrupt had given to some of his creditors a chattel mortgage on certain personal property within four months of the adjudication, and these creditors filed with the referee a surrender of the mortgage as a preference, admitting it to be a preference, but asserting the mortgage to be a lien upon certain property included in the mortgage which the bankrupt claimed as exempt. The claims of the creditors were allowed by the referee for the full amount against the estate of the bankrupt. The bankrupt set up his exemptions in his original petition, filed with the referee a demand that his exemptions be set off for him, and asked for an order upon the trustee setting off such exemptions. The referee ordered the trustee to set off and deliver to the bankrupt his exemptions as they should be selected by him. The trustee filed a report, following, in substance, the forms prescribed by the Supreme Court (form No. 47),¹ containing a list of the property designated and set apart to be retained by the bankrupt, with the value of each article. At a later date the bankrupt moved the referee for an order citing the trustee to show cause why he failed to place the bankrupt in possession of the property ordered delivered to him as exempt. After a hearing, in which there was no evidence offered, the referee refused to enter any of the orders prayed for by the bankrupt, and the bankrupt filed his petition for review.

The facts as set forth in the petition of the bankrupt for an order upon the trustee are undisputed. To the trustee's report setting aside the exemptions to the bankrupt no exceptions have been filed. The trustee's report was filed June 18, 1908. General order No. 17² requires the trustee to make report of the exempt articles set off to the bankrupt, with the estimated value of each article, and provides that any creditor may take exceptions to the determination of the trustee within 20 days after the filing of the report, and that these exceptions may be argued before the referee, and may be certified to the court for final determination, at the request of either party. The trustee was acting under an order of the referee, dated June 18, 1908, which directed the trustee to set off and deliver to the bankrupt the exemptions selected by him. The trustee's duty under this order was not only to designate the articles belonging to the bankrupt as his exemptions, and to affix a value to each of the said articles, but also to deliver the possession of such articles to the bankrupt. It is shown that the trustee has not delivered the possession of the exempt articles to the bankrupt. The trustee was in possession of such articles prior to the time of making his report, but upon setting them aside as exempt the title to them was no longer in the estate of the bankrupt: *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. The trustee was entitled to possession only until he ascertained that such articles were exempt, and thereupon it became his duty to deliver such articles to the bankrupt.

The case has been presented upon the theory that the bankrupt, by giving a mortgage to secure certain of his creditors, was guilty of a

¹ 18 Sup. Ct. xii.

² 89 Fed. viii, 32 C. C. A. xix.

preference, and that, upon the trustee's recovering the property so conveyed, the bankrupt was not entitled to claim his exemptions in such property, as against the trustee, citing *In re White* (D. C.) 109 Fed. 635; *In re Long* (D. C.) 116 Fed. 113; *In re Evans* (D. C.) 116 Fed. 909; *In re Coddington* (D. C.) 126 Fed. 891. These cases hold that where a bankrupt conveys or mortgages property, and the transaction amounts to a preference, after the trustee has been put to the expense and inconvenience of recovering the property so conveyed, the bankrupt cannot claim his exemptions in such property.

The effect of the surrender of the preferences received by the creditors was to restore the property of the bankrupt to his estate as if no mortgage had ever been made upon the property. The bankrupt has not lost his right to claim his redemptions, unless it is because of the mortgage given by him. The trustee did not obtain the property under this mortgage, but in hostility to it. It came into his hands unburdened by the mortgage, and as if the mortgage had never been given. Therefore neither the trustee nor the bankrupt are estopped by the terms of the mortgage. From the time the trustee took the property until such time as the bankrupt should assert his claim of exemptions, the trustee had the title to all of the property, and the mortgage was no lien upon any portion of it. Upon the assertion of the right of the bankrupt to his exemptions, the mortgage was not revived upon the articles selected as exempt. The title of the bankrupt is a new title, in effect antedating the mortgage, because the mortgage was given within four months of the bankruptcy. Upon the restoration of this property to the bankrupt's estate, it was subject to the exemptions of the bankrupt. *In re Falconer*, 110 Fed. 111, 49 C. C. A. 50; *Bashinski v. Talbott*, 119 Fed. 337, 56 C. C. A. 241; *In re Talbott* (D. C.) 116 Fed. 417; *In re Schuller* (D. C.) 108 Fed. 591.

The question now presented is not as to the right to have such exemptions declared or set aside to the bankrupt, but as to the effect of the order of the referee, and of the setting aside of such articles by the trustee. No exceptions were taken to these acts of the referee and trustee, and they have become final. The trustee's report setting aside the exemptions of the bankrupt is not a mere statement of the abstract right of the bankrupt to such exemptions, nor is the bankrupt required to proceed in the state courts to recover such exempt articles from the trustee. It is the duty of the trustee to surrender his possession of the personal property which he set apart to be retained by the bankrupt as exempt, and the bankrupt was entitled to the order asked for, requiring the trustee to show cause why he failed to place the bankrupt in possession of the property.

In re LEVIN.

(District Court, S. D. New York. April, 1909.)

1. BANKRUPTCY (§ 159*)—PREFERENCES—SECURED CLAIMS—PLEDGES.

Where a bankrupt obtained advancements on account of goods alleged to have been sold to merchants in distant cities, and thereafter obtained advances on account of goods falsely represented to have been sold, agreeing that claimants should be secured for such advances by the goods themselves, such agreement did not constitute an unlawful preference, but entitled claimants to retain the proceeds of the goods and to have their claim allowed for the deficiency.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 247; Dec. Dig. § 159.*]

2. BANKRUPTCY (§ 342½*)—FINDING BY REFEREE—REVIEW.

A finding of fact by a referee as to the existence of a contract between claimant and the bankrupt ought not to be set aside by the court on a petition for review, unless prejudice or ill will is apparent or there is a total lack of evidence to support the finding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. § 342½.*]

3. ASSIGNMENTS (§ 78*)—SECURITIES—REMEDY.

The assignment of a debt carries with it every remedy and security available by the assignor as incident thereto, though they are not specially named in the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 145; Dec. Dig. § 78.*]

4. ASSIGNMENTS (§ 24*)—CLAIMS ASSIGNABLE—TORT.

The cause of action for a mere tort is not assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 42-46; Dec. Dig. § 24.*]

5. ASSIGNMENTS (§ 76*)—CLAIMS ASSIGNABLE—ASSIGNMENT OF EVIDENCE OF DEBT.

In the absence of an agreement, express or implied, to transfer property or to create a lien thereon, the mere assignment of the evidence of a debt will not transfer the incidents thereto, unless the debt itself is assigned.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 143; Dec. Dig. § 76.*]

6. CARRIERS (§ 56*)—BILL OF LADING—TRANSFER.

Delivery of a bill of lading without written indorsement, if made with the intention of passing title to the goods, is sufficient therefor.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 168; Dec. Dig. § 56.*]

In the matter of Louis Levin, bankrupt. On petition by the bankrupt's trustee for review of the referee's allowance of a claim of M. L. & C. Ernst. Affirmed.

The following is the opinion of the referee:

DENTER, Referee. Messrs. M. L. & C. Ernst were bankers in the city of New York, whose business consisted mainly of making loans to merchants on their accounts receivable. The bankers did not make a practice of loaning on warehouse receipts or goods in store. On June 10, 1903, one Rosenthal, a commission merchant and broker, introduced to the bankers Louis Levin, with whom they had had no previous acquaintance or dealings, for the purpose of negotiating loans from them on notes of Levin secured by assignment of accounts, among others an account of Weinstock, Lubin & Co., merchants in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

San Francisco. Mr. Ernst said he was willing to loan on the transfer of the accounts as soon as he could "get acknowledgments," or have the accounts properly verified; but on Levin's urging an immediate advance, and stating that "we will pledge the goods and the accounts," Rosenthal was instructed to verify the orders and to see that the goods were about to be shipped, and to report to Ernst, which was done. The Weinstock order appeared to be regular, and the goods in cases were closed and marked in Rosenthal's presence, ready for shipment, and the first loan of \$1,825 was made. The itemized account and assignment were delivered to the bankers, together with a bill of lading in the usual form, as well as the truckman's receipt. On June 11th a similar transaction occurred with reference to an account of one Filene, in Boston, and \$450 was advanced. Both of these accounts represented bona fide orders for goods, and were legitimate, although sundry reclaims were subsequently made by the consignees by reason of alleged shortages, overbilling, and trade discounts. There was subsequently collected by the bankers on the Filene account the sum of \$471.47, and on the Weinstock account \$1,475.25—total, \$1,496.72—which was duly credited to the Levin account.

Having thus won the confidence of the bankers, Levin proceeded to work a barefaced fraud on them. At various dates between June 15th and June 25th he assigned sundry accounts purporting to represent goods sold to merchants in distant cities and received advances on similar terms, amounting to \$6,548. It does not appear that there was any further examination of the goods to be shipped, or any further conversation as to security; but in each instance, before the advance was made, bills of lading in the usual form covering the shipment of goods to the consignee mentioned in the account were delivered by Levin or his representatives to the bankers, together with the truckman's receipt showing the delivery of the goods for shipment. All of these last-mentioned accounts proved entirely fictitious and were repudiated by the consignees, as the goods had never been ordered. Before the discovery of the fraud Levin had absconded, and a petition in bankruptcy was filed against him on June 29, 1903. The bankers, after correspondence with the various consignees, were convinced of the fictitious nature of the accounts, and proceeded to realize on the goods to the best advantage possible. Some goods were sold to the consignees at half price to close out the matter and save freight charges if reshipped. In other instances the goods were returned to the bankers and disposed of by them as well as they were able. In this way they recouped their loss to the extent of \$3,992.14, having paid out in freight, telegrams, and other expenses \$279.04. A proof of claim was filed April 22, 1904, for \$3,462.58. The trustee considers the amount of the claim to be correct, but objects to its allowance on the ground that the taking and retention of the goods above mentioned constituted an unlawful preference to the claimants, which they should surrender before the claim can be allowed.

It is a well-settled rule of law that the assignment of a debt carries with it every remedy and security for such debt available by the assignor as incident thereto, although they are not specially named in the instrument of assignment. *Am. & Eng. Ency. Law*, vol. 2, 1084; *Craig v. Parkis*, 40 N. Y. 181, 100 Am. Dec. 469; *Itose v. Baker*, 13 Barb. (N. Y.) 230. But it is with much force urged by the learned counsel for the trustee that, conceding the rule to be as above stated in cases where there was a bona fide sale and a valid claim capable of assignment, it can have no application to this case, where the sales were entirely fictitious and there never was a valid and assignable account. He cites as controlling the opinion of Judge Hough in the case of *Pratt v. Columbia Bank*, hereto annexed, where the same bankruptcy frauds were under consideration. This opinion is supplementary to the main decision reported in 157 Fed. 137, 18 Am. Bankr. Rep. 406, and was rendered on the settlement of the decree in that case. Judge Hough says, with relation to the Levin frauds: "The bankrupt could not create an equity in favor of the Columbia Bank by working a fraud on the bank and his other creditors. It is an ineradicable objection to this allowance that there never was any such account."

This decision concisely states the law as I understand it, and would be conclusive of this proceeding, if the facts were the same. Of course, a chose in action for a mere tort is not assignable, and an attempted assignment is void, and confers no rights on the assignee. *People v. Tioga Com. Pleas*, 19 Wend. (N. Y.) 73; *Pulver v. Harris*, 52 N. Y. 73. And it is true that in the absence of

an agreement, express or implied, to transfer property or to create a lien thereon, the mere assignment of the evidence of a debt will not transfer the incidents thereto, unless the debt itself is assigned. *Battle v. Coit*, 26 N. Y. 404.

If the Ernst firm held only fictitious accounts as security, it may be conceded that they could not claim the goods shipped merely in furtherance of the fraud and to deceive the bankers. But I find, on a careful examination of the testimony, that there was an oral agreement between Levin and Ernst at the first interview to secure the bankers by the goods themselves and to subrogate the bankers to all the rights therein which Levin had. The delivery of the bills of lading without a written indorsement, if made with the intention of passing the title to the goods, is sufficient to effect that purpose. *Rochester Bank v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Marine Bank v. Wright*, 46 Barb. (N. Y.) 45; *Merchants' Bank v. Railroad Co.*, 69 N. Y. 376. The intention of the parties will be enforced in equity, and Levin's debt to the bankers, therefore, stands as a secured, and not as a preferred, claim. *In re Busby* (D. C.) 124 Fed. 469, 10 Am. Bankr. Rep. 650.

The lien thus created having been accepted in good faith, and not in contemplation of or in fraud upon the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), and for a present consideration, it is not affected by the act (section 67d), and hence the claimants are entitled to retain the proceeds of the goods sold by them, and to have their claim allowed for the deficiency.

So ordered.

Julius Henry Cohen, for petitioner.

Ernst, Lowenstein & Cane (Bernard M. L. Ernst, of counsel), for claimants.

HOUGH, District Judge. The interesting nature of the question suggested in argument has led me to carefully consider the evidence. The referee has found, as matter of fact, that there was an agreement between Levin and Ernst to secure the Ernsts "by the goods themselves." If there was such an agreement, it should be carried out in equity, no matter how inappropriate were the means adopted for putting the agreement in force, so long as such means were not unlawful. This finding of fact is at the bottom of the whole case, and without disregarding it the referee's decision cannot be upset.

It is not and cannot be denied that there is evidence to support this finding, and such evidence was given before the referee and presumably in his hearing. It is sufficient to refer to the testimony of M. L. Ernst. This case is one, in my judgment, calling for the application of what I believe to be the most salutary rule of litigation, viz., that a finding of fact made by a trial court ought never to be disturbed or upset, unless prejudice or ill will is apparent or a total lack of evidence to support the finding is demonstrated. By adopting the referee's finding of fact I think the case is disposed of.

The petition of review is dismissed.

In re ACRETELLI.

(District Court, S. D. New York. March, 1909.)

1. DOWER (§ 39*)—NATURE OF ESTATE—EXTINGUISHMENT.

A wife's inchoate right of dower, though not a lien, nor an estate nor interest in land, is nevertheless a substantial right, possessing in legal contemplation many of the incidents of property, one of which is the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

capacity of extinguishment at the instance of the wife in favor of her husband, or his assignee or trustee in bankruptcy.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 155, 156; Dec. Dig. § 39.*]

How inchoate right extinguished, see note to *Black v. Elkhorn Mining Co.*, 3 C. C. A. 316.]

2. DOWER (§ 49*)—ASSETS—LAND—SALE—RELINQUISHMENT OF DOWER.

Where a bankrupt's wife, by letter to his trustees, agreed to extinguish her dower interest in her husband's real estate for a specified price, she thereby consented to a sale of the real estate free from her dower interest, which the court thereupon had power to order.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 157; Dec. Dig. § 49.*]

In the matter of one Acretelli, bankrupt. On application by the trustees for the sale of the bankrupt's real estate free from the inchoate dower interest of the bankrupt's wife. Application granted.

Sternberg, Jacobson & Pollock (Henry W. Pollock, of counsel), for trustees.

James C. Church, for bankrupt's wife.

HOUGH, District Judge. It cannot, I think, be doubted that an inchoate right of dower is not a lien, nor an estate nor an interest in land; yet it is declared to be a substantial right, possessing in contemplation of law many of the incidents of property. The only incident which need be considered upon this motion is that it is capable of extinguishment at the instance of the wife and in favor of her husband, assignee, or transferees.

The husband's trustees in bankruptcy are undoubtedly in a position to receive such extinguishment, and Mrs. Acretelli has by her letter, of February 3d agreed to extinguish at a stated price. She has, therefore, consented that her bankrupt husband's real estate be sold free from her inchoate right of dower, and it was held in *Savage v. Savage*, 15 Am. Bankr. Rep. 599, 141 Fed. 346, 72 C. C. A. 494, 3 L. R. A. (N. S.) 923, that the right to make such a sale inhered in the bankruptcy court upon the wife's consent. The right to make the sale presupposes the power to compel it (the consent once given).

On the authority of the case cited, therefore, the motion will be granted.

UNITED STATES v. MOORE et al.

(Circuit Court, D. Oregon. October 11, 1909.)

No. 2,907.

1. CONSPIRACY (§ 43*)—INDICTMENT—CONSTRUCTION.

An indictment charging that defendants did conspire, combine, confederate, and agree together to defraud the United States, by corruptly and for their own gains administering and procuring the administration of Act Cong., March 3, 1901, c. 853, 31 Stat. 1133 (U. S. Comp. St. 1901, p. 3769), appropriating money to survey public lands, in a manner contrary to the true intent and purpose thereof, and wasteful of the money so appropriated and apportioned, prejudicial to the welfare and interest of the United States and the public service thereof, did not charge a conspiracy

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to defraud the government of its money or property, but charged a conspiracy to defraud the United States by corruptly administering an act of Congress.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 97; Dec. Dig. § 43.*]

2. CONSPIRACY (§ 33*)—PURPOSE—ADMINISTRATION OF STATUTE.

A conspiracy to defraud the United States by corruptly administering an act of Congress, contrary to the true intent and policy thereof, constitutes an indictable offense under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), prohibiting a conspiracy to defraud the United States in any manner or for any purpose.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. § 33.*]

3. CONSPIRACY (§ 33*)—STATUTE—"DEFAUD."

The term "defraud," as used in Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), prohibiting a conspiracy to defraud the United States in any manner or for any purpose, should not be construed as limited to frauds respecting property rights, but includes the deprivation of any right by deception or artifice; the act being intended to secure the wholesome administration of the laws and affairs of the United States in the interests of the government.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 97; Dec. Dig. § 33.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1947-1949; vol. 8, p. 7631.]

4. CONSPIRACY (§ 23*)—DEFENSE.

A conspiracy consists of a combination between two or more persons to do a criminal or an unlawful act, or a lawful act by criminal or unlawful means, including, as an essential element, a corrupt motive.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 32; Dec. Dig. § 23.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

5. CONSPIRACY (§ 43*)—INDICTMENT—MOTIVE.

In an indictment for conspiracy, the corrupt motive may be alleged, either by charging that the object of the conspiracy is to accomplish an unlawful act, in which case the intent is made to appear by the charge of a combination to do the unlawful act, or by charging a combination to do the lawful act, or the act innocent in itself by unlawful means, where the intent must appear by an allegation of the means.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 86, 88; Dec. Dig. § 43.*]

6. CONSPIRACY (§ 43*)—INDICTMENT—MOTIVE.

Where it is alleged that certain persons confederated to do a lawful act by criminal means, the indictment must charge that the means employed were attended by a corrupt motive.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 86, 88; Dec. Dig. § 43.*]

7. CONSPIRACY (§ 33*)—FRAUD—COMPLETION OF OFFENSE.

Where a conspiracy is formed to defraud the United States in any manner, in violation of Rev. St. § 5440,¹ the offense is complete when the conspiracy is formed, and the conspirators are subject to prosecution whenever one or more of them has done any act in the furtherance of the unlawful scheme devised and agreed on; it being, therefore, sufficient that the conspiracy, when formed, was attended with corrupt motives and was for a corrupt purpose.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. § 33.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

¹ U. S. Comp. St. 1901, p. 3676.

S. CONSPIRACY (§ 43*)—FRAUD—CORRUPT MOTIVE.

An indictment for conspiracy, alleging that defendants conspired to procure the maladministration of Act Cong. March 3, 1901, c. 853, 31 Stat. 1133 (U. S. Comp. St. 1901, p. 3769), appropriating money for the survey of public lands in a specified order, by procuring the use of such funds for the survey of lands which were nonagricultural and the subject of fictitious entries, sufficiently charged the conspirators' corrupt purpose, and was therefore not objectionable for failure to allege that defendants had guilty knowledge of the falsity of the entries.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 88; Dec. Dig. § 43.*]

Rufus Moore and others were indicted for conspiracy. On demurrer to the indictment. Overruled.

The pending controversy is upon the demurrer to an indictment charging the defendants with having entered into a conspiracy to defraud the government. The indictment presents that, by an act of Congress entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes," approved March 3, 1901 (31 Stat. 1133, c. 853 [U. S. Comp. St. 1901, p. 3769]), the sum of \$325,000 was appropriated for surveys and resurveys of the public lands of the United States, to be immediately available. In expending the appropriation preference is required by the act to be given, first, in favor of surveying townships occupied, in whole or in part, by actual settlers, and lands granted to the states by certain designated acts; second, to surveying under such other acts as provide for land grants to the several states, except railroad land grants, etc.; other surveys to be confined to lands adapted to agriculture, lines of reservations, except forest reservations, and lands within boundaries of forest reservations. The act also fixes the rate of compensation to be allowed for making surveys. Out of the sum so appropriated \$22,000 was set apart by the proper officers of the Department of the Interior for making surveys and resurveys in the state of Oregon, in accordance with the above provisions of law.

The indictment further presents that on the 18th day of April, 1902, Henry Meldrum, then Surveyor General of the United States for Oregon, George E. Waggoner, then chief clerk in the office of the Surveyor General, David W. Kinnaid, then an examiner of surveys of the United States, Rufus S. Moore, then a land surveyor, and John W. Hamaker and Frank J. Van Winkle, then notaries public for the state of Oregon, "unlawfully did conspire, combine, confederate, and agree together, and with divers other persons to the said grand jurors unknown, to defraud the said United States, by corruptly, and for their own gain, profit, and benefit, administering and procuring the administration of the said act of Congress in a manner contrary to the true intent and policy thereof, and wasteful of the moneys so appropriated and apportioned, and prejudicial to the interests and welfare of the said United States and the public service thereof, to be accomplished in the way now here described," namely, the said defendants were to take advantage of the fact that there had been filed in the office of the said Surveyor General, at Portland, divers false and forged written applications, purporting to be true and bona fide applications of settlers residing upon unsurveyed lands believed to be in township 27 south and ranges 26, 27, 28, and 29½ east, and township 28 south and ranges 28, 29, 29½, 29¾, and 30 east, of the Willamette meridian, for the survey of the said townships and lands pursuant to law, when in fact, as they, the said defendants, well knew, the said townships and lands were arid, desert, waste, and untimbered lands, and lands not adapted to agriculture, and not occupied, in whole or in part, by actual settlers, by which means the way was prepared for letting a contract between the said Surveyor General, acting for the United States, and some land surveyor, for the survey of said townships and lands, apparently in accordance with the terms and policy of said act of Congress and the regulations and printed manual, but really contrary thereto, and that said Henry Meldrum, as such Surveyor General, was, without advertising for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bids therefor, to enter into a contract with the said Rufus S. Moore, as a deputy surveyor, for surveying all the meander, township, section, and connecting lines necessary to complete the survey of the townships and lands aforesaid, and in consideration of the compensation fixed by the said act of Congress for such work, to be paid out of the moneys so appropriated and apportioned as aforesaid, and was to recommend and secure the approval of the said contract by the Commissioner of the General Land Office, and the said work was then to be done and payment therefor procured out of said moneys so appropriated and apportioned, at rates not higher than the minimum and intermediate rates fixed by the act of Congress. Then follow the allegation of the doing of certain overt acts for carrying into effect the scheme so devised.

To this indictment demurrers have been interposed, assigning as grounds thereof that the indictment does not state facts sufficient to constitute the offense of conspiracy.

Tracy C. Becker, Sp. Asst. Atty. Gen., for the United States.

W. P. Lord, Lionel R. Webster, and Dan. J. Murphy, for defendants.

WOLVERTON, District Judge (after stating the facts as above). A cardinal contention of counsel for defendants is that the indictment is faulty and insufficient, in that it does not set forth by apt language that the object of the conspiracy was to defraud the general government out of its money or property, nor does it contain any certain or definite description of the property of which it was sought to defraud the government, so that it might be readily identified. This contention necessarily proceeds upon the hypothesis that the indictment is drawn upon the theory that the object of the alleged conspiracy was to defraud the government out of public moneys, namely, a portion of the money specifically set apart and apportioned by Congress and the proper officers of the Department of the Interior for the survey of certain public lands. Indeed, it is stoutly urged that the indictment, taken as a whole, shows that such is the theory upon which it was drawn. I am not impressed that such is the theory and purpose of the pleader. The specific charge of the indictment in this relation, stripped of all inducement or matter intended to show the relationship of the parties defendant, is that they—

“did conspire, combine, confederate, and agree together, and with divers other persons to the said grand jurors unknown, to defraud the said United States, by corruptly, and for their own gain, profit, and benefit, administering and procuring the administration of the said act of Congress in a manner contrary to the true intent and policy thereof, and wasteful of the moneys so appropriated and apportioned, and prejudicial to the interests and welfare of the said United States and the public service thereof.”

There is no language here apt and adequate from which one can reasonably or legitimately conclude that the object of the conspiracy was to defraud the government out of its moneys, or any of its property or property rights. It would have been quite easy to say so in plain and simple terms, if it was the purpose of the pleader to so charge, and there could have been no controversy or dispute about it. Nor does the employment of the words “for their [the defendants’] own gain, profit, and benefit,” and “wasteful of the moneys so appropriated,” aid the indictment upon the theory that the scheme was to defraud the government of its money or property, except by the sheerest inference, which is not permissible in criminal pleadings. The language should be so direct in such a charge as to render the purpose

of the pleader clearly manifest; that is to say, the charge should be so specific and certain as that there could be no two opinions touching the purpose respecting the subject-matter of which it is proposed to defraud the government.

It is argued by the honorable assistant to the Attorney General that:

"As the design and natural result of the conspiracy, as alleged, is to defraud the United States out of its money or property, the indictment is good."

But we must judge of the design of a conspiracy by what is alleged concerning its purpose and object. The manifest purpose, however, is so aptly stated—namely, to defraud the United States by corruptly administering and procuring the administration of the said act of Congress, contrary to the true intent and policy thereof—as to exclude the theory that the purpose was something else, without apt statement as to that also. It is not possible that this plain purpose, by reason of some expressions attending it not sufficient to charge another purpose, can be tortured into charging such another purpose. That theory of the charge, therefore, cannot be maintained.

This brings us to the chief controversy in the case, which is whether the charge of a purpose to defraud the government by corruptly administering the act of Congress, contrary to the true intent and policy thereof, is a purpose within the intentment of section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), defining the offense of conspiracy and providing for its punishment. Section 5440 as it now stands is amendatory of section 30 of an act to amend existing laws relating to internal revenue, and for other purposes, adopted March 2, 1867, c. 169, 14 Stat. 484. The offense as originally denounced did not contain the words "or for any purpose." It simply read, "or to defraud the United States in any manner whatever." In all other respects the provision is substantially the same. By the revision of 1878 said section 30 was transferred from the internal revenue law to a place in the law concerning "Crimes," and arranged within the subdivision of crimes entitled "Crimes Against the Operations of the Government." It would seem, therefore, to have been the intention of Congress to give to the statute a more comprehensive signification than would ordinarily attach thereto in its original enactment. As it originally stood, it might have been argued that it had relation only to defrauding the government out of its revenue; but, when transferred to the general criminal statute, it was thenceforth to be applied in a more general sense, and the change of phraseology would further indicate a design to make it more searching and comprehensive by the very terms of the act. We have the following interpretation of the statute in its original phraseology by Lowell, District Judge, in *United States v. Whalan*, Fed. Cas. No. 16,669. He says:

"The act relates to various matters connected with the internal revenue department and the various taxes to be assessed. There is, among others, this general provision of law, which has a wide application, and covers all frauds which human ingenuity can devise."

And, speaking further of the word "conspiracy," he continues:

"But in this statute the word has a more comprehensive meaning, because it includes defrauding the United States in any manner whatever, whether

the fraud had been declared a crime by any statute or not. It is therefore immaterial to consider whether the acts were a crime independent of the statute, if there is shown a conspiracy to defraud the government."

This is a case, it is true, where the conspiracy charged was to defraud the government out of certain of its taxes upon spirits in storage; but the comprehensive language of the learned judge indicates his view of the broad scope of the statute, even in its first enactment as a part of a revenue statute. Later cases, decided since the amendment, have crystallized judicial opinion, even broadening the scope of the statute beyond this general language of Judge Lowell, which it must be conceded should be read in connection with the facts of that particular case. I speak of the statute as amended, because the revision was made by legislative authority and sanctioned by act of Congress, so that it was virtually adopted in its present form as a general criminal enactment. One of the first well-considered cases touching the scope of the present statute, as it respects the defrauding of the government "in any manner or for any purpose," is that of *Curley v. United States*, 130 Fed. 1, 64 C. C. A. 369, determined by the Circuit Court of Appeals of the First Circuit. The indictment in that case sets forth, in short, that one Hughes, desiring to be appointed a letter carrier, for the purpose of procuring the placing of his name upon the civil service list of persons eligible to appointment as letter carriers, and for the purpose of defrauding the United States, unlawfully agreed with Curley that he, Curley, should falsely impersonate Hughes at the civil service examination, and do all acts required by the board of examiners, and sign the name of Hughes to such examination papers as should be delivered to him for examination while he should personate Hughes; that Curley, in pursuance of said conspiracy, did falsely and unlawfully gain entrance to an examination, and for the purpose of defrauding the United States did falsely make a certain writing known as a "declaration sheet." Following these are other allegations of presenting false papers to an officer of the United States. From this statement it will be seen that there is no charge that the conspiracy was for the purpose of defrauding the government out of any money or property, or property rights; but the direct allegation is, as a deduction from the acts narrated, that they were done for the purpose of defrauding the United States unlawfully. In its discussion of the statute, the court says:

"Congress intended to protect the government in its rights, privileges, operations, and functions against all fraudulent operations, impositions upon its rights as well as properties, and to this end employed the most general terms and the broadest possible phraseology. * * * The statute thus clearly and expressly carries its provisions beyond wrongs which had been expressly declared to be offenses against the United States, and extends its provisions so as to embrace fraud in any manner for any purpose."

And again:

"The language of the statute in question is very broad: 'If two persons shall conspire to defraud,' etc. Now, it is, we think, not only reasonable, but the duty is upon us, in considering this statute, to have in mind the object of government in respect to a statute of this kind, as we would have in mind the object of a statute directing itself against wrongs destructive of individual property rights. The chief aim of government being that of protection and

service, it may safeguard itself against conspiracies or combinations, or acts intended to impair its proper administration, or conspiracies to impair any of the functions of the government. It may declare it unlawful to combine for the purpose of doing any act which obstructs or interferes with the operations of government or any of its departments. The government may unquestionably safeguard itself against being defrauded out of its right to administer an intelligent and honest service in the interests of the people."

But, without pursuing the argument further, the doctrine was there announced that the term "defraud," as employed in the statute, should not be construed as limited to frauds respecting property rights, but to include the deprivation of a right by deception or artifice. The real fraud purposed in that case, and the one that was hurtful to the government, was to foist an unqualified person upon the government as its official and public servant, without authority of law and in contravention of the purpose and provisions thereof. Could there be a more palpable fraud than this, though it does only by a remote inference touch the property rights of the government? An attempt was made to take this case to the Supreme Court by certiorari; but, after an examination of the petition, the court refused the writ. This petition was examined by Hough, District Judge, in *United States v. Morse* (C. C.) 161 Fed. 429, 436, touching which he has this to say:

"The question whether there could be a conspiracy to defraud by merely deceiving a governmental officer, when neither government nor officer was to be deprived thereby of money or its worth, was presented to the Supreme Court so fully and forcibly, yet so simply and directly, that the refusal of the writ is certainly an authority demonstrating the willingness of the highest tribunal to let the law alone."

Another case in the same thought is *Palmer v. Colladay*, 18 App. D. C. 426, wherein the Court of Appeals of the District of Columbia says:

"It is claimed by appellee that to defraud the United States must mean to deprive it of money wrongfully, or of something of money value, and that a falsehood or trick by which its officers are deceived in the matter of selecting those who are to perform work for it could not be a fraud against the United States. We do not agree to this proposition. The Civil Service Commission is a legal agency of the United States, created by act of Congress, and through it the President undertakes to find and appoint such persons as may best promote the efficiency of the civil service; and to that end regulations are prescribed by means of which the age, health, character, knowledge, and ability for the branch of service into which he seeks to enter, of each candidate, may be fully ascertained. If falsehoods are imposed upon the persons charged with the duty of ascertaining these qualifications, and made to take the place of facts, then the United States is defrauded, is deprived by deceit of the knowledge justly due to its officers in the proper discharge of its business, and it is thereby liable to obtain a less efficient employé. We think the trial court may properly hold that the appellee's alleged conduct, in co-operation with the candidate in this case, in making a false statement as to her past experience, constitutes an offense under this section 5440, and that such attempt at deception, if successfully carried out, would defraud the United States, within the meaning of the law."

So in the case of *United States v. Stone* (D. C.) 135 Fed. 392, it was held (quoting from the headnote) that:

"The provision of Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), which makes it a criminal offense to conspire 'to defraud the United States in any manner or for any purpose,' is not limited in its application to conspiracies to

deprive the United States of money or property, but should be broadly construed to protect the government in its rights, privileges, operations, and functions against all fraudulent operations; and an indictment is good thereunder which avers facts sufficiently showing that defendants conspired to deceive inspectors of the United States in the exercise of their official functions by fraudulently inducing them to approve life preservers which did not in fact comply with the requirements of the federal law, and that they committed overt acts pursuant to such conspiracy."

These cases are of very close analogy to the case at bar, and are therefore much in point in the present controversy. Other cases of not so strong analogy upon the facts hold to the same doctrine in language equally vigorous and unmistakable. In *McGregor v. United States*, 134 Fed. 187, 195, 69 C. C. A. 477, 485, the court says:

"It may be true that no pecuniary loss would follow the consummation of the conspiracy, and still the result might be that the damage to the government would be serious and far-reaching. The language of the statute clearly contemplates that the loss or damage may be other than a pecuniary one susceptible of accurate calculation. The words 'in any manner or for any purpose' are most comprehensive, and show that the intention of the lawmaking power was to have the statute as broad and as comprehensive as it could possibly be. It surely is a wrong and a great injury to the government when any officer or employé of one of its departments conspires with another to do an act the inevitable result of which will be to corrupt the efficiency and impair the usefulness of such department. To hold that such conduct would not be a fraud upon the government and a loss to it would be as reprehensible as such conduct itself."

This case arose out of an attempt, which was in part accomplished, by certain clerks of the Post Office Department and one Smith, a leather dealer, in league with each other, to defraud the government by inducing the First Assistant Postmaster General to purchase for the government a certain design of mail pouches at a price much in excess of their real value.

In *United States v. Bradford* (C. C.) 148 Fed. 413, 421, the court says:

"But while, under the proof, the question does not arise in this case, it is beyond question, in my opinion, that to constitute a conspiracy to defraud the United States, under Rev. St. § 5440, it is entirely unnecessary to either allege or prove a purpose to defraud the United States of a thing of pecuniary value. The confusion as to the contention made that to constitute a conspiracy to defraud, under Rev. St. § 5440, there must be a purpose of defrauding the United States of pecuniary value, arises from the failure to distinguish between the purpose of statutes intended to punish cheats and frauds by private persons committed against other private persons, and the purpose of Rev. St. § 5440, which is intended to punish frauds against the sovereign. So far as my knowledge goes, all the statutes of the former class, both in this country and in England, provide, either in express terms or by clear intendment, that the cheating or defrauding must be of a thing of value. Such is the entire extent to which those statutes go, and, of course, in prosecutions under them, it is essential to allege and prove that the purpose of the defendants was to defraud others of things of value. But no such restriction is found in Rev. St. § 5440, either in terms or by intendment. It uses the broadest possible language. It punishes all who conspire to defraud the United States 'in any manner and for any purpose.' It is certainly just as important that the government should not be defrauded with regard to its operations, even if no pecuniary value is involved, as that it should not be defrauded of its property. In fact, I believe that it is far more important that the government should be protected against the former class of frauds, and it would be astonishing, indeed, if Congress had failed to afford protection against such frauds."

This was a conspiracy to defraud the government by fraudulently obtaining the issuance of certain land scrip.

So, also, in *United States v. Lonabaugh* (D. C.) 158 Fed. 314, 315:

"The first question may be disposed of in a word, for it was admitted at the argument, as I understood counsel, that in order to bring the defendants within the meaning of section 5440, Rev. St. (U. S. Comp. St. 1901, p. 3676), the words 'conspiracy to defraud the United States' do not necessarily mean that there shall be pecuniary loss or damage to the government, resulting from false representations made to its officers in the performance of their duties, but that any false practice or trick set in motion for the purpose of inducing the government officials, in executing the laws of the United States in cases where they must act upon statements made by the parties interested, to act in a way which would be unlawful if the real truth were known, is a fraud upon the government."

And again, in a late case decided by the Circuit Court of Appeals in this circuit, *Jones v. United States*, 162 Fed. 417, 425, 89 C. C. A. 303, 311:

"Section 5440 makes it a crime for two or more persons to conspire to defraud the United States, whatever the manner or purpose. 'In any manner or for any purpose' is the language of the statute. To obtain land of the government open to entry under its homestead laws by means of false proof in respect to the entryman's residence or improvement thereon, or for the use or benefit of another, is not only a fraud in fact, but a fraud upon the homestead law, the design of which was to afford those entitled to its beneficent provisions a home for himself and family, and not for speculation either by himself or others. This does not admit of any sort of question."

So, in *Hyde v. Shine*, 199 U. S. 62, 82, 25 Sup. Ct. 760, 764, 50 L. Ed. 90, the Supreme Court has this to say:

"Whatever may be the rule in equity as to the necessity of proving an actual loss or damage to the plaintiff, we think a case is made out under this statute by proof of a conspiracy to defraud and the commission of an overt act, notwithstanding the United States may have received a consideration for the lands and suffered no pecuniary loss."

It would seem from these authorities that the doctrine could not be more distinctly and clearly resolved. Nor do I think that the case of *United States v. Hirsch*, 100 U. S. 33, 25 L. Ed. 539, militates against the doctrine, as in that and other cases cited to the same purpose the direct question here discussed was not presented.

Now, if we go back to the indictment, it will be seen in what way the government might be defrauded in the regular and lawful administration of the surveys of its public lands. The government, as well as the individual, is bound to the observance of law and the authorized rules and regulations of its lawfully constituted departments, and the officers and functionaries of the government are especially charged with the observance and execution of the laws, both fundamental and those promulgated in pursuance thereof. So that, when Congress has declared that certain things shall be done, in a way specifically pointed out, it is particularly incumbent upon its officers, intrusted by their functions of office with the execution of the law, to observe the mandates thereof in all substantial respects, and it is necessarily unlawful to accomplish the purpose in any other way or by any other means.

An appropriation was made by Congress for making surveys of the public lands, but it was provided that, in expending the appropriation,

preference should be given, first, in favor of surveying townships occupied, in whole or in part, by actual settlers, and lands granted to the states by certain enumerated acts of Congress; and, second, to surveying under such acts as provide for land grants to the several states, except railroad grants, etc.—other surveys to be confined to lands adapted to agriculture, lines of reservations, except forest reservations, and lands within the boundaries of forest reservations—prescribing the rates to be allowed for making surveys, a part of which appropriation was set apart by the proper officers of the Department of the Interior for making surveys and resurveys in the state of Oregon. The indictment alleges that certain false applications had been made and filed in the office of the Surveyor General, purporting to be the bona fide applications of settlers residing upon unsurveyed lands supposed to be situated in certain designated townships, which lands the defendants well knew to be desert, waste, and untimbered lands, not adapted to agriculture, and not occupied, in whole or in part, by actual settlers; and it is charged that the conspiracy was entered into to defraud the United States by taking advantage of these false applications, and through and by means thereof, whereby to promote and secure the letting of a contract for the survey of such lands, apparently in accordance with the terms and policy of said act of Congress, but really contrary thereto or in contravention thereof. And then it is further charged that the said Surveyor General, without advertising for bids for such contract, let the same to the defendant Moore at the compensation fixed by law. Thus it appears that the purpose of the conspiracy was to procure the survey of lands which, within the purview of the act making the appropriation, were not designed nor intended should be surveyed, and thus entitle the surveyor to the compensation fixed by the act. This is a palpable maladministration of the law—an administration in a way clearly not designated by Congress, and, as is alleged, wasteful of the moneys so appropriated. Supposing the scheme to have been fully executed, the government would have been induced, through false applications, fraud, and deception, to survey portions of its public lands never intended to be surveyed, and thus to have administered the law in direct perversion of its requirements. That such a device results in the impairment and subversion of the proper administration of the law cannot be gainsaid; and that it is in fraud of the government is quite as apparent.

Considering, then, the very broad terms of section 5440—"to defraud the United States in any manner or for any purpose"—the conspiracy alleged would seem to be well within the intendment of the law. As used in this statute, the word "defraud" has a significance applicable, not only for the protection of the government in its property rights and interests, but it was intended also for the protection of the government in securing the wholesome administration of its laws and affairs in the interests of the governed. The pleader might very appropriately have charged the defendants with conspiring to defraud the government out of its public moneys, to wit, a portion of the appropriation set apart for the survey of lands in Oregon, considering the facts as they appear by the indictment; but it seems that he did not choose to make that specific charge, but has rather chosen to charge

the defendants with the maladministration of the law. And upon this last theory of the charge I hold the indictment good.

It is next insisted that the indictment is faulty in the manner of setting out the means by which it was designed to effectuate the fraud upon the government. Eminent counsel for defendants says:

"It is not enough, in describing the means used, to say that the defendants took advantage of the fact that there were on file certain applications, etc., for the survey of certain lands that the defendants well knew were arid and desert lands. This only charges guilty knowledge as to the character of the lands applied for survey, whereas guilty knowledge should be charged as to the fact of the applications being on file, and that they were false and forged, and that no settlers on said lands described had made such application, and then, that the defendants well knew that the lands described were arid and desert, and not adapted to agriculture, as provided by the act of Congress."

To determine with what particularity the means should be set forth, it is necessary to advert to some well-established rules respecting conspiracies. The general definition of a conspiracy is that it consists of a combination between two or more persons to do a criminal or unlawful act, or a lawful act by criminal or unlawful means, although it is said the definition is not perfectly accurate. It is sufficiently accurate for our purpose here, however. Now:

"If the object of the combination is unlawful, the means contemplated to effect such object are immaterial, either in a criminal prosecution to punish the perpetrators for entering into the combination or to recover of them the damages inflicted by carrying out the object of the conspiracy; and it is not even necessary that the means should have been agreed upon. Where, however, the object of the conspiracy is in itself not unlawful, the object is immaterial, and the illegality of the means used or intended to be used constitutes the offense." 8 Cyc. 622.

It may be further observed that all unlawful conspiracies must be attended with a corrupt motive. Without the corrupt motives of the confederates, no criminality can attach to the confederation. The corrupt motive may be made to appear by the indictment in two ways—one, in charging that the object of the conspiracy is to accomplish an unlawful act. In such case the intent is made to appear by the charge of a combination to do the unlawful or fraudulent act. Benedict, District Judge, says, in *United States v. Donau*, Fed. Cas. No. 14,983:

"The crime is committed when the combination is made, and the act of one of the conspirators is not required by the statute to show the intent. That is inferred from the unlawful act of combining to defraud, or to commit an offense."

So it is said in *United States v. Stone* (D. C.) 135 Fed. 396, supra:

"The charge is that the defendants conspired to defraud the United States, and the intent to defraud will be inferred from the unlawful agreement set forth in the indictment."

The other way is by charging a combination to do a lawful act, or an act innocent in itself, by unlawful means. In such a case the intent or corrupt motive must appear through the allegations of the means employed to effect the object of the conspiracy. To illustrate: If two or more persons are charged with a conspiracy to defraud the government of its revenue, the intent to defraud attends the combination for that purpose, and the means whereby to accomplish the purpose may or may

not in themselves, and disconnected with the unlawful purpose, be corrupt. But, if it be charged that certain persons confederated to do a lawful act by unlawful or criminal means, then it must be that the means employed shall be attended with a corrupt motive, which must adequately appear by the allegations of the indictment. It is well stated by counsel that the offense denounced by section 5440 is the act of conspiring together to do the things enumerated in the section, and the conspirators are subject to prosecution whenever one or more of them has done any act in furtherance of the unlawful scheme devised and agreed upon. Such being the case, it is sufficient if it appears that the conspiracy formed was attended with corrupt motives and for a corrupt purpose.

Now, the offense charged by the present indictment is that of conspiracy to defraud in the first of the two ways, namely, by corruptly, and for the conspirators' own gain, profit, and benefit, administering and procuring the administration of said act of Congress in a manner contrary to the true intent and policy thereof, and wasteful of the moneys so appropriated and apportioned. Thus the corrupt purpose appears as well by direct and positive averment as by inference from the charge to defraud the government. So that it is not essential that the corrupt motive and guilty knowledge be made to appear at every turn of what is alleged touching the means employed to effectuate the unlawful purpose. It is sufficient that there existed on file in the office of the Surveyor General false affidavits, which the defendants knew to be false in the particular that the lands described and which formed the basis for letting the contract were not of the kind that were contemplated by the act of Congress should be surveyed. In the case of *United States v. Walsh*, 5 Dill. 58, Fed. Cas. No. 16,636, it was not even alleged that the pay rolls presented were false, or not true, and that case is readily distinguishable from this.

I am persuaded that the indictment is sufficient. It follows, therefore, that the demurrer should be overruled.

WATKINS v. EATON.

(Circuit Court, N. D. New York. September 15, 1909.)

1. WILLS (§§ 70, 436*)—VALIDITY AND CONSTRUCTION—WHAT LAW GOVERNS.

Both by the New York statutes and by general law the validity and effect of a testamentary disposition of personal property situated in New York, made by the will of a testator who was a resident of another state, is governed by the laws of the state of such residence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 184, 947; Dec. Dig. §§ 70, 436.*]

2. EXECUTORS AND ADMINISTRATORS (§ 523*)—FOREIGN ADMINISTRATION—DISPOSITION OF ASSETS.

Whether personal property of a testator, situated in another state and in the possession of a probate court therein, shall be transmitted to the court of the domicile of the testator for distribution, is a matter of judicial discretion, to be exercised by any court having jurisdiction; but under the law of New York as settled by decision, where there is a dif-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ference of opinion between the probate courts of the two jurisdictions as to the construction of the will, which has been probated in both, the property should be remitted to the jurisdiction of domicile.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2329; Dec. Dig. § 523.*]

3. COURTS (§ 505*)—JURISDICTION OF FEDERAL COURTS—MATTERS OF PROBATE.

Where funds belonging to the estate of a decedent are in the possession of a probate court of a state acquired in ancillary proceedings, a federal court cannot disturb such possession by ordering the funds transmitted to the principal administrator in another state; nor can it entertain a suit by such foreign administrator against the local administrator to determine the right to such fund, where by the law of the state the probate court having the fund alone has jurisdiction to make such adjudication, subject to review on appeal.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1410; Dec. Dig. § 505.*]

Probate jurisdiction, see note to *Bedford Quarries Co. v. Thomlinson*, 36 C. C. A. 276.]

Bill in equity by William L. Watkins, administrator with the will annexed of Elizabeth S. Eaton, deceased, against Hervey E. Eaton, as executor of the last will and testament, and of the codicil and memorandum thereto attached, of Elizabeth S. Eaton, deceased. On demurrer to bill. Demurrer sustained.

A. F. & F. M. Freeman (B. M. Thompson, of counsel), for complainant.

Carlos J. Coleman (Edwin H. Risley, of counsel), for defendant.

RAY, District Judge. The main object and purpose of this bill of complaint is to secure a decree directing the property (wholly personal) of the estate of Elizabeth S. Eaton, deceased, to be transferred to the complainant, William S. Watkins, as administrator with the will annexed of the estate, etc., of said decedent, appointed by the probate court of the county of Washtenaw, state of Michigan, by the defendant, Hervey E. Eaton, as executor of the last will and testament of said testatrix, appointed such by the Surrogate's (or Probate) Court of Madison county, state of New York, and who now has possession of the same, or the main portion of the same. Watkins, the complainant, resides at Ann Arbor, in the state of Michigan, and Hervey E. Eaton resides at Eaton, Madison county, N. Y. The testatrix, Elizabeth S. Eaton, died at Ann Arbor, Mich., of which state she was a citizen, resident, and inhabitant, on or about May 17, 1906, leaving a last will and testament and a codicil thereto, and also leaving personal property, a small part of which, about \$600, consisting of furniture, household effects, etc., was then situated in the state of Michigan, but the main portion of which, some \$50,000, or more, was situated and located in said county of Madison, N. Y., and was in the possession of her agent, the defendant, Hervey E. Eaton, who, in and by said last will and testament, made and executed at Eaton aforesaid, while the testatrix was there temporarily, was made sole executor thereof. The bill alleges that this property in New York consisted of stocks, bonds, and other choses in action.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On or about March 31, 1906, said decedent, under the name Elizabeth Storms, at Ann Arbor, Mich., made and executed the codicil to the said will above referred to, in and by which she made some change as to the persons who were to care for her invalid brother, George A. Storms, and the amount to be paid them for such care. By the will the amount to be paid from the income for this purpose is \$100 per month to Susan C. Storms, and by the codicil \$75 per month to Genevieve S. Jacobs and N. P. Jacobs, her husband. The estate is to be divided and paid over to certain legatees named on the death of a sister, Susan C. Storms, and the said brother, George A. Storms. All the legacies and shares that can be paid before the happening of such event have been paid, and there is little, if anything, to be done by way of administration, except to hold and invest the property and pay for the support of George A. Storms, as directed, until the happening of the event referred to. It is not claimed that the testatrix owed any debts to any person or persons in the state of New York, and if she did they have been paid. There are no debts to be paid in the state of Michigan. No legacy was given to any person residing in New York, except three portraits to Hervey E. Eaton and a memorial window for a church in Syracuse, which the bill alleges have been satisfied. All the other legatees reside in Michigan, and did at the time the will and codicil were executed.

Soon after the death of the testatrix, Elizabeth S. Eaton, or Storms, the executor named in the will, who had it in his possession, as well as the property mentioned, duly applied to the Surrogate's Court of the said county of Madison, N. Y., to have the said will and codicil proved and admitted to probate in said court. A citation issued and was duly served as required by the laws of the state of New York on all the persons interested in the estate. This service was by publication, not personally, and the legatees resided and were in Michigan at the time, except two whose specific legacies have been paid. Rachel P. Dickenson, Susan C. S. Higgins, and Leah C. Kersey, Leah C. Kersey being one of the residuary legatees, appeared and contested said will and codicil in said Madison County Surrogate's Court on the grounds, among others, that the said will and codicil were not her act, her last will and testament and codicil thereto, and that she was mentally incompetent to make and execute same. The issues presented were tried, evidence taken, and the surrogate of Madison county made findings of fact and conclusions of law, and a decree was entered accordingly that same was the valid last will and testament and codicil thereto of said Elizabeth S. Eaton, and that she was competent to execute same, and admitting same to probate, and thereupon letters testamentary of said last will and testament and codicil were duly issued by said surrogate to the defendant, Hervey E. Eaton, who remains such executor, and who has proceeded and is proceeding to execute such will and codicil according to the terms thereof. Such decree was not appealed from. Soon after the death of said testatrix, and in July, 1906, said Higgins, Dickenson, and Kersey filed their petition for the proof of said will, not including the codicil, which they alleged to be invalid by reason of the mental incompetency of the testatrix to execute same, in the probate court of Washtenaw coun-

ty, Mich., of which county the testatrix was a resident when she executed the will and codicil and at the time of her death, and asked that the will be admitted to probate, and that the codicil be rejected as invalid for the reason stated, and that letters of administration with the will annexed of said will issue to Ralph Phelps, Jr. Notice pursuant to the laws of the state of Michigan of such application and proceeding was duly given to all interested parties, and such proceedings were had that December 1, 1908, W. L. Watkins was appointed administrator with the will annexed of the estate of said Elizabeth S. Eaton by said probate court of the county of Washtenaw, state of Michigan, and he duly qualified as such, and remains such administrator. This service was by publication as required by law of Michigan.

It is alleged and conceded that the defendant, as executor, is paying from the estate, for the support and care of George A. Storms under, and in recognition of the validity of, the codicil to said will; that is, at the rate of \$75 per month, instead of \$100 per month, as provided in the will itself, which is \$300 per year less than the will as proved and admitted to probate in the courts of Michigan permits or authorizes, and that the sum paid is being paid to a person or to persons not authorized to receive it, and that no payment is being made to the one entitled thereto, if the codicil is invalid and no part of the testamentary disposition. The executor claims that, the will and codicil having been declared valid and admitted to probate in New York, and the decree not appealed from, he is protected in proceeding and acting under it. The complainant, on the other hand, claims that the validity of the will and codicil is determined by the court of Michigan and that its decree prevails; that distribution and payment over of the funds is governed by the law of Michigan; and that, the codicil having been duly adjudicated void there, although held valid here in New York prior to such adjudication, the executor, Eaton, must be governed as to the validity of the codicil by the decree in Michigan. The complainant also contends that, all purposes of administration in New York having been fully met and satisfied, that is, there being no unpaid debts or legacy due or coming due to any person in New York, the estate should be delivered by Eaton to the administrator with the will annexed in Michigan for purposes of administration and distribution according to the law of the domicile of the testatrix. The defendant claims that this transfer or delivery over is a matter of discretion, to be exercised by the Probate or Surrogate's Court of Madison County, N. Y., alone, and that the Circuit Court of the United States has no jurisdiction or power in the matter. The bill in substance and effect charges that there is a devastavit of \$860 per year in the payments made by the defendant for the care of George A. Storms, and that the same is being paid to the two Jacobses without authority, inasmuch as the codicil has been rejected by the Michigan courts, and that \$100 per month should be paid to Susan C. S. Storms for the purpose.

The provisions of the will in this regard read:

"Sixth. I give and bequeath to my sister Susan C. Storms, during the term of her natural life, from the income of my estate, one hundred dollars per month, provided and on condition that she care for and make a home for my mute brother George Albert Storms during his lifetime.

"Seventh. Should my sister Susan C. Storms die before my brother George Albert Storms, then and in that case I hereby direct and empower my said executor to pay to my sister Leah Catherine Kersey, from the income of my estate, the sum of fifty dollars per month for caring for and making a home for my said brother George Albert Storms during his lifetime, and in case George Albert Storms would survive both Susan C. Storms and Leah Catherine Kersey then my said executor is hereby authorized and directed to make other suitable and sufficient arrangements for such care and home and to pay for the same."

The provisions of the codicil are:

"Whereas, my brother George A. Storms is unable to care for himself through physical defects and infirmities, it is my wish that my sister Genevieve S. Jacobs and her husband, Nathaniel P. Jacobs, do so care for him and make his home with them during the term of his natural life and that they shall receive the sum of seventy-five dollars (\$75) per month compensation during that time. In the event of his death before that of Genevieve S. Jacobs or Susan S. Higgins, I direct that they shall share alike with the other heirs in the general and final distribution of my estate."

By the laws of the state of New York this will was properly proved in the Surrogate's Court of the county of Madison, N. Y., and that court had jurisdiction to prove same and issue letters testamentary. By chapter 18, Code of Civil Procedure, state of New York, relating to "Surrogates' Courts and Proceedings Therein" (title 1, art. 1, § 2472), it is provided:

"Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction as follows:

"1. To take the proof of wills; to admit wills to probate; to revoke the probate thereof; and to take and revoke probate of heirship.

"2. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.

"3. To direct and control the conduct, and settle the accounts, of executors, administrators, and testamentary trustees; to remove testamentary trustees, and to appoint a successor in place of a testamentary trustee so removed.

"4. To enforce the payment of debts and legacies; the distribution of the estates of decedents; and the payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession, belonging to the estate. * * *

"6. To administer justice, in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto. * * *

"This jurisdiction must be exercised in the cases and in the manner prescribed by statute."

By section 2476, same chapter and title, it is provided, amongst other things, as to when and what wills may be proved:

"3. Where the decedent, not being a resident of the state, died without the state, leaving personal property within that county, and no other; or leaving personal property which has since his death, come into that county, and no other, and remains unadministered."

By title 3, art. 1, § 2611, Code Civ. Proc., relating to "Granting and Revoking Probate, Letters Testamentary, and Letters of Administration, Foreign Wills, Ancillary Letters," it is provided:

"What Wills may be Proved: Change of Residence Not to Affect Validity.—A will of real or personal property, executed as prescribed by the laws of the state, or a will of personal property executed without the state and within the United States, the Dominion of Canada, or the Kingdom of Great Britain

and Ireland, as prescribed by the laws of the state or county where it is or was executed, or a will of personal property executed by a person not a resident of the state, according to the laws of the testator's residence, may be proved as prescribed in this article."

Section 2611 limits the proof of wills of personal property executed by a resident of the state of Michigan, when executed in the state of New York, to those executed according to the laws of the state of Michigan.

Section 2694, art. 7, tit. 3, Code Civ. Proc., provides:

"What Laws Govern as to Effect of Testamentary Disposition.—The validity and effect of a testamentary disposition of real property, situated within the state, or of an interest in real property so situated, which would descend to the heir of an intestate, and the manner in which such property or such an interest descends, where it is not disposed of by will, are regulated by the laws of the state, without regard to the residence of the decedent. Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the state or country, of which the decedent was a resident at the time of his death."

Elizabeth S. Eaton, the decedent, was a resident of the state of Michigan when she made her will, and when she made the codicil thereto, and at the time of her death. Therefore, there being no special provision otherwise made by law, the validity and effect of the testamentary disposition of her personal property situated in the state of New York are regulated by the laws of the state of Michigan. *Cross et al. v. U. S. T. Co. et al.*, 131 N. Y. 330, 339, 346, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597; *Despard v. Churchill*, 53 N. Y. 192; *Dammert et al. v. Osborn et al.*, 140 N. Y. 30, 35 N. E. 407, *Id.*, 141 N. Y. 564, 35 N. E. 1088; *Cong. U. Soc. v. Hale*, 29 App. Div. 396, 400, 51 N. Y. Supp. 704; *Wright v. Mercein*, 34 Misc. Rep. 414, 418, 69 N. Y. Supp. 936; *Matter of Hughes*, 95 N. Y. 55, 60; *Story on Conflict of Laws* (7th Ed.) §§ 465, 468, 473; *Parsons v. Lyman*, 20 N. Y. 103; 18 Cyc. p. 74. In 18 Cyc. p. 74, it is said:

"With regard to creditors the administration of the assets of a deceased person is governed exclusively by the law of the place where the executor or administrator acts and from which he derives his authority, and the domicile of the decedent or of the creditor cannot authorize the introduction of another law to defeat the law of the situs of the administration. With regard to heirs and distributees the rule is that personal estate is to be administered according to the law of the decedent's last domicile, while real estate is administered according to the law of the place where it is situated."

This is, I think, the law. The probate court of the state of Michigan, having jurisdiction, has judicially declared and held, by decree duly entered and not appealed from or reversed, that the will referred to is the last will and testament of Elizabeth S. Eaton, and that the codicil referred to is no part thereof or of her testamentary disposition, and is invalid, as she was mentally incompetent to make or execute same. The Surrogate's Court of the county of Madison, N. Y., has held exactly the contrary. In effect the personal property of Elizabeth S. Eaton, the testatrix, situated in the state of New York, as to the income, is being disposed of by the executor in accordance with an alleged testamentary disposition thereof which the Surrogate's Court

of Madison county, N. Y., has held to be valid, but which the probate court of the county of Washtenaw, Mich., the county of her residence at the time of the execution thereof and at the time of her death in the state of Michigan, by decree duly made and entered, and which has not been appealed from or reversed, has adjudged to be invalid and no part of her will or testamentary dispositions. That decree was made under and pursuant to, and, presumably, in accordance with, the laws of the state of Michigan, the state of the residence of the deceased testatrix. It would seem to be the law of the state of Michigan that this codicil is void and no part of the will of Elizabeth S. Eaton, deceased. The probate court of that state has so adjudicated. This is so unless the decree of the Surrogate's Court of Madison county, N. Y., prevails over that of the probate court of Washtenaw county, Mich. While that decree was made subsequent to that entered in the Surrogate's Court of the county of Madison, N. Y., the proceedings in each court were pending concurrently.

However, the decree in Madison county is not *res adjudicata* between these parties or the parties interested in the estate, unless it be Rachel P. Dickenson, Susan C. S. Higgins, and Leah C. Kersey. These persons were served by publication, and actually personally appeared in the Madison County Surrogate's Court, and answered and litigated the question of the validity of the codicil, and the mental competency of the testatrix to make and execute it. If they are bound and concluded by the decree of the Madison County Surrogate's Court, then they have no interest in the compensation to be paid for the care, etc., of George A. Storms. And, if that be so, being bound here, they ought to be bound everywhere; and hence the administrator with the will annexed in Michigan, if they are so bound, would be bound to regard the codicil as part of the will in making payments, and follow it. This would present the inconsistency of one will in New York and another and different will in Michigan. The administrator with the will annexed in Michigan cannot be called upon to execute two wills, inconsistent in their provisions, or to obey two courts, one holding the codicil valid and the other holding it invalid. Is the decree of the probate court of Washtenaw county in the state of Michigan to be held to prevail over that of the Surrogate's Court in New York? This will relate solely to personal property. This property must eventually be distributed according to the laws of the state of Michigan, unless it be the income paid for the support of Storms. But there is no inflexible rule that it shall be distributed by the courts of Michigan. Whether the personal estate shall be transmitted to the court of the domicile of the testator for distribution seems to be a matter of judicial discretion, to be exercised, of course, by any court having jurisdiction in the premises. *Parsons v. Lyman*, 20 N. Y. 103; *Matter of Hughes*, 95 N. Y. 55, 60; *Cross et al. v. U. S. T. Co. et al.*, 131 N. Y. 330, 347, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597; *Harvey v. Richards*, 1 Mason, 381-407, Fed. Cas. No. 6,184; 18 Cyc. 1235, and cases there cited; *Despard et al. v. Churchill*, 53 N. Y. 192.

But it has been held by the Court of Appeals of this state that where there is a difference of opinion between the surrogate or probate courts of the two jurisdictions as to the construction of the same will, admit-

ted to probate in both jurisdictions, the personal estate should be remitted to the courts of the state of the domicile of the testator for distribution in accordance with the laws of such domicile. *Parsons et al. v. Lyman et al.*, 20 N. Y. 103. In that case the Court of Appeals held:

"The rule that personal property is subject to the law which governs the person of its owner, as to its transmission by bequest or intestacy, though founded on international comity, is equally obligatory upon our courts as a legal rule of purely domestic origin. * * * Whether the courts of this state are to decree distribution of the assets collected here under an ancillary administration granted by them, or to remit the disposition thereof to the courts of the testator's domicile, is not a question of jurisdiction, but of judicial discretion, upon the circumstances of the particular case. The testator died a resident of Connecticut, as were his executors and legatees. Five-sixths of the estate was before the probate court of that state for accounting and distribution, and the executor desired to remit to that jurisdiction the distribution of the remainder which had been collected by virtue of administration granted to him by the surrogate of New York. Several of the legatees who, after the testator's death, became residents of this state, insisted that the distribution should be decreed by the surrogate of New York, to whom the executor had applied for a final settlement of his accounts. It appeared that the surrogate differed in opinion from the courts of Connecticut in reference to the construction of the will. *Held*, that the surrogate should have remitted the distribution to the courts of Connecticut."

This, as matter of course, would seem to be the sensible and proper rule, and one that should be followed without question under ordinary circumstances. If the Surrogate's Court of Madison county, N. Y., is at variance with the probate court of Washtenaw county, Mich., the state of the domicile of the testatrix at the time of her death, and distribution, including payment of income, is to be made according to the law of the state of Michigan, where the legatees eventually entitled to the corpus of the estate reside, it would seem that the property, after satisfaction of all debts and legacies here—and there are none—should be remitted to that state on sufficient bond being given by the administrator with the will annexed there. The title to the personal property of a testate or of an intestate is not absolute, but in trust for the benefit of the legatees or distributees as the case may be; and as this estate is to be held by either the executor or by the administrator with the will annexed for a long term of years, probably, it would seem that there ought to be security, and that it ought to be held in the jurisdiction where the parties ultimately entitled are domiciled. *Despard et al. v. Churchill et al.* is not particularly pertinent here, as there the personal estate was remitted to California, for the reason that, while some of the executors resided in New York state, the material provisions of the will were void under the laws of this state, but valid in the state of California, the domicile of the testator, and the courts of this state would not aid in enforcing a will contrary to our statutory law. The court, therefore, directed that after the payment of certain legacies, valid by the laws of New York and directed to be paid by the executors here, the balance of the estate be remitted to the state of California, to be there distributed. In Massachusetts, it is held that after payment of debts the personal assets remaining must be remitted to the place of the testator's domicile for the payment of legacies, etc. *Dawes v. Boylston*, 9 Mass. 337, 6 Am. Dec. 72; *Richards v. Dutch*, 8 Mass. 506.

In *Despard v. Churchill*, *supra*, the court, per Folger, C. J., said:

"Personal property is subject to the law which governs the person of its owner as to its transmission by last will and testament; and this principle, though arising in the exercise of international comity, has become obligatory as a rule of decision by the courts. *Parsons v. Lyman*, 20 N. Y. 103. And, as a general rule, the distribution of personal property, wherever made, must be according to the law of the place of the testator's domicile. *Harvey v. Richards*, 1 Mason, 381-407, Fed. Cas. No. 6,184. The cases are not uncommon in which a testamentary disposition made in a foreign jurisdiction has controlled the transmission of personal property in this. Usually the administration of the estate has been committed by the will to citizens of that jurisdiction. They have acquired the possession and control of the property through voluntary payment or surrender, or, by making probate of the will here, have obtained auxiliary letters testamentary, and under these have enforced collection or surrender. In such case, those charged with the administration are liable to account here for the assets collected by the authority granted here. It seems to have been generally held that, where there are domestic creditors of the estate, payment of the debts may be decreed out of the assets. * * * The question then arises, under the particular circumstances of this case, whether the assets in this state should not be remitted to the executors in the state of California to be administered, as they may be, in accordance with the directions of the will, under the laws of that state. As has been stated, the courts of this state may not directly aid in carrying out here a bequest which is in violation of its statute law and contrary to a policy of which it is tenacious; and yet they may not hold the bequest void, when it is valid by the law of the state by which the disposition of the property is to be governed. The one would be to transgress the written law of this state; the other would be to disregard an unwritten rule of law, well settled, and of extensive and frequent application. * * * There are no creditors of the estate in this state to be protected. The legatees here are protected by the payment of the legacies to them from the assets. The next of kin of the testator are also the annuitants under the provision of the will which is void by our law. As annuitants, they must soon rely mainly upon the fund, the executors, and the courts in California. If to them as next of kin were adjudged here a distribution of the property here, it might not prevent them from claiming there as annuitants. Thus by conflict of laws and adjudications there would be a measurable thwarting of the testamentary intention, and the giving to them of more than the testator designed. It seems, then, that the rule of law above mentioned and the circumstances of the case indicate that the judgment of the Special Term directing a distribution of the assets in this state among the next of kin was not well advised, and that the judgment of the General Term, reversing that of the Special Term in that respect, was proper."

This absolute rule of the Massachusetts cases cited does not prevail in New York, however, or in the federal courts, and by statute remission is now discretionary in Massachusetts. In *Matter of Hughes*, *supra*, the court held that as the only purpose of remitting to the courts of Pennsylvania would be mere distribution, and the rule of distribution being the same in both states, that such remission would result in double commissions and unnecessary charges, and therefore the refusal of the court to decree distribution here was error. But the court said (95 N. Y. 60):

"This doctrine, however, does not interfere with the general principle of law that personal property is distributable and that succession thereto is regulated by the law of the decedent's domicile. The courts of the county where the ancillary jurisdiction is granted, where decreeing distribution, apply the law of the domicile, unless such application will interfere with the rights of domestic creditors or infringe some controlling principle of public policy."

But the case now before this court as presented by the bill of complaint shows (1) domicile of the testatrix in Michigan; (2) all or

nearly all the legatees and distributees domiciled in Michigan; (3) Storms, for whose benefit the income of the estate is to be used, domiciled in Michigan; (4) no legatee or creditor in New York; (5) the will proved in Michigan according to the laws of the testatrix's domicile, and also proved in New York where the main part of the assets are, but with a codicil added and recognized as valid which the Michigan court has repudiated as invalid; (6) the executor named in the will residing in New York and fully recognizing and acting under the provisions of the codicil. These facts, under the decisions in *Parsons v. Lyman* and *Harvey v. Richards*, demand, unless it be the presence here of the executor named in the will, but who has not qualified or taken letters testamentary in Michigan, that the assets be transmitted to Michigan for distribution in due course. But I do not see that the residence here of the executor named in the will, and to whom letters have issued here, should control. Clearly this fact is without force, unless the codicil is to be recognized as valid and enforced.

But it is said and urged that, as the administrator with the will annexed appointed by the Michigan court has not taken out ancillary letters here, he has no standing to maintain this or any action here, even in the Circuit Court of the United States; that he could not even maintain a proceeding in the Surrogate's Court in Madison county, N. Y., to have the executor here settle his accounts and then pay over or transmit the assets to the Michigan court; in short, that he has no standing in New York to invoke the jurisdiction of the said Surrogate's Court, or to ask it to exercise its judicial discretion in the matter of such transmission—cannot even set the court in motion. But the will of the testatrix has already been proved here, the will recorded here, and letters testamentary thereon have issued here. Clearly this is all-sufficient in these regards. There cannot be double probate of the same will in the same court, or double issue of letters to two persons by the same court. In the eye of the law the proof of the will in Madison county, N. Y., and the issue of letters there, is not the principal administration, but ancillary in its very nature. The principal administration is that of the domicile of the intestate testator or testatrix as the case may be. 3 *Redfield on Wills* (3d Ed.) 29 (26); *Churchill v. Prescott*, 3 *Bradf. Sur.* (N. Y.) 233; *Suarez v. Mayor*, 2 *Sandf. Ch.* (N. Y.) 173; *Dammert v. Osborn*, 140 N. Y. 30, 39, 35 N. E. 407. In this last case (*Dammert v. Osborn*) the court is emphatic, reversing the court below, in declaring that when a foreign will is valid at the place of the domicile of the testator—in that case Peru—it is valid here, even if invalid under our laws if made by a party domiciled here, and that the will must be construed and enforced according to the law of the domicile. Said the court:

"At every stage of the inquiry pressed upon us by this appeal, it is important to keep in view a fundamental fact, established by uncontradicted evidence at the trial and conceded upon the argument, and that is that the bequest to the Sevilla Home was perfectly valid by the law of Peru, the domicile of the testator, which governed his personal property, wherever it was at the time of his death. The validity of the gift by the law of the domicile necessarily involves the conclusion that it is not affected, under that law, by the fact that at the time of the testator's death there was no trustee competent to take, or that the estate did not vest within a period measured by lives, or

by the general and indefinite nature of the trust, nor any other local rule that would defeat the intention of the testator in case it had been a domestic will. The general principle that a disposition of personal property, valid at the domicile of the owner, is valid everywhere, is of universal application. It had its origin in that international comity which was one of the first-fruits of civilization, and in this age, when business intercourse and the process of accumulating property take but little notice of boundary lines, the practical wisdom and justice of the rule is more apparent than ever. It would be contrary to the principles of common justice and right, upon which the rule is founded, to permit a testamentary disposition of personal property, valid by the law of the domicile, to be annulled or questioned in every other country where jurisdiction was obtained over the property disposed of or the parties claiming it, except for the gravest reasons. * * * Our courts may in certain cases decline to administer the gift, and remit the property to the principal seat of administration, but they cannot divest the title of one or transfer it to another contrary to the law of the domicile. That law is part of the disposition and the foundation of all title under it, and it cannot be disregarded, to the prejudice of one and the benefit of another, any more than the other parts of the instrument."

And, says the Court of Appeals, in *N. Y. Life Ins. & Trust Co. v. Vile*, 161 N. Y. 11, 55 N. E. 311, 76 Am. St. Rep. 238:

"It is well settled that the law of the testator's domicile must prevail in the interpretation of a will."

This is expressly decided in *Harrison v. Nixon*, 9 Pet. 483, 504, 505, 9 L. Ed. 201. And so it is laid down and held that the law of the domicile of the testator must determine and prevail as to the mental and other competency of the testator to make the will in question. Willard on Executors, 59; Story, Conflict of Laws, §§ 465, 468; *Lawrence v. Kitteridge*, 21 Conn. 582, 56 Am. Dec. 385; *Holmes v. Remsen et al.*, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581; *Isham v. Gibbons*, 1 Bradf. Sur. (N. Y.) 69; 2 Thomas, Law of Estates, 1277. Says Willard, *supra*:

"It appears to be the generally received doctrine, at the present day, that the status or capacity of the testator to dispose of his personal estate by will, depends upon the law of his domicile."

And, further:

"The law of the testator's domicile at the time of his decease governs as respects his testamentary capacity."

Says Story, *supra*:

"And, first, in relation to testaments of movable property: So far as respects the capacity or incapacity of a testator to make a will of personal or movable property, we have already had occasion to consider the subject in another place. The result of that examination was that the law of the actual domicile of the party, at the time of the making of his will or testament, was to govern as to that capacity or incapacity. * * * The same doctrine is now as firmly established in America. The earliest case in which it was directly in judgment was argued in the Supreme Court of Pennsylvania in 1808; and this case may be truly said to have led the way to the positive adjudication of this important and difficult doctrine. There a foreign testator domiciled abroad had made a will of his personal estate, invalid according to the law of his domicile, but valid according to the law of Pennsylvania; and the question was whether it was competent and valid to pass personal property situate in Pennsylvania. The court decided that it was not, and asserted the general doctrine that a will of personal estate must, in order to pass the property, be executed according to the law of the place of the testator's domicile at the time of his death. If void by that law, it is a nullity everywhere, although it

is executed with the formalities required by the law of the place where the personal property is locally situate. The court asserted that in this respect there was no difference between cases of succession by testament and by intestacy. The same doctrine has been since repeatedly recognized by other American courts, and may now be deemed as of universal authority here."

If this be the law, has any court aside from the Surrogate's Court of Madison county, N. Y., and the appellate courts of the state, power or jurisdiction so to declare and adjudicate and enforce its decree? It is a general proposition of law that the federal courts, outside the District of Columbia, have no probate jurisdiction strictly as such. *Fouvergne v. City of New Orleans*, 18 How. 470, 15 L. Ed. 399; *Tarver v. Tarver*, 9 Pet. 174, 9 L. Ed. 91; *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; *Farrell v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101. In *Farrell v. O'Brien*, *supra*, the court held:

"As the authority to make wills is derived from the state, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States."

But it is equally well settled that, as between citizens of different states, where one has an interest in an estate of personalty as legatee or distributee, the courts of the United States may enforce such rights and interests if the courts of general jurisdiction of the state where the administrator or executor resides and has the property and was appointed may enforce such rights. This is but the enforcement of the laws of the state in the federal courts. It is not the exercise of probate jurisdiction. *Byers v. McAuley*, 149 U. S. 608, 621, 13 Sup. Ct. 906, 37 L. Ed. 867.

But in such case we are again confronted with the proposition: Can the federal court, confronted by a will of the testatrix proved and admitted to probate in the proper Surrogate's Court of the state of New York, whose laws the court is called upon to enforce, or under whose laws it is acting, not the state of the domicile of the testatrix, and also confronted by another will of the testatrix, admitted to probate in the proper probate court of the domicile of the testatrix, decide between them and enforce the will of the domicile, or must it presume, and act on the presumption, that the will recognized by the probate court of New York is the legal and valid will? Can the federal court in substance and effect, when it cannot do it directly in a suit for the purpose of establishing one will or annulling another, *Farrell v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101, decree that the will admitted to probate at the domicile is the legal and valid will as against one admitted to probate elsewhere? Can the federal court decree or direct that the personal estate in the hands of the ancillary executor be held and delivered to the administrator with the will annexed in the place of the testator's domicile, that of the principal administration?

In *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867 (and before cited), the court held:

"It is a rule of general application that, where property is in the actual possession of a court of competent jurisdiction, such possession cannot be disturbed by process issued out of another court. An administrator appointed by

a state court is an officer of that court, his possession of the decedent's property is the possession of that court, and as such it cannot be disturbed by process issued out of a federal court. The jurisdiction of the federal courts is a limited jurisdiction, depending either upon the existence of a federal question or the diverse citizenships of the parties; and where these elements of jurisdiction are wanting it cannot proceed, even with the consent of the parties. Federal courts have no original jurisdiction in respect to the administration of decedents' estates, and they cannot, by entertaining jurisdiction of a suit against the administrator, which they have the power to do in certain cases, draw to themselves the full possession of the res, or invest themselves with the authority of determining all claims against it. A citizen of another state may proceed in the federal courts to establish a debt against the estate, but the debt thus established must take its place and share in the estate as administered by the probate court. It cannot be enforced by direct process against the estate itself. Therefore a distributee, citizen of another state, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally or his sureties, or against other persons liable therefor, or proceed in any way which does not disturb the actual possession of the property by the state court. In this case it was reversible error for the Circuit Court to take any action or make any decree looking to the mere administration of the estate, or to attempt to adjudicate as between themselves the rights of the litigants, who were citizens of the state of Pennsylvania; the res being in the possession of a court of that state."

It would seem to follow that the personal estate of Elizabeth S. Eaton, situated in the state of New York, is now in the possession of the Surrogate's Court of the county of Madison, N. Y., a court of competent jurisdiction; that the possession of such property by such court cannot be disturbed by any process issued out of the federal court; and that a decree cannot be pronounced and enforced by this court that the executor deliver the property in his hands as an officer of that court to the administrator with the will annexed appointed by the Michigan court. But I do not see that this case denies the right and power of this court to adjudicate the rights of the parties and leave the execution of the adjudication to the Surrogate's Court. It is, as we have seen, the law of the state of New York, as well as that of the state of Michigan and of all the states, that the estate of a decedent testate or intestate must be distributed in accordance with the law of the decedent's domicile, that such law governs, and that the law of the domicile of a testator determines what his will is, including its construction.

In *Byers v. McAuley*, supra, May McAuley, domiciled in Pennsylvania, died owning personal property as to which she died intestate, but leaving a writing, purporting to be her last will and testament, disposing of all or certain of her real estate situate in that state. This instrument was admitted to probate in Allegheny county, Pa., as her will, and letters testamentary with the will annexed issued to one Byers. He rendered his account to the court appointing him, and the same was approved, and the amount for distribution fixed, and it was put upon the audit list for distribution on March 29, 1887. On March 28, 1887, a bill in equity was filed in the Circuit Court of the United States for the Western District of Pennsylvania, by certain nonresidents of Pennsylvania interested in the estate, against the administrator with the will annexed and others interested in the estate, some of whom were residents of Pennsylvania, which bill set forth the death of May McAuley, the will, that there were two classes of claimants, that the will

was null and void, and that there was a large amount of personal estate in the hands of the administrator for distribution. Relief was demanded that the administrator render an account of the personal estate, that the parties entitled be ascertained and determined and distribution made, that the will be declared null and void, that the administrator be enjoined from disposing of same, that some person be appointed to take charge of such real estate, and that same be partitioned and sold, and the proceeds divided amongst those entitled, and for general relief. A plea in bar, setting up the proceedings in the orphans' court of Pennsylvania, answering to the surrogates' and probate courts of certain states, was filed and overruled. The case went to a hearing on answer and replication. An accounting was had before a master. The will was held valid, the proceeds of the real estate directed to be paid to the parties named therein, the rights of the two sets of claimants to the personal estate were adjudged and determined, and payment directed accordingly. From the decree appeals were taken, and the jurisdiction of the Circuit Court challenged, as it was from the beginning. It will be noted that this was a suit by nonresident parties directly entitled to share in distribution of the personal estate and claiming to have an interest in the real estate because of the alleged invalidity of the will. The Supreme Court of the United States (see page 620 of 149 U. S., and page 910 of 13 Sup. Ct. [37 L. Ed. 867]) upheld the jurisdiction of the Circuit Court of the United States in the premises, and its right to entertain jurisdiction in behalf of all citizens of other states and "to determine and award their shares in the estate." This determination necessarily involved the question whether the first cousins took the whole of the personal, or whether second cousins were entitled to share, and on this question it was held that the Circuit Court decided and adjudged correctly, as it followed the decisions of the highest court of Pennsylvania (see page 621 of 149 U. S., and page 911 of 13 Sup. Ct. [37 L. Ed. 867]), and that it decided and adjudged correctly in determining the validity of the will. It also held that the Circuit Court erred in determining or assuming to determine the rights and interests of the parties domiciled in Pennsylvania (Chief Justice Fuller and Mr. Justice Shiras dissenting) as between themselves, and in ordering an accounting, which had already been had in the orphans' court (probate court) and had become final. The court also held that the estate or property could not be taken by the Circuit Court or its processes from the custody of the orphans' court, as that court had possession, but that the decree of the Circuit Court would be binding as to all nonresident parties.

The case of *Graham v. Lybrand*, 142 Fed. 109, 73 C. C. A. 333, is more pertinent to the question before this court. There Jacob W. Lybrand, the decedent and testator, was domiciled in Ohio, where he died, and where letters of administration were granted to one Graham. The property, all personal, of Lybrand, some \$85,000, was sent or taken by certain of his relations to the state of Wisconsin shortly before his death, where his will was proved and letters issued to the executors, the persons who took the property to that state. There was no property in Ohio belonging to the deceased. Lybrand owed certain debts in Ohio, and judgments therefor were obtained in Ohio against

the administrator, to be collected, of course, from the estate. Graham, as administrator, brought suit in the Circuit Court of the Western District of Wisconsin against the executors, praying a decree that the executors turn over to him sufficient of the assets to pay the debts in Ohio, the domicile of the testator. The bill was demurred to, the demurrer sustained, and on appeal to the Circuit Court of Appeals this action was affirmed. There was a statute in Wisconsin which would have permitted the Ohio administrator to file his letters, etc., in Wisconsin, and collect the assets, etc., there, in case no administration had been granted in that state? The Circuit Court of Appeals said (142 Fed. 111, 112, 73 C. C. A. 335, 336):

"The Wisconsin statute would permit the plaintiff, if no administration was being had in Wisconsin, to file a duly authenticated copy of his appointment and to sue for the possession of property which had belonged to his decedent at the time of his death; but, if administration is going on in Wisconsin, the statute leaves the foreign administrator disqualified to come into the state and take independent action to gather in the assets. The fund is in charge of the Wisconsin state court. The federal court in Wisconsin would have the right to adjudicate against these defendants the amount of a claim against the estate; but it rightly declined to order the officers of the Wisconsin state court to turn over a fund under the control of that court to the officer of the Ohio state court for administration there. *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. If the Ohio court desired a portion of the assets in Wisconsin, possibly a more fortunate outcome would have resulted from sending its ambassador with a proper petition to the court where the fund was; but, even so, the event would depend upon comity rather than right."

This suit now before this court is not brought by any legatee named in the will or codicil of Elizabeth S. Eaton to have their respective rights and interests in the estate ascertained and determined, or to recover any debt, legacy, or distributive share. The estate is not ready for distribution to the residuary legatees; but the income from time to time is ready to be paid to the one entitled thereto. If Susan C. Storms, now Higgins, should bring suit in this court to have it determined that she has an interest as legatee under the provisions of the will, disregarding the codicil, setting up the action of the respective courts in Michigan and New York, and praying a determination as to which is the will that governs, I think this court would have jurisdiction of the action. This court could not take the property from the custody of the Madison County Surrogate's Court by any process; but it could make a decree as to the rights of the parties. I do not find authority for the proposition that the administrator with the will annexed can maintain an action for such purpose. Should such suit be brought by the legatee, this court would be called on to determine her right, and in such case would be called upon to decide whether or not she is bound by the decree in the Madison County Surrogate's Court holding that the testatrix was of sound mind and memory when she executed the codicil; the legatee having entered upon a contest over that question when she personally appeared and made herself a party. Probate proceedings are not usually *inter partes* or *res adjudicata* as between nonresidents served by publication and the petitioner or petitioners. The court has jurisdiction by virtue of the location of the res within its jurisdiction. The nature of a proceeding to probate a

will is one in rem, and not one inter partes. *Farrell v. O'Brien*, 199 U. S. 89, 106, 110-111, 25 Sup. Ct. 727, 50 L. Ed. 101. See, also, opinion in *Overby v. Gordon*, 177 U. S. 214, 222, 20 Sup. Ct. 603, 44 L. Ed. 741 et seq.; *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049. However, under the New York statutes all persons cited and having an interest to defeat the will may appear and contest its validity and the competency of the testator to make it. Section 2617, Code Civ. Proc. And section 2626 makes the will of personal property conclusive, except as there stated. This question may affect Mrs. Kersey, also, as under the will, in a certain contingency, she takes the place of Mrs. Higgins to a certain extent. However, she, too, appeared and contested the validity of the codicil.

May this court, at the suit of the administrator with the will annexed appointed in Michigan, exercise the judicial discretion of determining whether or not the property in New York, and in the possession of the executor appointed here, and consequently of the Surrogate's Court of Madison county, N. Y., shall be transmitted to such administrator, and consequently to the probate court of Michigan. If this court can do that, and enforce its decree, it can take the property from the custody of the one state court and transfer it to that of the other. This power is denied by the Supreme Court of the United States, as we have seen. Can this court substitute its judgment or discretion in the matter for that of the Surrogate's Court? Is not that a matter relating or pertaining solely to the administration of the estate? I find no statute expressly conferring such power on any court. However, the Supreme Court of the state of New York in certain cases has concurrent jurisdiction with that of the Surrogate's Court in the settlement of the estates of deceased persons, testate and intestate. If the Supreme Court of the state of New York may in its discretion assume jurisdiction of this estate, so far as situated here, and direct the transmission of the property, I think this court can exercise the same power at the suit of a nonresident of the state having the proper interest in the matter. See *Schurmeier v. Connecticut M. L. I. Co.*, 137 Fed. 42, 44, 45, 69 C. C. A. 22, and cases cited; *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147. In this last case it is held that the federal courts, in exercising jurisdiction at the suit of a nonresident against an executor, is but enforcing the law of the state, and is bound by the same rules that govern the local tribunals. But the Supreme Court of the state of New York will not assume or exercise jurisdiction over the settlement of the estates of executors or administrators, except in special cases, where it is necessary to "supplement insufficient authority in the Surrogate's Court to meet the conditions of the particular case, or where for some other reason full and complete justice cannot be done in that court." *Borrowe v. Corbin et al.*, as Executors, 31 App. Div. 172, 52 N. Y. Supp. 741, affirmed on opinion below 165 N. Y. 634, 59 N. E. 1119; *Matthews v. Studley et al.*, as Executors, 17 App. Div. 303, 45 N. Y. Supp. 201, affirmed on opinion below 161 N. Y. 633, 57 N. E. 1117. In this last case the court below said:

"Indeed, no proceeding for an accounting of executors, in the Supreme Court, will ever be permitted, unless special reasons are shown why such an account-

ing cannot, or ought not to, be taken in the Surrogate's Court. That court is the proper tribunal for such proceedings, and it is not necessary or proper to remove them into another court, in the absence of special reasons which require that course to be taken."

The surrogate of Madison county has full power and jurisdiction to hear and decide every question presented here. Therefore, following the law as declared by the highest court of the state of New York, this court ought not to take jurisdiction here. It is presumed that the Surrogate's Court of Madison county, N. Y., will follow the law and administer and distribute the estate according to the law of the testator's domicile. If it fails or refuses so to do, its errors will be corrected on appeal. There is no privity between an executor of the will of a deceased person appointed in one state, that of his residence, and an administrator with the will annexed of the estate of the same person appointed in another state, and a judgment against the one establishing a debt against the estate is not binding in the other. *Brown v. Fletcher's Estate*, 210 U. S. 82, 28 Sup. Ct. 702, 52 L. Ed. 966; *Stacy v. Thrasher*, 6 How. 44, 59, 60, 12 L. Ed. 337; *Johnson v. Powers*, 139 U. S. 156, 160, 11 Sup. Ct. 525, 35 L. Ed. 112; *Ingersoll v. Coram*, 211 U. S. 335, 362, 29 Sup. Ct. 92, 53 L. Ed. 208, et seq. But see *Aspden v. Nixon*, 4 How. 467, 11 L. Ed. 1059, and *Carpenter v. Strange*, 141 U. S. 87, 105, 11 Sup. Ct. 960, 35 L. Ed. 640. Estoppels must be mutual. What effect this may have in proper proceedings in the proper form it is unnecessary to decide. Clearly the decree in Madison county is not binding on the administrator in Michigan.

An answer was filed, but subsequently a demurrer was filed to the bill, with permission of this court, which takes its place. The issue is on the demurrer, and on an application for an injunction to restrain payments under the codicil pending the suit. My conclusions are that the administrator with the will annexed cannot maintain this suit as one to recover the legacy given by the will to Susan C. Storms, or Higgins, conceding that the decree of the probate court of Michigan must prevail; that it is not a suit by a nonresident plaintiff for a legacy or share; that this court cannot exercise the same power and jurisdiction in the premises possessed by the local court of Madison county in regard to the transmission of the estate to the jurisdiction of the domicile of the testator; that under the law of the state of New York, as declared by its highest court, the Supreme Court of the state, of general jurisdiction, has no power to grant the relief prayed for; and that, therefore, this court cannot. This view is sustained by the decision of *Putnam, C. J.*, in *Ingersoll v. Coram* (C. C.) 132 Fed. 168, 172, where it is said:

"The line of demarcation thus pointed out is a clear one, recognizable on fundamental principles; but also, on the authority of numerous decisions of the Supreme Court, we would have no jurisdiction to interfere with the action of the probate court for the county of Suffolk, so far as restraining that court from remitting portions of the estate under its jurisdiction to the proper tribunal at the place of domicile for distribution by that tribunal. Possibly, if all the heirs and legatees interested in the estate were defendants in the present bill, and were retained therein as such parties, we might restrain them from applying to the probate court in Suffolk county for an order remitting the estate under its jurisdiction; but we doubt whether, even under those circumstances, we could proceed to that extent. It is for the probate court for

the county of Suffolk to determine whether it will order the estate to be directly distributed or to be remitted, and we cannot compel it to order distribution; so that the result of any attempt on our part to prevent it from remitting would justify the probate court in refusing all action, if it saw fit to take that course, thus indefinitely leaving the portions of the estate in this jurisdiction unavailable, and demonstrating the folly, as well as the illegality, of our interference."

The demurrer is sustained, the injunction vacated, and the motion to continue same denied.

In re SUSQUEHANNA ROOFING CO.

(District Court, M. D. Pennsylvania. September 18, 1909.)

No. 1,255, in Bankruptcy.

BANKRUPTCY (§ 140*) — OWNERSHIP OF PROPERTY — CONVERTED BY TRUSTEE — LIABILITY OF ESTATE THEREFOR.

In a controversy between a trustee in bankruptcy for a roofing company and a claimant as to the ownership of certain roofing felt that had been sold by the trustee as that of the bankrupt, but was alleged by claimant to have been a part of a car load which he had sent to the bankrupt to be tarred, the evidence *held* to support the contention of the claimant, and to entitle him to recover the value from the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

In Bankruptcy. Sur petition of William Hughes for reclamation of certain property.

W. E. Benjamin and C. A. Hawkins, for claimant.
George E. Neff and C. A. May, for trustee.

ARCHBALD, District Judge. This case is purely one of fact. In the fall of 1907 William Hughes, the present claimant, shipped to the plant of the bankrupt company a car load of dry felt in rolls to be saturated with tar for roofing purposes, and, after treatment, to be reshipped to customers upon his orders. The dry weight was 31,435 pounds, which was increased to 56,894 pounds upon being treated. Of this, 18,110 pounds, tarred weight, was shipped away on orders of Hughes prior to bankruptcy, and 8,263 pounds, admittedly on hand, was turned over to him by order of the referee afterwards. This leaves 30,521 pounds to be accounted for, which is the amount in controversy. If this was on hand at the works when the company went into bankruptcy, in addition to that which was turned over, having been disposed of by the trustee, the estate must respond for it; but if, as contended by the trustee, it was shipped off by the company, before that, to fill its own orders, there is nothing but the ordinary liability on account of it. The referee took the latter view, and this is an appeal from his decision.

Having seen the witnesses, the referee is supposed to be in a better position to pass on their testimony, and his findings are therefore to be respected accordingly. But after a careful study of the case, and the reasons given by him for his decision, I cannot resist the conclusion that a mistake has been made in the disposition of it. The case

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

turns on the identity of the Hughes felt with the piles of material in the yard, when the receiver, who is now the trustee, took possession, to wit, a large pile near the end of the tar plant, and two smaller ones out by the siding. That the two smaller ones were his is conceded, this being what the referee ordered to be turned over. But the large pile is claimed by the trustee to have been material that he himself manufactured, after he took charge as receiver. And the referee accepts this. It may be that he meant merely that it was manufactured by the company at the mill, and left there. But that is not what he says. Nor does the referee so understand him. "Mr. Kopp, positively testified," as the referee finds, "that the third pile of felt, which Mr. Eastlack identified as Hughes' felt, was in point of fact not Hughes' felt at all, but that he (Kopp), as receiver, made it in the mill, and had it piled up in the yard, after the filing of the petition in bankruptcy and while he was acting as receiver. And in this Mr. Kopp is supported by the testimony of Strine, Grissinger, and Willis." If that was true, the evidence was all in the trustee's hands, and it would have been easy for him to have proved it. But the fact is that, except his mere say-so, there is not a particle of evidence to sustain it. And if the case is to be disposed of upon any such theory, there can be but one result to it. That there was a pile there, at the time of his appointment, there can be no question. Eastlack, the general manager, and Spahr, the secretary and treasury, both of whom were actively engaged in directing the business, so testified, as does Grissinger, one of the workmen, i., indeed, Mr. Kopp himself does not in the end admit it. Except the statement of Willis, another workman, that he does not know of any felt piled at the end of the tar plant, there is nothing to the contrary. It could not thus have been made by the receiver. The only thing that can be said is that, if not shown to belong to Hughes, it must have been made by the company.

But that it was made by the company is not much better supported. It was expressly testified by both Eastlack and Spahr that the car of felt sent there by Hughes in the latter part of 1907, to be saturated, was set out in the yard, after it had been treated, in three piles, to await shipping orders—one large pile, the second from the end of the tar plant, and two smaller ones, further out in the yard, by the color house or siding, all of which were there when the receiver took possession, only the two smaller ones being left, when the matter came to be looked up afterwards. This is strong evidence, coming from those most likely to know, and charged with the duty of doing so, and is not to be lightly disregarded. Opposed to it is the testimony of Strine, who did the loading and shipping, Grissinger and Willis, who were saturators, and Warfel, the bookkeeper, who in substance say that some time in the latter part of 1907 a car of felt was shipped to the mill to be tarred, which was designated by Eastlack at the time as "Ben's" or "Munn-Price" goods, and afterwards, as belonging to Hughes, the present claimant; the Munn-Price Company being a New York concern which failed just about the time it came there. This felt, as they testify, as soon as it was saturated, was piled up, partly in the mill and partly in the yard, where two piles of it were made beside the

color house or siding, that in the mill being almost immediately shipped out to fill certain of the company's own orders. They know of no such third pile as is spoken of by Eastlack and Spahr, at the end of the tar plant; Grissinger stating that the one he saw there was made by the company, which is the only direct evidence of any one on this subject.

It is not easy, on their face, to reconcile these conflicting stories. But if one is to be taken rather than the other, that of Eastlack and Spahr would seem to be much the more reliable; it being their business to know about and look after this material, the others only knowing about it casually, and having to fall back upon Eastlack and Spahr in the main for their information. In several particulars, also, the testimony of Strine and the others is open to question. It is left very indefinite, for instance, just how much of the Hughes felt was shipped, as they say, from the mill, directly after being tarred; it being variously given "as a car load" (there was only a car load in all, as I understand it), "600 or 700 rolls," "less than half a car load," and "different little shipments of less than car load lots." It was also stated to Vetter by Strine that there was only one load of 800 pounds which was shipped off that he knew of, which statement he now virtually admits. The little so shipped out of the mill, according to the lower of these estimates, hardly accounts for the missing 30,000 pounds, while the larger amounts are not consistent with there being two big piles in the yard, of 600 or 700 rolls each, as testified by Strine, or 500 or 600 each, according to Grissinger, which, at 40 pounds to the roll, would amount to anywhere from 40,000 to 56,000 pounds, or practically the whole quantity that came to be tarred. As calling in question, also, the statement that a part of these goods were shipped out immediately after they were treated, it is shown that, if this were done, there would be danger of spontaneous combustion.

But, without dwelling upon these points, it is evident to my mind that the confusion in the testimony arises because the parties are speaking of different goods. There was more than one load of so-called Munn-Price felt, in other words, which came that year to the mill to be tarred. It is true that some of the witnesses say they knew of but one. But it is testified by Vetter, Mr. Hughes' representative, that two or three cars were shipped there by Hughes, for the account of the Munn-Price Company, before the one in controversy. And it is admitted by Warfel, the bookkeeper, that other Munn-Price felt came there that year. Previous shipments, moreover, were of soft felt, where the one in question was hard. There is some dispute over this; Exhibits 4 and 5, where a record of it was made, apparently designating it as soft, and Kopp also testifying that that was the character of what he saw in the two smaller piles in the yard. But the saturation is conclusive that it was hard; 31,435 pounds, dry weight, becoming 56,894 pounds when treated; which, as I make it, is a gain of about 86 per cent. by absorption. If it were soft, it would have taken up at least 120 per cent. Kopp may very well have been mistaken about it, judging, as he did, only from outward appearances; it being put up, like soft felt, in 40-pound rolls, the standard weight

of that factory. Willis also says that the felt about which he testifies, which is supposed to be the same as that spoken of by the others, was single-ply felt, which is only used for soft and not hard goods. And Strine admits that after the soft Munn-Price felt, of which he speaks, the company got hard felt from outside parties to be saturated, which might thus have been that which is here in controversy.

It is said that all the witnesses for the trustee identified the car of Munn-Price goods, a part of which was shipped from the mill, with the small piles out in the yard, which are now claimed as belonging to Hughes, and that this is also tied up to that which came in the latter part of 1907, that being the time of the Munn-Price Company's failure. But, with even more positiveness, these goods, as has just been pointed out, are identified as soft felt goods, which those in controversy were not, and the one must give way to the other. And it being established that there were different Munn-Price shipments of different kinds of felt, to which the observations of the witnesses might equally apply, the chance for confusion appears, and with it the opportunity to reconcile the testimony, otherwise conflicting.

Accepting, then, the statement that there was Munn-Price felt, which was shipped away to help out orders which there was not enough company felt on hand to fill, as testified to by Strine and the others, this being soft felt, and not hard, it may well be, as testified by Eastlack and Spahr, who certainly ought to know, and whose testimony under the circumstances is to be taken, that other Munn-Price felt belonging to Hughes was piled up in the yard, in the way described, which was there, to the extent claimed, at the time the receiver went in; and this having been subsequently disposed of by him, with the idea, no doubt, that it was made at the mill, that being the only information he had with regard to it, it must now be accounted for accordingly.

It is contended that, even if the goods were converted by the company, and not by the receiver or trustee, being held on bailment, the same right to recover for them would exist. *Bills v. Schliep*, 11 Am. Bankr. Rep. 607, 127 Fed. 103, 62 C. C. A. 103. But, without passing upon that, the case being otherwise disposed of, the petition is sustained, the order of the referee reversed, and the case sent back, with directions to allow the claim.

In re GARTNER HANCOCK LUMBER CO.

(Circuit Court, W. D. North Carolina. September 10, 1909.)

BANKRUPTCY (§ 397*)—EXEMPTIONS—PARTNERSHIP PROPERTY.

Evidence *held* to entitle bankrupt partners to exemption from the partnership property under the statute of North Carolina.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 397.*]

In Bankruptcy. On certificate of referee.

Wm. R. Whitson, for trustee.

Craig, Martin & Thomason, for exemption claimants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NEWMAN, District Judge. In this case the referee denied to Walter Gartner and Mrs. Mary Hancock, members of the bankrupt partnership, their right to an exemption of \$500 each, which they claimed under the Constitution of this state, in so far as the same was claimed out of the partnership assets. I am compelled to differ with the referee as to the conclusion he reached in this matter. I do not think the reasons urged against the exemptions, and the reasons given by the referee for refusing the same, are sufficient.

The referee decided against the right to the exemptions claimed on June 24, 1909, and gave the claimants 15 days in which to institute proceedings for a review of his order. While the exceptions do not appear to have been filed until July 12th, the referee in his certificate says:

"The referee was absent from his office from July 3, 1909, until the 28th day of July, 1909. On my return I found a letter, dated July 9, 1909, written from Bakersville, N. C., inclosing exceptions, signed by Messrs. W. L. Lambert and J. W. Ragland, attorneys for applicants and bankrupts, to my order of June 24th."

It appears, therefore, that there was substantial compliance with the referee's order as to the time within which a review should be sought.

I hardly think the evidence justified the referee in finding that Mrs. Hancock's residence was in Texas. On the contrary, I think it justified, if it did not require, a finding that her residence was in North Carolina.

Neither do I believe the evidence was sufficient to justify the refusal of Gartner's exemption. Even if the matter of the accident insurance money would be sufficient in any event, I am satisfied that the referee took the wrong view as to where the burden is in such matters. I think the burden was on the trustee to show that there was individual property out of which his exemption could be claimed and allowed.

The exemptions seem to have been claimed in the schedules when filed, although there was considerable delay in filing them. Mrs. Hancock claimed her exemptions in \$136.50 of household furniture and clothing and \$363.50 worth of "logs now on Squirrel creek, Mitchell county, North Carolina." Gartner claimed \$34.50 of household furniture, etc., and the remainder of the \$500 in "lumber at Powder Mill and Cranberry, North Carolina." As to both of these claims, out of the partnership assets, the logs and the lumber, they should only be allowed in the proportion that the amount realized at the sale of each bears to the appraised value of the logs and lumber. In addition to this, there should be added to the amount of the household furniture claimed by Mrs. Hancock the articles of furniture which she states in her testimony she sold after the petition in bankruptcy was filed, and the exemption out of the partnership assets only allowed after such addition.

The foregoing is subject to the claims made by Griffin and others to the property out of which the exemption is claimed, if their title to the same has been or may be sustained. The referee will properly apportion and fix the costs of administration, in conformity with the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]).

BREYMANN et al. v. FORE RIVER SHIPBUILDING CO.

(District Court, D. Massachusetts. July 12, 1909.)

No. 77.

SHIPPING (§ 81*)—LIABILITY OF VESSELS—INJURY TO MOORED SCOW BY SWELL FROM PASSING VESSEL.

A dredge, engaged in deepening the main channel into Boston Harbor, was left anchored in the channel on a holiday, when not at work, with a scow made fast to her south side by lines. No one was on the scow, and no one on the dredge was giving her any attention. During the day the battleship Vermont came in from a trial trip made by the builders, and, passing to the south of the scow at a distance of about 200 feet, her swell caused the scow to break her lines and she drifted ashore and received some injury. Held that, while it was the duty of the Vermont to use reasonable care to avoid injury to the scow and dredge by her swell, which, owing to her construction, was unusually heavy, she was entitled to use the channel, and under the evidence, it did not appear that she failed in such duty, her speed having been reduced as much as was safe, having reference to her draft and the state of the tide, which was ebb and nearly out, and that she was not liable for the injury to the scow, which under the circumstances, and considering that her lines were old, should not have been left with no one in charge.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 345; Dec. Dig. § 81.*

Liability of vessel for injuries caused by creation of swell, see note to The Asbury Park, 78 C. C. A. 3.]

In Admiralty. Action by George H. Breymann and others against the Fore River Shipbuilding Company to recover damages for injury to scow. Libel dismissed.

Blodgett, Jones & Burnham, for libelants.
Bingham, Smith & Hill, for respondent.

DODGE, District Judge. The libelants' dredge Boston was being employed by them in dredging work in Boston Harbor under a government contract. On Thursday, November 29, 1906, she was moored at a point about midway in the main ship channel of Boston Harbor, below Castle Island and above Spectacle Island, on one side of the channel, and about opposite the lower end of the Lower Middle shoal on the opposite side. Thursday, November 29th, was Thanksgiving Day, on which active work was suspended. The only men on board the dredge were the engineer and two firemen and a deck hand, who were spending most of their time below. The libelant's scow No. 11, one of the scows into which, when dredging was going on, the material dredged was dumped in order that it might be towed away, was lying alongside the dredge, partly loaded. She had been placed there on the day before to be in readiness for the tugboat, which would take her to the dumping ground on the morning after, and also in order that she might meanwhile be kept pumped out by a steam pump on board the dredge. There was no one on board her.

The dredge was 115 feet long and 40 feet wide. As she lay moored, she was headed down the channel and parallel, or nearly so, to its gen-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

eral direction. The scow was alongside on the southerly or starboard side of the dredge, attached to her by three 6-inch lines, one of them doubled. The scow was 140 feet long and 40 feet wide. She projected in the direction down the channel 10 or 15 feet beyond the dredge. At about 4 o'clock in the afternoon the battleship Vermont, which the defendant company had just completed under a contract with the United States, came up the harbor on her return from a trial trip. The government authorities had not yet accepted her, and she was being navigated by employes of the defendant company, to which she then belonged. She passed the dredge and scow at about 4 o'clock, going to the southward of them at a distance of not over 200 feet from the scow when at the nearest point. The tide was still running out at the time, but it was only about half an hour before low water. The wave or swell created in the channel by her passage caused the scow to part the lines which attached her to the dredge, and the scow then drifted down the channel and went ashore on Spectacle Island. The libel seeks to recover for the damage she sustained by being thus stranded.

The Vermont's dimensions are: Length, 420 feet, and about 76 feet beam. She was drawing $24\frac{1}{2}$ feet, and her displacement was about 16,000 tons. The passage of so large a vessel inevitably creates a considerable wave or swell, and the Vermont's model is such as to cause her to create rather more disturbance and suction in the water than most vessels of like dimensions. The less the depth of water, the more noticeable is the disturbance and suction. There was, therefore, more of it on this occasion than there would have been, had the tide been higher. There was nothing to prevent the dredge and scow being seen from the Vermont as she approached them.

That it is the duty of a steamer to use reasonable care to prevent the swell or suction caused by her passage from injuring moored or anchored vessels near which she has occasion to pass has been repeatedly decided and is not disputed. The Vermont is claimed to have failed in this duty in several respects, which I next proceed to consider.

She is charged with having passed the dredge and scow at an undue rate of speed, such as augmented the danger to other vessels from her swell or suction. There is evidence on the scow's behalf that the Vermont passed at a rate of 10 miles an hour or more; but on the whole evidence I find that she had slowed down immediately upon sighting the dredge and scow, and when at an abundantly safe distance from them, from her full speed of 17 knots, or thereabout, to a speed of not more than 5 or 6 miles per hour; also that she did not increase that speed until after she had passed through the narrow part of the channel and come out of it into the upper harbor, a long way above the dredge. I find, also, that she could not, at low water and with the tide ebbing against her, have been run in that part of the channel at a rate materially slower than that at which she passed the dredge without risk to herself. I cannot believe that there was any such occasion for apprehending danger to the scow as to call upon her to anchor. I think she had a right to proceed through the channel, and that, if she was to do this, it would not have been safe to stop her engines, even temporarily. Her draft required, not only that she be kept in the channel, but that proximity to the channel limits or to the shoal spots in the

channel be avoided by a safe margin, and for this purpose steerage way was necessary. She could not have been permitted to drift without risk. Excessive speed on her part, therefore, is a charge which, in my opinion, has not been sustained.

She is charged with having gone to the southward of the dredge and scow, when by going to the northward of them the dredge would have protected the scow from the force of her swell. The evidence is that, of the steamers that had passed while the scow had been lying there, nearly all went to the northward of the dredge, and it is claimed that the Vermont was not following at that point the usual course for steamers. It appears, also, that the deepest water in the channel at that point, and for some distance above and below it, was in fact to the northward of the dredge. The libelants were undertaking to deepen the channel to a uniform depth of 35 feet for a width of 525 feet. They were to make 15, and had made 10, cuts in the bottom of the channel to that depth, each cut 35 feet wide, and the dredge was then anchored upon the eleventh cut, which had been partly completed. All the completed cuts were to the northward of where the dredge lay, so that 350 feet of 35-foot water extended northwardly from her. I find, however, that the completion of the cuts referred to had not been in any way publicly announced and was not generally known; also that the respondents' employes in charge of the Vermont did not know about it, and could not reasonably have been expected to know about it. Without such knowledge, and judging by the depths shown on the charts then in use, there was about the same room in the channel available for the Vermont to the southward as to the northward of the dredge and scow. The course to the southward, however, was the one indicated by those ranges from objects on shore upon which navigators were accustomed to rely, and the one best calculated to avoid danger from shoal spots in the channel a little further up, toward which a course to the northward would have headed the Vermont. I am unable to hold that reasonable care toward craft thus constituting in fact an obstruction nearly in midchannel (though not an unlawful obstruction), as the dredge and scow undoubtedly did, required the battleship to pass on one side of them rather than on the other.

The Vermont is charged with having gone too close to the dredge and scow. If, as appears to have been the case, the swell inevitably created by her passage was known to be considerable, even at the slow rate of speed adopted, and to be in any case greater than would be created by most other vessels of like draft, and to be particularly great at low tide; and if, as must have been obvious, the scow was lying unsheltered in any way from its effects, it may be said that reasonable care required the Vermont to keep as far away from the scow as she could with due respect for her own safety. No witness on either side has undertaken to estimate the distance at which she passed at more than 200 feet at the nearest point, and according to the charts there was room enough to permit a vessel even of the Vermont's draft to give the scow a berth considerably wider than this. In view, however, of the importance to the Vermont of not getting out of her course as she approached the entrance to the narrowest part of the channel immediately

above, I do not think it is satisfactorily shown that she could materially have increased the distance between herself and the scow in passing, with due regard for her own safety. Unless the distance was to be very materially increased, I see no reason to believe that it would have made any difference in the result so far as the scow was concerned. I am unable, on the whole, to charge the Vermont with any negligence in this respect.

Whether there was reasonable care or not on the Vermont's part, in the above respects or in any respect, must to a great extent depend upon what the persons in charge of her were bound to anticipate as the consequences of their navigation past the scow, and this would include more or less risk of injuring the scow in proportion as precautions had or had not been taken on board the scow to guard her against the peculiar dangers of the place she occupied. They were not bound to anticipate consequences which adequate precautions would have prevented. Clearly the owners of the scow would have no right to impose upon all craft having occasion to use this, the only deep-water, entrance to the harbor the sole burden of avoiding injury to her. The cases in which steamers have been held responsible for damage to other craft moored or at anchor, by the swell created in passing them, have generally been cases in which the damaged vessel was at a wharf or dock, or at some point of the shore out of the channel, where her regular business might well require her to be. If it was necessary for the dredge to be in the middle of this channel, it can hardly be said that it was necessary for the scow to be there. The evidence is that she had to be kept pumped out while partially loaded, as she was, and that this was one reason why she had been kept during the holiday alongside the dredge, in preference to taking her to an anchorage ground out of the channel. While it may not be possible to say that it was unlawful or necessarily negligent thus to leave the scow in midchannel, I think it must nevertheless be true that when her owners, for their own convenience and advantage, thus left her where she must unavoidably increase the dangers and difficulties to be encountered by other vessels in navigating this always somewhat dangerous and difficult portion of the channel, they did so to a considerable extent at their own risk, and must show that precautions were taken by them commensurate with the dangers to which they thus exposed her, before they can assume to charge other vessels lawfully navigating the channel with negligence. They were bound to see to it that the scow's mooring ropes were adequate for any emergency of this kind which might arise, and to have some one constantly on watch to act as emergencies of this kind might require, as by slackening the mooring ropes, if sudden strain could be thus avoided, or by giving signals of some sort to approaching vessels that special caution was needed. *De Lelle v. The Atlanta* (D. C.) 34 Fed. 918, 919. They had in this case taken no such precautions whatever. No one was on board the scow, the men on the dredge were keeping no lookout, and did not find out that the Vermont's swell was likely to reach the scow until it did reach her. Nor are the scow's mooring ropes shown to have been such as ought to have been used under such circumstances. According to the evidence they parted

easily and readily at the first strain put upon them, and I think the evidence shows that this is the result which ought to have been anticipated in view of their age, the use to which they had been put, and the usual life of ropes so used. An attempt was made after the scow broke adrift to get a line to her, but only one small rowboat had been provided for the use of the dredge and scow, and the attempt failed for want of a proper boat or sufficient men. Had these been at hand, as I think they ought to have been, the scow need not have gone ashore. The libelants' neglect seems to me to have been such as prevents any issue which the evidence leaves at all doubtful from being determined in their favor.

The evidence seems to me insufficient to establish any negligence on the Vermont's part as the cause of damage to the scow, and I must therefore dismiss the libel, with costs.

UNITED STATES v. RALEY et al.

(District Court, D. Oregon. October 4, 1909.)

No. 5,017.

1. CONSPIRACY (§ 33*)—DEFAUDING UNITED STATES—ELEMENTS—OFFENSE.

Under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), prohibiting a "conspiracy" to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, it is sufficient that it be the conspirator's purpose to commit a willful fraud on the law, or some statutory requirement pertinent to be observed, in view of the present controlling conditions; and it is not necessary that there should be a conspiracy to do an act that is an offense or crime by some statute of the general government, or to deprive the United States of its property or some property right.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. § 33.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

2. INDIANS (§ 15*)—INDIAN LANDS—SALE—STATUTES.

The officers of the government having been unable to sell all the excess lands in the Umatilla Indian reservation at public sale, as authorized by Act Cong. March 3, 1885 (23 Stat. 340, c. 319), private sale of such lands subsequently authorized by Act Cong. July 1, 1902 (32 Stat. 730, c. 1380), was subject to the same terms and conditions affecting the purchase, regulating actual settlements, payment of purchase price, etc., as were imposed by the former act on public sales thereof.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 15.*]

3. CONSPIRACY (§ 43*)—MEANS—INDICTMENT.

In an indictment for conspiracy to defraud the United States, it is sufficient that the means be set out with such particularity as will put defendant on notice of what he is to meet at the trial.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-99; Dec. Dig. § 43.*]

4. CONSPIRACY (§ 43*)—INDICTMENT—PURCHASE OF INDIAN LANDS.

An indictment for conspiracy alleged that defendants conspired to defraud the United States out of the Umatilla reservation lands sold at private sale by means of procuring persons to make false and fraudulent applications and affidavits to purchase such lands for the benefit of defend-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ants, and procured them to make such false and fraudulent applications and affidavits. *Held*, that an objection that there was no requirement of the statute for the sale of such lands that an affidavit should be made for the "purchase" of the land, but that an "oath or affirmation" was required of the purchaser at the time of the purchase, and that the indictment did not charge that defendants conspired to defraud the government by procuring persons who had become purchasers to make fraudulent oaths or affirmations was hypercritical; a false affidavit being tantamount to a false oath or affirmation.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-99; Dec. Dig. § 43.*]

5. CONSPIRACY (§ 43*)—FRAUD AGAINST THE UNITED STATES—INDICTMENT—AFFIDAVITS—OATH.

In an indictment for conspiracy to defraud the United States by making a false oath or affidavit in connection with the purchase of Umatilla reservation lands, it was not necessary to set out the details of the administration of the oath, by whom administered, or that the person officiating was an officer duly qualified to do so.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-99; Dec. Dig. § 43.*]

6. CONSPIRACY (§ 43*)—INDICTMENT.

An indictment for conspiracy in procuring false public land affidavits was not defective for failure to allege in what respect the affidavits were false or fraudulent.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-99; Dec. Dig. § 43.*]

7. INDICTMENT AND INFORMATION (§ 59*)—REQUISITES.

An indictment is sufficient if it states facts furnishing accused with such a description of the charges against him as will enable him to make his defense and avail himself of his prosecution or acquittal for the same offense, and informs the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 180, 181; Dec. Dig. § 59.*]

8. CONSPIRACY (§ 43*)—DEFRAUDING UNITED STATES—INDICTMENT—MEANS.

Where an indictment for conspiracy to defraud the United States alleged that defendant conspired to obtain Umatilla reservation lands by procuring persons to make false affidavits for the purchase of the lands on defendant's account, and by procuring persons to make contracts prior to such purchase whereby the title was to inure to defendant's benefit, and by procuring them to make false proofs of residence and cultivation of the lands, all of which acts were forbidden and unlawful, it sufficiently charged the means by which the conspiracy was to be effectuated.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-99; Dec. Dig. § 43.*]

9. CONSPIRACY (§ 27*)—ELEMENTS.

A conspiracy consists in the unlawful combination, and, but for the necessity of alleging an overt act, is committed when the combination is entered into, without anything further being done to effect the object.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec. Dig. § 27.*]

10. CONSPIRACY (§ 27*)—OVERT ACT.

Where defendants conspired to obtain Umatilla reservation lands by procuring false applications to purchase, defendant's act in procuring some person to make an application to purchase, and a false oath accompanying it, would constitute a sufficient overt act.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec. Dig. § 27.*]

11. CONSPIRACY (§ 43*)—DEFAUDING UNITED STATES—INDICTMENT—PUBLIC LANDS.

Where an indictment for conspiracy to defraud the United States alleged that the defendants had conspired by means of false applications to purchase to obtain title to a portion of the public lands subject to private sale and situated on the Umatilla Indian reservation, in Umatilla county, Or., not allotted nor required for allotment, it was not material that such lands were not public lands in the strict sense; the ultimate title being in the United States.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-99; Dec. Dig. § 43.*]

12. CRIMINAL LAW (§ 150*)—LIMITATIONS—OVERT ACTS.

Where conspirators are acting together for a common purpose comprehended by the scheme, limitations begin to run from the last overt act, except as to a conspirator withdrawing from the scheme, as to whom the statute runs from time of his withdrawal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 274, 275; Dec. Dig. § 150.*]

Commencement of period of limitations against prosecutions for continuing offenses, see note to *Ware v. United States*, 84 C. C. A. 519.]

J. H. Raley and another were indicted for conspiracy, and demurred to the indictment. Overruled.

John McCourt, for the United States.

Martin L. Pipes and Henry E. McGinn, for defendants.

WOLVERTON, District Judge. The questions presented for determination here arise upon a demurrer to an indictment charging the defendants with having committed the offense of conspiracy. The language of the indictment, omitting such as relates to the overt acts, is as follows:

"That the defendants J. H. Raley and John W. Crow, and William Rahe and J. H. Parkes, together with other persons to the grand jurors unknown, upon the fifteenth (15th) day of August, 1902, in Umatilla county, within the state and district of Oregon and within the jurisdiction of the above-entitled court, did wrongfully and unlawfully conspire, combine, confederate, and agree together to defraud the United States out of a portion of its public lands subject to private sale and situated upon the Umatilla Indian reservation, in Umatilla county, Oregon, and not included within the new boundaries of said reservation, and not allotted or required for allotment to the Indians, and which was not sold at the public sale of said lands theretofore held at the price for which said lands had been appraised and upon the condition provided in the act entitled 'An act providing for the allotment of lands in severalty to the Indians residing upon the Umatilla reservation in the state of Oregon and granting patents therefor and for other purposes,' by means of soliciting and procuring persons to make false and fraudulent applications and affidavits for the purchase of said lands for and on account of and at the solicitation of the said defendants J. H. Raley, John W. Crow, and the said William Rahe, and by procuring such persons to make contracts at the time of and prior to such application by said persons to purchase said lands, whereby the title thereto should inure to the benefit of said defendants J. H. Raley and John W. Crow, and by causing and procuring such persons so to be solicited and procured to make such false and fraudulent applications and affidavits for the purchase of said lands to make false and fraudulent proof of residence and cultivation upon said lands, and thereby acquire title from the government of the United States to such lands for the use and benefit of said defendants J. H. Raley and John W. Crow. And the said wrongful and unlawful conspiracy, combination, confederation, and agreement so wrongfully and unlawfully form-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 173 F.—11

ed and entered into by and among the defendants J. H. Raley, John W. Crow, and William Rahe and J. H. Parkes, and other persons to the grand jurors unknown, was in continuous operation and continuously in process of execution by the defendants J. H. Raley and John W. Crow at all the dates and days on and between the fifteenth (15th) day of August, 1902, and the first (1st) day of March, 1908."

It is first suggested that a conspiracy under the federal statute must, if it is based upon the doing of an unlawful act, be a combination to do an act that is constituted an offense or a crime by some statute of the general government. I do not understand such to be the law. By section 5440, Rev. St. (U. S. Comp. St. 1901, p. 3676), it is declared to be a conspiracy if two or more persons conspire to do either of two things, namely, to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose. There are, concededly, many ways in which the government may be defrauded, and yet the acts which go to or encompass the perpetration of the fraud are not made criminal by statute. It is sufficient that the purpose be to defraud the government in some way or manner. It may be to defraud it out of its property, or some property right, but not necessarily so; for it may be to commit a willful fraud upon the law or some statutory requirement pertinent to be observed in view of the conditions present and controlling. *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90; *Curley v. United States*, 130 Fed. 1, 64 C. C. A. 369; *United States v. Lonabaugh* (D. C.) 158 Fed. 314. The following language employed in the last case is indicative of the principle:

"The first question may be disposed of in a word, for it was admitted at the argument, as I understood counsel, that in order to bring the defendants within the meaning of section 5440, Rev. St. (U. S. Comp. St. 1901, p. 3676), the words 'conspiracy to defraud the United States' do not necessarily mean that there shall be pecuniary loss or damage to the government, resulting from false representations made to its officers in the performance of their duties, but that any false practice or trick set in motion for the purpose of inducing the government officials, in executing the laws of the United States in cases where they must act upon statements made by the parties interested, to act in a way which would be unlawful if the real truth were known, is a fraud upon the government."

Next, it is strenuously urged that the means charged by which it is alleged the object and purposes of the conspiracy were to be accomplished or effected are wholly insufficient in substance and in the manner of their averment in the indictment. To comprehend the force of the averments as to the means to be employed for effecting the purpose of the alleged conspiracy, it will be necessary to allude to the statute under which it was sought to acquire title to the lands involved. The act in question is that of March 3, 1885, relating to the allotment of lands in severalty to the Indians residing upon the Umatilla Indian reservation. Act March 3, 1885, c. 319, 23 Stat. 340. Certain lands upon the reservation were set aside to be allotted, which left a residue. This residue was directed to be sold for the use and benefit of the Indians residing upon said reservation. It is provided that such lands be sold at public auction, each purchaser being entitled to 160 acres of untimbered lands, and an additional 40 acres of timbered lands, and no more; the purchase price for the timbered lands to be paid down, and

that for the untimbered lands to be paid in three equal annual installments. It is further declared that:

"Each purchaser shall, at the time of making his purchase, make and subscribe an oath or affirmation that he is purchasing said lands for his own use and occupation, and not for or on account of or at the solicitation of any other, and that he has made no contract whereby the title thereto shall, directly or indirectly, inure to the benefit of another. And if any conveyance is made of the lands set apart and allotted as herein provided, or any contract made touching the same, or any lien thereon created before the issuing of the patent herein provided, such conveyance, contract, or lien shall be absolutely null and void. And before a patent shall issue for untimbered lands the purchaser shall make satisfactory proof that he has resided upon the lands purchased at least one year and has reduced at least twenty-five acres to cultivation. No patent shall issue until all payment shall have been made; and on the failure of any purchaser to make any payment when the same becomes due, the Secretary of the Interior shall cause said land to be again offered at public or private sale, after notice to the delinquent; and if said land shall sell for more than the balance due thereon, the surplus, after deducting expenses, shall be paid over to the first purchaser."

The officers of the government were unable to sell all these lands at public sale. Later, to wit, on July 1, 1902, an act was passed providing for the sale of such as yet remained at private sale. Act July 1, 1902 (32 Stat. 730, c. 1380). The same terms and conditions attending the purchase, and the same limitations as to the amount of purchase, were imposed as in the former act. *Jones v. Hoover* (C. C.) 144 Fed. 217. These statutes impose three conditions relevant to this inquiry, namely: That each purchaser is entitled to purchase no more than 160 acres of untimbered and 40 acres of timbered lands; that he shall, at the time of making purchase, make oath or affidavit that he is purchasing said lands for his own use and occupation, and not for, or on account of, or at the solicitation of, any other, and that he has made no contract whereby the title thereto shall, directly or indirectly, inure to the benefit of another; and that, before a patent shall issue, the purchaser shall make satisfactory proof that he has resided upon the untimbered lands at least one year and has reduced at least 25 acres to cultivation.

Now, it is charged that the defendants conspired to defraud the United States out of a portion of the public lands by means of soliciting and procuring persons to make false and fraudulent applications and affidavits for the purchase thereof, which were in reality for and on account of the defendants themselves. The lands were now selling at private sale, so that application was required to be made to the proper authorities for their purchase. It is objected that:

"There is no allegation that they [the applications and affidavits] were intended to be used, or that the plan of the conspiracy contemplated their use, in any manner that would contravene any statute or that would tend to effect the objects of the conspiracy."

I do not think this to be necessary. It is sufficient that the means be set out with such particularity as will put the defendant upon notice of what he has to meet in that respect at the trial. But more of this later.

The next contention is that there is no requirement of statute that an affidavit shall be made for the purchase of the land, but that an oath

or affirmation shall be made by the purchaser at the time of the purchase, and that the charge is not that these defendants conspired to defraud the government by procuring persons who had become purchasers to make fraudulent oaths or affidavits. Then it is further asserted that an oath or affidavit, to be effective, must be taken before an officer qualified to administer the oath, and that there is no averment that any such was administered by any person qualified to administer the same, or that such an oath was in fact solicited or procured for the purpose of deceiving any one.

The first objection is hypercritical. It is plain that the pleader has reference to the purchaser, and that the means assigned were to procure such person to make false affidavits for the purchase. The applicant becomes a purchaser, to all intents and purposes, when he makes his application, accompanied by the required oath or affirmation. True, the purchase is not complete, so as to entitle him to a patent, until he has paid the full purchase price; but he is deemed a purchaser when he has done those things which put him into contractual relations with the government, to the end that he may acquire his title in due course under the law. So that it is a palpable fraud upon the government to procure persons to make false oaths or affidavits, to be submitted with their applications, with a view to becoming such purchasers. A false affidavit is tantamount to a false oath or affirmation.

As to the next objection, it is unnecessary to set forth the details of the administration of the oath, by whom administered, and that the person officiating was an officer duly qualified to perform the service.

Then, again, it is urged that the indictment should show in what respect the affidavits were false or fraudulent. To this the answer is the same. But, not to pursue the objections in detail, the primary and essential objects of the indictment are: First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. To show forth these objects, facts must be stated, not conclusions of law alone. *United States v. Cruikshank et al.*, 92 U. S. 542, 558, 23 L. Ed. 588.

Since the decision of the case of *Dealy v. United States*, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545, there remains but little, if any, question as to what is necessary to be set forth showing the means to be employed to the end of defrauding the government out of its public lands. The defendant in that cause sought to make use of the homestead law by pretending to comply therewith, through false and fictitious entries. But it was simply alleged that the defendants, naming them, did conspire, confederate, and agree together to defraud the United States of the title and possession of large tracts of land "by means of false, feigned, illegal, and fictitious entries of said lands under the homestead laws of the United States." Then are set forth the overt acts. This was held sufficient as an averment of the means by which it was sought to accomplish the fraud complained of. In the case at bar the means relied on are set out with much greater fullness,

and with equal pertinency, namely: By procuring persons to make false affidavits for the purchase of said lands for the account of the defendants, and by procuring such persons to make contracts prior to such purchase whereby the title would inure to the benefit of the defendants, and by procuring such persons to make false proofs of residence upon and cultivation of said lands. All such acts are forbidden and unlawful, so that both the act and the means employed are unlawful.

But, upon principle, is not this ample specification, so that the defendants will be fully advised as to the particular charge they are called upon to answer? The conspiracy consists in the unlawful combination, and, but for the necessity of alleging an overt act, the offense is committed when the combination is entered into; and this without anything further being done to effect the object of the conspiracy. Such being the case, how would it be possible to set out the means in a more particular manner, if the purpose of the conspiracy is such as is alleged here? It could not be known then what persons could be procured to make the false oath, or what officer would administer it. Yet, under the statute, the offense is complete, or has been committed, when there has been any overt act to effect the object of the conspiracy. That overt act may have consisted in agreeing with some person simply that he would make an application, and a false oath to accompany it, looking to the end the conspirators had in view. There is no doubt that the means are sufficiently stated. That the lands are adequately described is also settled by the Dealy Case. Indeed, that case covers almost every feature of this, as it relates to the sufficiency of the indictment. See, also, *United States v. McKinley* (C. C.) 126 Fed. 242.

Another question presented is that the alleged purpose of the conspiracy was to defraud the government of a portion of its public lands, when in reality the lands in contemplation were not public lands, but lands as to which the Indian title had not as yet been extinguished. It is unnecessary to enter into a discussion as to what are public lands in any designated sense, as I do not deem it at all material to the present inquiry. It is enough to know that the ultimate title to the lands involved is in the United States, and that patent comes through that source to persons becoming purchasers. But, further than this, the lands are so definitely described as that the words "public lands" could be eliminated as surplusage if not properly applied. The description runs:

"A portion of its public lands subject to private sale and situated upon the Umatilla Indian reservation, in Umatilla county, Oregon, and not included within the new boundaries of said reservation, and not allotted or required for allotment to the Indians, and which was not sold at the public sale," etc.

These lands are treated as equitably belonging to the Indians upon this reservation; the United States holding the legal title, but rather in trust for the use and benefit of the Indians. A conspiracy to defraud the government of its title to these lands would constitute an offense, as well as one to defraud the government of public lands using the words in their ordinary acceptation.

The next question relates to the statute of limitation. Let it be borne in mind that the scheme that the defendants had devised, ac-

cording to the charge of the indictment, was ultimately to divest the government of its title to the lands in question. It is alleged that the conspiracy was entered into on the 15th day of August, 1902, but that it was in continuous operation and process of execution from then until the 1st day of March, 1908. The first act which it is alleged was done in furtherance of the conspiracy was of date September 15, 1902, and consisted in the defendants procuring Rose Bogart and many others to make application to the land office at La Grande to purchase each 160 acres of untimbered land and 40 acres of timbered land, and to make false and fraudulent affidavits with relation thereto, whereupon the said defendants paid the first installment of the purchase money for the untimbered lands and the full amount of the purchase money for the timbered lands, together with the necessary expenses and filing fees of the alleged entrymen. The second overt act relates to the procuring by defendants, on November 16, 1903, of three several parties to make final proofs as to certain lands, describing them. The third relates to the procuring of others, on November 20, 1903, to make final proofs as to other lands; the fourth, to procuring, on November 21, 1903, still others to make like final proofs; the fifth, to like transactions occurring on the ——— day of September, 1903. The sixth relates to an act whereby, on the ——— day of July, 1905, the defendants, in behalf of one David Nelson, one of the supposed purchasers gave notice of the intention of said David Nelson to make final proofs; the seventh, to a like notice given on September 27, 1905, in behalf of Elmer Hubbard, another of the alleged purchasers; the eighth, to a like notice given on April 24, 1905; the ninth, to a like notice given on December 14, 1905; the tenth, to a like notice given May 10, 1905; the eleventh, to a like notice given December 29, 1905; the twelfth, to an application made June 23, 1903; and the thirteenth, and last, relates to an act of the defendant Raley, performed August 26, 1905, whereby he paid to the proper officer of the land office \$17.64, being the third and final payment upon untimbered lands included in the application of Henry Shockey then deceased. The indictment was found June 8, 1908. By this it will be seen that, while part of these overt acts were committed more than three years previous to the date of the finding of the indictment, others were committed within the three years. This shows also a continuous operation under the alleged scheme for the accomplishment of an ultimate purpose, namely, to obtain title to these lands from the government, which title would not pass until patent issued.

The question presented under such a state of the case has been set at rest in this circuit by the case of *Jones v. United States*, 162 Fed. 417, 427, 89 C. C. A. 303, 313. Ross, Circuit Judge, after putting a case of great analogy to this, says:

"The conspiracy was a continuing one in its nature, and, so long as the conspirators continued in pursuance of it, each overt act committed by any one of them gave to the conspiracy effect and constituted an offense at the time of the commission of the act. So, in the case at bar, the conspiracy alleged contemplated the commission of various overt acts. It was a continuing conspiracy, and so long as the conspirators continued in pursuance of it, and did not avail themselves of the locus poenitentiae that section 5440 of the Revised Statutes

afforded them, every overt act committed by any party to the conspiracy gave new effect to the conspiracy and constituted another crime."

Other cases are to the same effect and constitute the undoubted weight of authority at this time. See *United States v. Bradford* (C. C.) 148 Fed. 413; *United States v. Brace* (D. C.) 149 Fed. 874; *Ware v. United States*, 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053; *United States v. Barber* (D. C.) 157 Fed. 889.

I take it that the true doctrine is that, so long as it may be shown that the conspirators are acting together for the common purpose comprehended by the scheme, and have, while so acting together, committed some overt act, all within the three years prior to the finding of the indictment, the statute has not run. A conspirator may withdraw from the common purpose. If he does so, and three years have run without his participation, although others of the original conspirators may have continued in the execution of the common design, he could not be prosecuted. But as to those who are still participating in the effectuation of the unlawful purpose when the overt act is committed, being committed within the three years, they are still confederating, conspiring, and agreeing together, and are chargeable with having committed the offense of conspiracy within the statute fixing the limitation for prosecuting the same. The objection, therefore, that the statute of limitations has run, is without merit.

For the reasons here stated, the demurrer should be overruled; and it is so ordered.

GUNDRY v. REAKIRT.

(Circuit Court, E. D. Pennsylvania. October 8, 1909.)

No. 582.

1. GARNISHMENT (§ 16*)—FOREIGN CORPORATION.

An attachment execution is available in Pennsylvania to reach a debt owed by a foreign corporation, lawfully doing business in that state, to the defendant in the original judgment.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. §§ 29, 30; Dec. Dig. § 16; * *Corporations*, Cent. Dig. § 2630.]

2. GARNISHMENT (§ 27*)—CORPORATE STOCK.

Attachment execution is not a proper remedy to reach a stockholder's interest in a corporation, the corporation not being a debtor to the stockholder to the amount of the stock liability, in the absence of express statute authorizing it.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 46; Dec. Dig. § 27.*]

3. EXECUTION (§ 29*)—PROPERTY SUBJECT—FOREIGN CORPORATIONS—STOCKHOLDER'S INTEREST.

The situs of a stockholder's interest in a corporation being the corporation's domicile the interest of a stockholder in a New Jersey corporation, though maintaining an office and doing business in Pennsylvania, could not be reached in that state, under Act Pa. June 16, 1836 (P. L. 765) § 22 (2 *Stewart's Purdon*, p. 1520, par. 20), providing that the stock owned by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

any defendant in any body corporate shall be liable to execution like other goods and chattels.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 61; Dec. Dig. § 29.*]

Action by Richard F. Gundry against Margaret L. Reakirt, in which the Cumberland-Georges Creek Coal Company was summoned as garnishee. On exceptions to the answer of the garnishee. Overruled in part.

Thomas Stokes, for plaintiff.

J. Frank Staley, for garnishee.

J. B. McPHERSON, District Judge. The plaintiff, having recovered a judgment in the Circuit Court against the defendant, has issued an attachment execution thereon and summoned the Cumberland-Georges Creek Coal Company as garnishee. The coal company was chartered by the state of New Jersey, but is registered in Pennsylvania as a foreign corporation and maintains an office in the city of Philadelphia. The attachment was duly served upon the president, who is also the agent named in accordance with the Pennsylvania law as the person upon whom process is to be served. The company entered an appearance and answered the plaintiff's interrogatories, denying that it possesses or controls any property belonging to the defendant, or is indebted to her in any manner. These answers are not objected to, but exception is taken to the answer to the following interrogatory:

"(7) At the time the writ in the above case was served upon you, or at any time since, was the said defendant the owner or holder of, or in any way or manner entitled to, certificates of stock, or shares, or any interest, in the capital stock of the Cumberland-Georges Creek Coal Company? If yea, state the number of shares or amount of interest that said defendant was the owner or holder of, or in any way or manner entitled to receive, and what is their par value, and whether the said shares were transferred by power of attorney on the books of said company."

The garnishee answered this question by submitting itself to the court for instruction, giving as the reason for so doing:

"That, as it is a corporation organized under the laws of the state of New Jersey, although registered as a foreign corporation to do business in the state of Pennsylvania, with F. A. Von Boyneburgk designated as its registered agent, with offices at Nos. 475-477 Bourse Building, Philadelphia, upon whom the writ in this case was served, it is not required to make answer, and for the further reason that the interrogatory so addressed is immaterial and irrelevant."

The suggestion that the interrogatory is immaterial and irrelevant need not be considered, since in my opinion the following considerations furnish a sufficient ground for refusing to require a further answer from the garnishee:

It is no doubt true that the writ of attachment execution may be used in Pennsylvania to reach a debt owed by a foreign corporation, lawfully doing business in the state, to the defendant in the original judgment. *Fithian v. Railroad Co.*, 31 Pa. 114, and *Barr v. King*, 96 Pa. 485, were cases of this kind. But a corporation does not owe a debt

to one of its stockholders in respect of his shares, and the writ of attachment execution is not an appropriate remedy against them, unless its scope has been thus extended by legislation. In Pennsylvania the only law subjecting corporate shares to execution (so far as I am advised) is the act of 1836. P. L. 755. The twenty-second section of that statute (2 Stewart's Purdon, p. 1520, par. 20) provides that:

"The stock owned by any defendant in any body corporate * * * shall be liable to execution like other goods or chattels. * * *"

And sections 32, 33, 34, 36, 37, and 38 (Id. pp. 1532-33, pars. 45-47; Id. pp. 1537-1540, pars. 49, 50, 52) describe the procedure, "in the nature of an attachment," by which the stock may be levied upon and sold. But the act of 1836 applies only to stock in Pennsylvania corporations. It makes no attempt to subject the stock of foreign companies to execution process in this state; and it need hardly be said that, without express legislative declaration of such a purpose, the general words of the statute must be restricted to domestic shares. Whether an attempt by one state to authorize a levy within its own borders upon shares of capital stock in a foreign corporation can be successful is a question that need not now be decided. For present purposes it is enough to hold that no such effort can be sustained, unless there is at least the apparent warrant of a statute permitting the effort to be made.

The general rules of law concerning the liability of stock to execution are well settled. For example, in section 480 of 2 Cook on Corporations (5th Ed.) it is said:

"A share of stock is in the nature of a chose in action, and at common law a chose in action could not be reached by or made subject to a levy of execution. Consequently it has been uniformly held by the courts that at common law a levy of execution could not be made on shares of stock. Unless, therefore, the process of execution has been extended by statute, so as to reach such property, the stock of a judgment debtor cannot be made subject to the payment of his debts by means of an execution. An attachment, being entirely statutory, can be levied on shares of stock only when the words of the statute declare that an attachment may be levied upon such property."

In section 485 it is further said:

"Shares of stock in a corporation are personal property, whose location is in the state where the corporation is created. It is true that for purposes of taxation, and for some other similar purposes, stock follows the domicile of its owner; but, considered as property separated from its owner, stock is in existence only in the state of the corporation. All attachment statutes provide for the attachment of a nonresident debtor's property in the state, and generally, under such statutes, the stock owned by a nonresident in a corporation created by the state wherein the suit is brought may be attached, and jurisdiction be thereby acquired to the extent of the value of the stock attached. But a defendant's shares of stock cannot be reached by a levy of attachment in an action commenced outside the state wherein the corporation is incorporated, unless the certificates of stock are within the state where the suit is commenced and are reached by the sheriff. For purposes of attachment, stock is located where the corporation is incorporated, and nowhere else. The shares owned by a nonresident defendant in the stock of a foreign corporation cannot be reached and levied upon by virtue of an attachment, although officers of the corporation are within the state engaged in carrying on the corporate business."

And in section 491:

"The process of garnishment is proper only where a debt is due from a third person to the defendant debtor. It is not a proper remedy for reaching shares of stock owned by the debtor. The corporation owes the stockholder no debt, and by no fiction of law can it be held to be a debtor of the defendant debtor."

Thompson on Corporations, vol. 2, § 2786, is similar in effect:

"So far as the writer knows, all the states which prescribe the manner of levying upon shares of corporate stock by execution or attachment prescribe that it shall be done by giving notice to the corporation, or to its secretary, or to the officer having charge of its books; this notice to the officer in charge of the corporate books being essential to the validity of the seizure. The effect of such a statutory provision necessarily is to make the situs of corporate shares for the purpose of the levy of an execution or attachment the situs of the corporation itself. It follows that shares owned by a nonresident defendant in the stock of a foreign corporation cannot be reached and levied upon by virtue of an attachment, although officers of the corporation are in the state of the forum, engaged in carrying on the corporate business there. But, when the foreign company has by appropriate legislation been vested with the character and status of a domestic corporation, then its stock has been held to be within the jurisdiction of the local court and subject to execution."

In 19 Cyc. p. 1338, § 111, a recent summary of the law is to be found:

"It has generally been held that, for the purpose of attachment or garnishment of shares of stock in a corporation, their situs is the domicile of the corporation, and they cannot be reached by such process in another state, even though the debtor shareholder is a resident of such other state and the certificates of stock are found therein; and even though the corporation may be doing business and be subject to process in such other state. In some cases, however, the contrary has been held where the certificates were in the state, or where the corporation had become domesticated under the laws of the state."

To the same effect is section 2b, p. 906, vol. 13, of the American & English Encyclopedia of Law (2d Ed.):

"It is a well-settled rule that, in the absence of a statute expressly authorizing the attachment of stock owned by nonresident defendants in a foreign corporation, such stock cannot be reached or levied upon by virtue of an attachment in the domestic state. The mere fact that the officers of the foreign corporation reside within the state and are engaged in promoting and transacting its business, or that one of its branch registry offices is located in such state and that certificates may be found within its borders, makes no difference. The situs of stock for the purpose of attachment is the domicile of the corporation, and that place alone. Certificates of stock are not the stock itself. They are but evidences of the stock, and the stock cannot be attached by levy of attachment on the certificate."

There is some difference of opinion concerning one or two of the statements contained in the foregoing quotations, but the general rule is unquestioned that the situs of stock for the purpose of attachment is in the domicile of the corporation issuing the shares. They are therefore not subject to the process of another state, and (in the absence of legislation attempting to reach the foreign stock) it can make no difference whether the owner of the shares is a resident of the domestic, or of the foreign, state. See, also, *Pinney v. Nevills* (C. C.) 86 Fed. 97, and note to *Simpson v. Jersey City, etc., Co.*, 55 L. R. A. 796.

The state of New Jersey has dealt with the subject of levying upon whatever stock the defendant may own in the Cumberland-Georges Creek Coal Company. Gen. St. 1895, p. 913, § 26, provides:

"That the shares of stock in every corporation of this state shall be deemed personal property and shall be transferable on the books of such company in such manner as the by-laws may provide."

Act March 10, 1892 (P. L. 1892, p. 90; Gen. St. 1895, p. 989, § 366), makes it lawful—

"for any corporation of this state, incorporated under any general or special act, to carry on and conduct its business outside of the state of New Jersey, although not provided for in the act of certificate of incorporation of such corporation: Provided, however, that such corporation shall have an office in the state of New Jersey."

By Act March 17, 1869 (P. L. 1869, p. 498; Gen. St. 1895, p. 1415, § 4), it is provided that

"Any share or interest in any bank, insurance company, or other joint-stock company, that is or may be incorporated under the authority of the state or of the United States, belonging to the defendant in the execution, may be taken and sold by virtue of such execution in the same manner as goods and chattels."

In the three following paragraphs the method of executing such a writ is ordained, not only when the proper officer of the company is a resident of the state, but also when he is a nonresident. These provisions resemble some of those considered by the Supreme Court in *Jelenik v. Huron, etc., Co.*, 177 U. S. 1, 13, 20 Sup. Ct. 559, 563, 44 L. Ed. 647, where it was held that shares of stock in a Michigan corporation were to be deemed personal property in that state transferable on the books of the company and that the share or interest of a stockholder might be taken in execution in the method provided by the Michigan laws. Mr. Justice Harlan, speaking for the court, said:

"Whether the stock is in Michigan, so as to authorize that state to subject it to taxation as against individual shareholders domiciled in another state is a question not presented in this cause, and we express no opinion upon it. But we are of opinion that it is within Michigan for the purposes of a suit brought there against the company—such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner. This principle is not affected by the fact that the defendant is authorized by the laws of Michigan to have an office in another state, at which a book showing the transfers of stock may be kept."

In brief, there is no domestic legislation attempting to authorize the attachment now in question, and no reason is perceived why the plaintiff may not be required to pursue in that state the remedy that is given by the law of New Jersey.

The exception to the seventh answer of the garnishee is overruled.

MAXEY v. RIDEOUT.

(Circuit Court, E. D. Wisconsin. October 11, 1909.)

1. INDEMNITY (§ 11*)—ACTION AGAINST INDEMNITOR—ACCRUAL.

Plaintiff, defendant, and another started the promotion of a railroad company, the scheme contemplating a transfer to it of certain timber land belonging to plaintiff, to be paid for in stock, etc.; it being agreed that defendant, in consideration of \$100,000 in stock of the railway, should furnish such money as might be necessary, over a loan to be obtained, to enable the railroad company to complete its organization and to make the necessary payments on plaintiff's land, etc., and for personal expenses, the sums advanced to be returned on completion of the organization of the company. The corporation was formed prior to the time contemplated in the original scheme, and plaintiff's land was transferred to it in return for certain notes of the railroad company, one of which, for \$5,000, plaintiff indorsed to a bank of which defendant was president to secure money to pay off taxes and other liens on the land. Defendant was no party to this note, and on its maturity refused, under the contract, to protect the same, whereupon judgment was recovered by the bank thereon against plaintiff. *Held*, that defendant's contract to advance money for the promotion of the corporation was not a contract to indemnify plaintiff against "liability," but a contract to create an indemnity fund for the benefit of plaintiff and other vendors; and hence plaintiff could not maintain an action on the contract before he had been compelled to satisfy the judgment on the note.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 21-25; Dec. Dig. § 11.*]

2. FRAUDS, STATUTE OF (§ 33*)—DEBT OF ANOTHER—CONSIDERATION.

Where defendant, one of the promoters of a corporation, was interested in the success of the scheme to the extent of \$100,000 of the paid-up stock to which he was entitled, there was a sufficient consideration for his parol agreement that he and the corporation would pay or secure to plaintiff a sufficient amount of cash out of the purchase price of plaintiff's timber lands, which plaintiff had agreed to transfer to the corporation, to enable plaintiff to discharge claims for taxes, etc., to perfect his title.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 50-53; Dec. Dig. § 33.*]

Sufficiency of expression of consideration in memorandum within statute, see note to *Choate v. Hoogstraet*, 46 C. C. A. 183.]

3. FRAUDS, STATUTE OF (§ 33*)—ORIGINAL UNDERTAKING.

An oral agreement by one of the promoters of a corporation to secure to plaintiff a sufficient amount of cash out of the purchase price of plaintiff's timber lands, which were to be conveyed to the corporation, to enable plaintiff to discharge liens thereon to perfect his title, was an original undertaking, not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 50-53; Dec. Dig. § 33.*]

Action by John O. Maxey against Walton K. Rideout. On plea in abatement. Overruled.

The facts, as disclosed by the complaint, are briefly as follows:

That the plaintiff was the owner of a tract of about 7,900 acres of timber land, which was contiguous to a certain old and abandoned railroad right of way known as the "Huron Bay Railroad." That the plaintiff and defendant,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

together with one M. C. Phillips, formed a plan to organize and promote, for their personal profit, a railway company which was to acquire said old railway right of way and certain timber lands adjacent thereto. Pursuant to said plan, a company was organized under the laws of Michigan, to be known as the "Lake Superior Southern Railway Company." Phillips was elected president, the defendant was elected treasurer, and the plaintiff became the secretary, and they controlled the majority of the stock. The said railway company controlled rights in such old grade and right of way, with docks and terminal facilities on Huron Bay, in Lake Superior. That, according to the plan of said promoters, said company was to purchase certain tracts of timber land in Michigan, and among the rest said tract of 7,900 acres belonging to the plaintiff. That it was the plan of said promoters to have said railway company issue bonds to be secured by a mortgage covering such property rights. That according to such plan said railway company was to pay for said land by giving its promissory notes for the amount of the purchase price. That said railway company had no financial responsibility whatever, and no money with which to buy said timber land or to pay the notes as they matured. That said company secured a loan from the Citizens' Trust Company of Milwaukee for \$75,000 to pay for a portion of said tracts of timber land. That for the purpose of securing further funds, and in order to induce the plaintiff to deed his tract of land to the company, said promoters entered into a certain agreement in writing on the 21st day of September 1905.

"It is mutually agreed between us that the money or bonds arising from the prorating of the same according to the annexed agreement shall be divided by three, each party receiving one-third of the amount thereof; also, that W. K. Rideout shall receive \$100,000 in stock of the proposed railway company, fully paid, in consideration for which said W. K. Rideout is to furnish such moneys as may, over and above the loan made and obtained from the Citizens' Trust Company, of Milwaukee, of \$75,000, or shall be required to enable us and the railway company to complete its organization, make the necessary payments on the Maxey lands, of about 7,000 acres, the Read & Bronson and the Reed & Co. lands, including such personal expenses as may be necessary of the respective parties in connection therewith, provided said sums of money shall be returned to said W. K. Rideout upon the completion of the organization of the company.

"M. C. Phillips,
"John O. Maxey,
"W. K. Rideout."

That the agreement therein referred to as the "annexed agreement" related to the organization of said railroad and to the division among said Rideout, Phillips, and Maxey of the money or profit which they were to receive and share personally out of the sale of the obligations of said Lake Superior Southern Railway Company. That the plaintiff, in reliance on the terms of said agreement, sold and conveyed to the railway company by warranty deed his tract of timber for \$79,205, and received therefor from said railway company its certain promissory notes for that amount, payable to the plaintiff, among which was a certain note for \$5,000, dated on the 21st of September, 1905, payable to the order of said plaintiff on the 2d of July, 1906, with interest at 6 per cent., and that without such agreement on the part of Rideout to advance and furnish such money the plaintiff would not otherwise have sold nor conveyed said land. That at the time of such sale and conveyance by the plaintiff of such timber land to said railway company there were certain outstanding claims against said lands for the taxes and other liens, which the plaintiff was obligated to pay and discharge in order to perfect his title to the lands; and that about the sum of \$5,000 was necessary for that purpose. That it was then and there agreed between said plaintiff and defendant that the defendant and said railway company should pay or secure and furnish to said plaintiff a sufficient amount in cash to enable the plaintiff to pay and discharge said claim. That on the 23d day of September, 1905, for the purpose of securing said \$5,000 in cash for the purpose aforesaid, said railway company's note of \$5,000 so given by the railway company as part payment of the purchase price of his timber land was indorsed by the plaintiff as an accommodation to said defendant Rideout, and said defendant thereupon caused said note

to be discounted at the National Union Bank of Oshkosh, Wis., of which bank said Rideout was then the president. That said note was discounted by said bank, and became the property of the bank, with full knowledge on the part of the bank of the agreement among said promoters hereinabove set out. That the proceeds of such discount were in fact used in clearing the title to the plaintiff's land. That upon the 2d day of July, 1902, at the maturity of said note for \$5,000, such note, not being paid, was protested by the bank for non-payment, and that the defendant neglected and refused to take care of said note or to furnish the money necessary to retire the same. That said bank brought suit upon the note in the circuit court of Winnebago county, Wis., and on the 21st of January, 1908, obtained judgment thereon against the plaintiff in the sum of \$5,745.50. That said bank thereupon brought suit in the Circuit Court of the United States for the Western District of Michigan, based upon such judgment so obtained in said circuit court for the county of Winnebago, and a judgment was obtained in said Circuit Court of the United States on the 24th day of September, 1908, in favor of said bank and against this plaintiff, for the sum of \$5,931.90. Plaintiff further alleges he is financially responsible, and is possessed of property and lands out of which said judgment can be satisfied, and that said National Union Bank of Oshkosh is now pressing such judgment for collection, and threatens to enforce the same by levying a writ upon the plaintiff's lands. The plaintiff therefore demands judgment against the defendant for the sum of \$5,931.90, with interest thereon from the 24th day of September, 1908, together with costs, etc.

Hill & Smith and William P. Belden, for plaintiff.
Barbers & Beglinger, for defendant.

QUARLES, District Judge (after stating the facts as above). The theory upon which the plea of abatement rests is that the action has been prematurely brought, that the promise of the defendant was collateral and did not amount to a guarantee against liability, and that no recovery can be had until the judgment or some part thereof has been paid by the plaintiff. It was conceded in the argument by plaintiff's counsel that, if the defendant by virtue of the written agreement became a surety, the plea should be sustained. But it was vigorously contended that this was an original engagement on the part of Rideout, based upon a good consideration, which rendered him liable to suit when he failed to comply with his written agreement to furnish the necessary means to enable the railway company to purchase the plaintiff's lands. The sole question, therefore, to be determined is: What was the legal relationship between the plaintiff and the defendant, growing out of the written agreement upon which this action is brought?

It is important at the outset to ascertain when this written agreement was made. It bears no date. The complaint alleges that it was entered into September 21, 1905. This is an evident mistake, because the contract must have been made before the organization of the corporation. Upon the argument counsel for both parties agreed that the true date of this preliminary contract was August 16, 1905, more than a month before the organization. At this early date the scheme of the promoters seems to have been nebulous. Their anxiety to divide the profits of the enterprise amongst themselves seemed uppermost. As there were no assets in sight, some ready money was necessary to defray expenses and to acquire certain tracts of land, which might be capitalized and which might furnish a lawful basis for a bond issue which was relied upon to reimburse all advancements made by the

promoters. The defendant's promise to contribute to this fund must be construed with reference to those facts. It was explicitly stated in the memorandum that all such money advanced should be repaid to the defendant upon the organization of the corporation. It was further provided that such primary fund was to be expended by "us" (the promoters), or by the corporation. Whether under any construction of this written agreement defendant could be called upon to make any advancements of funds after the corporation was organized is a question going to the merits, and not raised by the plea under consideration.

It will be observed that the written agreement does not create any personal obligation between the plaintiff and the defendant, but is essentially an agreement on the part of the defendant to advance funds to the embryo railway company as a preliminary step to organization. It further appears that about the 21st of September, 1905, the railway company was organized under the Michigan statute, and thereupon executed certain promissory notes to the plaintiff, aggregating \$7,900, in exchange for his warranty deed to a certain tract of timber land. This would seem to indicate change in the programme. Instead of a preliminary purchase by the promoters, the railway company was first organized, and purchases made in its name, and promissory notes given by it to the vendors. It appears that there were certain outstanding liens upon this tract of land, which plaintiff by his warranty deed obligated himself to remove, so as to furnish a clear title. In order to perfect this title the plaintiff took one of the promissory notes received by him from the railway company, and indorsed the same in blank, and had the same discounted at the National Union Bank of Oshkosh, of which bank defendant was president. The proceeds of such discount were applied to the extinguishment of such liens on the plaintiff's lands. Plaintiff avers that he indorsed this note as an accommodation for the defendant; but, as the indorsement was made without condition or qualification, it is difficult to understand the meaning of this averment. Certain it is that the defendant was no party to the note. The theory of the complaint is that these notes were taken by the plaintiff, and the \$5,000 note was discounted by him upon the strength of defendant's engagement in the written contract to advance a sufficient sum to enable the railway company to pay for the lands, etc.

Conceding for the purposes of the argument that the agreement of the defendant survived the organization of the railway company and was still available when the plaintiff discounted his \$5,000 note, upon the legal theory that the plaintiff may rely upon the promise made by the defendant to the railway company if made for his benefit, still I am constrained to hold that the entire scheme evidenced by the written contract was to create an indemnity fund for the benefit of the vendors, and that it cannot be said to be an indemnity against liability. Defendant has made no promise to pay this \$5,000 note, and his written agreement has no reference to the discount of the same or the extinguishment of liens upon the real estate. Plaintiff accepted the railway company as the primary obligor, and can only resort to the contract when he shall have sustained some damages. He has not paid

the judgment, or any part thereof, and therefore the action is prematurely brought. The Supreme Court of Wisconsin has laid down the law on this subject in the following cases: *Thompson v. Taylor*, 30 Wis. 68; *Selleck v. Griswold*, 57 Wis. 291, 15 N. W. 151; *Barth v. Graf*, 101 Wis. 28, 76 N. W. 1100; *Lyle v. McCormick Harvesting Mach. Co.*, 108 Wis. 81, 84 N. W. 18, 51 L. R. A. 906. It is unnecessary to refer to the numerous decisions of other states where the same definition is adhered to.

Under this construction of the complaint, the plea in abatement should be sustained. There is, however, an averment in the complaint which, under one construction, would give a different complexion to the legal question raised by the plea:

"That it was then and there agreed between said plaintiff and said defendant Rideout that he and said railway company should pay or secure and furnish to said plaintiff a sufficient amount in cash out of said purchase price of \$79,205 to enable the plaintiff to pay and discharge said claim and thus perfect his title."

This averment may be construed to set up a distinct and separate oral promise on the part of the defendant, made subsequent to the written agreement. From the brief and argument of plaintiff's counsel we are led to believe that the above averment was intended as the plaintiff's interpretation of the written agreement. In such brief plaintiff's counsel announce "that this suit is based squarely upon an express written contract in the nature of an original obligation," and no suggestion is anywhere made that the plaintiff relies upon a subsequent oral promise. The court, however, is not concluded by the construction of counsel, but must impose its own interpretation upon the averments of the complaint. If we are to read this averment of the complaint as setting up a later parol engagement by the defendant to furnish the plaintiff with the necessary means to perfect his title, such obligation, although by parol, may be original in nature, although the railway company was primarily liable. The interest that defendant had in the success of the scheme, and which involved for him \$100,000 of paid-up stock, may furnish a sufficient consideration, in which event the case would not fall within the statute of frauds, and should be ruled by *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 360, *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826, and *Choate v. Hoogstraet*, 105 Fed. 713, 46 C. C. A. 174.

Under these circumstances, the court being in doubt as to the true construction and interpretation of the complaint, the better course would seem to be to overrule the plea and allow the parties to be heard upon the merits, so that the court may have a clearer understanding of the facts than can be gathered from ambiguous averments of the pleadings.

For these reasons, the plea in abatement will be overruled.

UNITED STATES v. STANDARD OIL CO. OF NEW JERSEY et al.

(Circuit Court, E. D. Missouri, E. D. November 20, 1909.)

No. 5,371.

1. COMMERCE (§ 3*)—ANTI-TRUST ACT—CONGRESSIONAL RESTRICTION OF USE OF CONTRACTS AND METHODS OF HOLDING TITLES TO RESTRAIN INTERSTATE COMMERCE AUTHORIZED BY CONSTITUTION.

Congress has power, under the commercial clause of the Constitution, to regulate and restrict the use, in commerce among the several states and with foreign nations, of contracts, of the method of holding title to property, and of every other instrumentality employed in that commerce, so far as it may be necessary to do so in order to prevent the restraint thereof denounced by Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 3; Dec. Dig. § 3.*]

2. MONOPOLIES (§ 12*)—ANTI-TRUST ACT—TEST OF LEGALITY OF COMBINATION ITS NECESSARY EFFECT UPON COMPETITION.

The test of the legality of a combination under this act is its necessary effect upon competition in commerce among the states or with foreign nations.

If its necessary effect is only incidentally or indirectly to restrict that competition, while its chief result is to foster the trade and increase the business of those who make and operate it, it does not violate that law.

But, if its necessary effect is to stifle or directly and substantially to restrict free competition in commerce among the states or with foreign nations, it is illegal within the meaning of that statute.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

3. MONOPOLIES (§ 12*) — ANTI-TRUST ACT—POWER TO RESTRICT COMPETITION VESTED BY COMBINATION INDICATIVE OF ITS CHARACTER.

The power to restrict competition in commerce among the several states or with foreign nations, vested in a person or an association of persons by a combination, is indicative of the character of the combination, because it is to the interest of the parties that such a power should be exercised, and the presumption is that it will be.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

4. MONOPOLIES (§ 20*) — ANTI-TRUST ACT—COMBINATION IN ONE PERSON OF POWER OF MANY TO RESTRICT COMPETITION RENDERS THAT POWER MORE EFFECTIVE AND DURABLE.

The combination in a single corporation or person, by an exchange of stock, of the power of many stockholders holding the same proportions, respectively, of the majority of the stock of each of several corporations engaged in commerce in the same articles among the states or with foreign nations, to restrict competition therein, renders the power thus vested in the former greater, more easily exercised, more durable, and more effective than that previously held by the stockholders, and it is illegal.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.*]

5. MONOPOLIES (§ 20*)—ANTI-TRUST ACT—COMBINATION RESTRICTING COMPETITION IN INTERSTATE COMMERCE BY EXCHANGE OF STOCK OF TRADING CORPORATIONS ILLEGAL—FACTS—CONCLUSION.

In 1899 the stockholders of the Standard Oil Company of New Jersey owned a majority of the stock of 19 other corporations in the same proportions that they owned the stock of the Standard Company, and those 20 corporations controlled, by the ownership, of the majority of their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 173 F.—12

stock or otherwise, many other corporations. Each of these corporations was engaged in some part of the business of producing, buying, refining, transporting, and selling petroleum and its products, and they were conducting about 30 per cent. of the production of the crude oil and more than 75 per cent. of the business of purchasing, refining, transporting, and selling petroleum and its products in this country. Many of them were engaged in commerce in these articles among the several states and with foreign nations, and were naturally competitive.

During the 10 years prior to 1879 the 7 individual defendants had acquired control of many corporations, partnerships, and refineries that had been competing in this business, had placed the majority of the stock of those corporations and the interests in property and business thus obtained in various trustees, to be held and operated by them for the stockholders of the Standard Oil Company of Ohio, one of the 19 companies in which the individual defendants were principal stockholders, and had thereby suppressed competition among these corporations and partnerships. In 1879 they and their associates caused all the trustees to convey their interests in the stock, property, and business of all these corporations to 5 trustees, to be held, operated, and distributed by them for the stockholders of the Standard Company of Ohio. From 1879 until 1892 they prevented these corporations and others engaged in this business, of which they secured control, from competing in this commerce, by causing the control of their operations, and generally of a majority of their stocks, to be held in trust for the stockholders of the Standard Company of Ohio, and from 1892 until 1899 they accomplished the same result by a similar stockholding device and by the joint equitable ownership of the majority of the stocks of the corporations.

In the year 1899 the 7 individual defendants and their associates caused the majority of the stock of the 19 corporations to be transferred to the Standard Oil Company of New Jersey in exchange for its stock, so that the latter company thereby acquired the legal title to a majority of the stock of each of the 19 companies, the control of these companies and of all the companies which they controlled, and the power to fix the rates of transportation, and the purchase and selling prices of petroleum and its products, which all these corporations should pay and receive in the conduct of their business in commerce among the states and with foreign nations. Since that exchange of stock the 7 individual defendants have been and are stockholders and officers of the Standard Company of New Jersey, which has exercised, and is still using, that power, and by its use it has prevented, and is still preventing, competition in commerce among the states and with foreign nations among these corporations.

Held, the transaction constituted a combination and conspiracy in restraint of, and to monopolize, commerce among the states and with foreign nations, in violation of sections 1 and 2 of the anti-trust act of July 2, 1890 (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and the government is entitled to an injunction against the farther continuance and operation thereof.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 20.*]

(Syllabus by the Court.)

In Equity. Bill by the United States against the Standard Oil Company of New Jersey and others. Decree for complainant.

See, also, 152 Fed. 290.

Frank B. Kellogg and Charles B. Morrison (The Attorney General, Cordenio A. Severance, J. Harwood Graves, and Guy Chase, on the brief), for the United States.

John G. Johnson, John G. Milburn, D. T. Watson, and Moritz Rosenthal (M. F. Elliott, Martin Carey, Frank L. Crawford, Chauncey W.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Martyn, Douglas Campbell, Walter F. Taylor, John M. Freeman, Ernest C. Irwin, and W. I. Lewis, on the brief), for defendants.

Before SANBORN, VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This is a suit brought by the United States to enjoin the Standard Oil Company of New Jersey, a corporation, about 70 subsidiary corporations, and 7 individual defendants, from continuing an alleged illegal combination in restraint of commerce among the several states, in the District of Columbia, in the territories, and with foreign nations, in violation of the Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). The provisions of that act pertinent to the issues in this case are:

Section 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Section 2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

Section 8:

"The word 'person' or 'persons' wherever used in this act shall be deemed to include corporations and associations."

Repeated discussion and consideration of the purpose and meaning of this act have established, by controlling authority, beyond debate in this tribunal, these pertinent rules for its interpretation and application to the facts of this case. The test of the legality of a contract or combination under this act is its direct and necessary effect upon competition in interstate or international commerce. If the necessary effect of a contract, combination, or conspiracy is to stifle, or directly and substantially to restrict, free competition in commerce among the states or with foreign nations, it is a contract, combination, or conspiracy in restraint of that trade, and it violates this law. The parties to it are presumed to intend the inevitable result of their acts, and neither their actual intent nor the reasonableness of the restraint imposed may withdraw it from the denunciation of the statute. *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; *Northern Securities Company v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679; *United States v. Joint Traffic Association*, 171 U. S. 505, 577, 19 Sup. Ct. 25, 43 L. Ed. 259; *Hopkins v. United States*, 171 U. S. 579, 592, 19 Sup. Ct. 40, 43 L. Ed. 290.

The exchange of the stock or shares in the ownership of competitive corporations engaged in interstate or international commerce for stock or shares in the ownership of a single corporation, the necessary effect of which is a direct and substantial restriction of competition in that commerce, constitutes a combination in restraint of commerce among the states or with foreign nations that is declared illegal by this

law. *Northern Securities Company v. United States*, 193 U. S. 197, 354, 366, 24 Sup. Ct. 436, 48 L. Ed. 679; *United States v. American Tobacco Co.* (C. C.) 164 Fed. 700, 718.

The business of the defendants is the production and the purchase of petroleum, its storage, its transportation from the producing wells to refineries, the refining of this oil, and the transportation and sale of its products to purchasers in this and other countries. In 1865 John D. Rockefeller owned a refinery in Cleveland, Ohio. He and Samuel Andrews formed the firm of Rockefeller & Andrews, which bought and operated this refinery. In 1870 the successors of this firm, John D. Rockefeller, William Rockefeller, Samuel Andrews, Henry M. Flagler, and Stephen D. Harkness, owned two refineries, and had a domestic trade in oil at Cleveland and a warehousing business and an export trade at the port of New York, which they vested in the Standard Oil Company of Ohio, a corporation with a capital stock of \$1,000,000, which they then organized. Between the organization of that corporation in 1870 and April 8, 1879, Henry H. Rogers, John D. Archbold, Oliver H. Payne, and Charles M. Pratt associated themselves with the Rockefellers and Flagler and became stockholders in this corporation, and these 7 defendants and their associates increased the number of its stockholders to 37, its capital stock to \$3,500,000, the value of its property to a much larger sum, and acquired for the stockholders of that corporation, by the purchase of property conveyed directly to it, by the exchange of its stock for stock of other corporations and for interests in partnerships, and by placing the title to the business and property obtained in new corporations organized to hold them, and then vesting the title to a majority of all of their stock in various individuals in trust for the stockholders of the Standard Oil Company, more than 40 competitive refineries located, respectively, in Cleveland, Pittsburg, Titusville, Parkersburg, Baltimore, Philadelphia, Bayonne, New York Harbor, Boston, and other places, and the ownership of the entire interest or of a controlling interest in more than 30 companies, some of which were corporations, while others were partnerships, engaged in the same general business. The result was that on April 8, 1879, the stockholders of the Standard Oil Company were, by their holdings of stock and by their position as cestuis que trust, practically the owners of controlling interests in the property and the business of more than 30 companies engaged in the oil business, the title to which was held in trust for them by the Standard Oil Company and other trustees in proportion to their ownership of the stock of that corporation. Thereupon on that day the Standard Oil Company and all the other trustees conveyed their interests in the stock, property, and business of these concerns to George H. Vilas, M. R. Keith, and George F. Chester, in trust, to hold and manage them for, and to divide and distribute them among, the 37 stockholders of the Standard Oil Company in proportion to their respective holdings of the stock of that company. The trustees, however, did not divide or distribute, but operated the refineries and the companies which they held under this deed, and with their earnings purchased other property and the stock of other companies, until in 1882 they held in this trust property worth more than \$55,000,000.

In January, 1882, the owners, as cestuis que trust and otherwise, of all this property, and the trustees, George H. Vilas, M. R. Keith, and George F. Chester, entered into a trust agreement to the effect that all the stocks they owned in the Standard Oil Company of Ohio and in all other corporations and limited partnerships engaged in the oil business, 39 of which were mentioned in the contract, were conveyed to 9 trustees during their lives and the life of the survivor of them and for 21 years thereafter, unless the trust was sooner dissolved by vote of the shareholders; that these trustees might organize other corporations to produce, manufacture, refine, and deal in petroleum and its products; that they might buy with the trust funds bonds or stocks of other companies engaged in similar or collateral business; that as stockholders of the various corporations they should elect the officers of those corporations; that they should issue and deliver, to each of the equitable owners of the stocks, bonds, and property held by them, trust certificates, which should show the value and extent of his interest in the trust in shares of the par value of \$100 each; and that they should supervise the business of all the companies whose stock they held, collect the dividends upon the stock and the interest upon the bonds in their possession, and distribute the income thus derived in dividends upon the trust certificates. Six of the individual defendants were six of the nine trustees, and these trustees issued for the stocks, the title to which was thus conveyed to them, trust certificates of the par value of \$70,000,000, and between 1882 and March 21, 1892, additional certificates of the par value of \$27,250,000, so that on the latter date there were outstanding certificates for 972,500 shares in the trust.

In March, 1892, the Supreme Court of Ohio decided that the making and operation of this trust of 1882 were beyond the corporate powers of the Standard Oil Company of Ohio and tended to create a monopoly, and enjoined that corporation from continuing its operation. *State v. Standard Oil Company*, 49 Ohio St. 137, 30 N. E. 279, 291, 15 L. R. A. 145, 34 Am. St. Rep. 541. A few days later, on March 21, 1892, the holders of the trust certificates met and resolved that the trust agreement was terminated on that day, that the trustees should sell all the trust property except the stocks of companies held by them, and that these stocks should be distributed to the owners of the trust certificates, who then numbered several thousands, in proportion to their respective ownerships of shares in the trust. The trustees then held stocks in 84 companies. They first transferred the stocks they held in 23 of these companies to the Standard Oil Company of New Jersey, the stocks they held in 11 of these companies to the Standard Oil Company of New York, the stocks they held in 3 of these companies to the South Penn Oil Company, the stocks they held in 4 of them to the Forest Oil Company, the stocks they held in 2 of them to the Standard Oil Company of Indiana, the stocks they held in 4 of them to the Standard Oil Company of Kentucky, the stock they held in 1 of them to the Ohio Oil Company, the stocks they held in 3 of them to the Buckeye Pipe Line Company, the stocks they held in 2 of them to the National Transit Company, and the stocks they held in 11 of them to the Anglo-American Oil Company, so that they retained the stocks

of the 20 principal companies, and these 20 companies held the stocks in the 64 other companies. There were outstanding trust certificates for 972,500 shares in this trust, and the owners of these certificates were the equitable owners of the stocks in all these companies. The method of division and distribution of these stocks adopted by the trustees was this: They made to each holder of a trust certificate, upon his surrender of it, a single assignment of as many $\frac{1}{972500}$ ths of all the stocks held by them on July 1, 1892, in each and all of these companies as the holder of the trust certificate held shares in the trust. If he had one share, he received one assignment of $\frac{1}{972500}$ of all the stocks; and if he held 256,854 shares, he received $\frac{256854}{972500}$ of all the shares held in the trust. But the receipt by the assignee of his share of the stock of any one of these companies was conditioned by the terms of the assignment upon his accepting his share of the stock of all of them. This method of distribution appears to have deterred many of the holders of trust certificates from surrendering them and accepting their shares of the stocks. The individual defendants, however, and their more intimate associates, surrendered their trust certificates and took sufficient shares of the stocks to aggregate a majority of the stock of each of the 20 companies and secured to themselves the control and management of all the companies in that way until the year 1899.

In that year the defendant the Standard Oil Company of New Jersey, a corporation, was one of the 20 companies. The par value of its capital stock was \$10,000,000. Its charter was then so amended that it was empowered to do all kinds of mining, manufacturing, trading, and transportation business, to acquire, hold, vote, sell, and assign shares of capital stock, and to carry on its business in all parts of the world. Its capital stock was increased to \$100,000,000, and the stock of the other 19 companies was exchanged for the stock of the Standard Oil Company of New Jersey, so that the latter company succeeded to the legal title to the majority of the stock of the 19 companies, and thereby to the management and control of those companies and of all the companies which they controlled. Henceforth in this discussion the Standard Oil Company of New Jersey will be called the "principal company," and the companies it then and thereafter controlled the "subsidiary companies."

Between 1899 and the filing of the bill in this case in November, 1906, the affairs of the principal company and of the subsidiary companies have been managed by the former as the business of a single person. Subsidiary companies have come and gone at its bidding, but it still holds the control of more than 30 of the chief companies whose management was committed to it in 1899. The par value of the capital stock of these companies in 1899 was about \$100,000,000. In 1908 it was more than \$150,000,000. Among them are 9 companies, the owners of 16 refineries, while the principal company has several, engaged in manufacturing illuminating oil and other products of petroleum, 12 transportation companies, the owners in 1899 of 10,749 and in 1908 of 45,227 miles of gathering pipe lines, and in 1899 of 3,904 and in 1908 of 9,338 miles of trunk pipe lines, capable of gathering from the

wells and pumping oil from Pennsylvania, Indiana, Kansas, and Oklahoma to the Atlantic seaboard and to the refineries, 6 marketing companies, which in 1906 had 3,574 selling stations scattered throughout the United States, and several producing companies.

The crude oil is transported from the oil fields to the refineries by pipe lines, and the products from the refineries and storage tanks to the selling stations by tank cars, and, when exported, by ships. From 1899 to 1907 the principal company and the subsidiary companies it has operated under this trust produced more than one-tenth of the crude oil obtained in this country, transported more than four-fifths of the petroleum derived from the Pennsylvania and Indiana oil fields, manufactured more than three-fourths of all the crude oil refined in the United States, owned and operated more than one-half of all the tank cars used to distribute its products, marketed more than four-fifths of all the illuminating oil sold in the United States, exported more than four-fifths of all the illuminating oil sent forth from the United States, sold more than four-fifths of all the naphtha sold in the United States, and sold more than nine-tenths of all the lubricating oil sold to railroad companies in the United States. The principal company, by means of this trust and the commanding volume of the oil business which it acquired thereby, secured, and it has since exercised and is using, the power to prevent competition between the companies it controls, to fix for them the purchase price of the crude oil, the rates for its transportation, and the selling prices of its products. It has prevented, and is preventing, any competition in interstate and international commerce in petroleum and its products between its subsidiary companies and between those companies and itself.

The United States charged in its bill that between 1869 and 1879 the 7 individual defendants conspired to restrain interstate and international commerce in petroleum and its products, that they combined with each other and with numerous corporations and partnerships named, and by the union of competing companies, by the trust of 1879, by the trust of 1882, and by the formation and operation of the stockholding trust of 1899, they have restrained and are still restraining that commerce. Attention is challenged to the fact that these defendants constitute only 7 of about 5,000 stockholders of the principal company and only 7 of its 15 directors, and that they own but little more than one-third of its stock, and it is contended that no adequate proof has been presented that they are, or were in 1906, when the bill was filed, controlling or directing the operations of the principal or subsidiary corporations, or operating the stockholding trust of 1899. But a third of the stock of a great corporation, when the remainder is scattered among thousands of followers, and 7 out of 15 friendly directors, may control a board of directors and a corporation; and evidence in this case, too voluminous for recitation or review, has convinced that prior to 1879 these 7 defendants combined to secure and obtained the control of companies competing in interstate commerce in oil and suppressed their competition, that they caused the formation and execution of the trusts of 1879 and 1882, that they directed and followed that unique method of distributing the stock held in the latter trust by which it was

not distributed to the majority of the stockholders for many years after 1892, while they and their associates held the control of it and of the corporations it commanded, that they caused the stockholding trust of 1899, and that by means of that trust they still hold the actual control and direction of the Standard Company and of its subsidiary corporations, and that since 1899 they have been and still are engaged in carrying into effect and executing that trust.

The acts of these and other defendants prior to July 2, 1890, did not violate the anti-trust act of that year, because it was not then in existence. Whether or not their transactions constituted a violation of the common law is a question much discussed, which it is unnecessary to determine in this case. However that may be, the acts of the defendants and the effect of their transactions in the conduct of the oil trade prior to July 2, 1890, which, if done thereafter, would have constituted a violation of the law of that date, are competent and material evidence of the dominant purpose and the probable effect of their similar transactions in that business since that date, and for that purpose they may be considered. Laying out of view the acts of the defendants prior to July 2, 1890, except as evidence of their purpose, of their continuing conduct, and of its effect, do the stockholding trust of 1899 and its continuing operation constitute an illegal restraint of interstate or international commerce, in violation of the anti-trust act of 1890?

The purpose of this statute was to keep the rates of transportation and the prices of articles in interstate and international commerce open to free competition. Any contract or combination of two or more parties, whereby the control of such rates or prices is taken from separate competitors in that trade and vested in a person or an association of persons, necessarily restricts competition and restrains that commerce. The formation or maintenance by competing corporations of an association to determine their rates of transportation (*United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259), agreements of competitive manufacturers and traders not to compete in the purchase or sale of articles in interstate commerce, or to buy or to sell them at prices fixed by a mutual agent or association (*Continental Wall Paper Co. v. Voight & Sons Company*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 217, 20 Sup. Ct. 96, 44 L. Ed. 136; *Id.*, 85 Fed. 271, 285-294, 29 C. C. A. 141, 155-164, 46 L. R. A. 122; *Swift & Company v. United States*, 196 U. S. 375, 395, 25 Sup. Ct. 276, 49 L. Ed. 518; *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 396, 27 Sup. Ct. 65, 51 L. Ed. 241; *Montague & Company v. Lowry*, 193 U. S. 38, 41, 24 Sup. Ct. 307, 48 L. Ed. 608), the conveyance of the stock or property of competitors to a trustee or trustees to hold and operate as a single interest (*Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 488, 41 N. E. 188, 201, 47 Am. St. Rep. 200), the exchange of the stocks or the property of competitive corporations for the stock or for interests in a single corporation, which thereby acquires the power to control the rates of transportation or the prices of articles in interstate com-

merce in which the corporations were dealing (*Northern Securities Company v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679; *United States v. American Tobacco Company* [C. C.] 164 Fed. 700, 710; *Continental Securities Company v. Interborough Rapid Transit Company* [C. C.] 165 Fed. 945, 953; *Richardson v. Buhl*, 77 Mich. 632, 636, 43 N. W. 1102, 1103, 6 L. R. A. 457; *Harding v. American Glucose Company*, 182 Ill. 551, 615, 55 N. E. 577, 598, 64 L. R. A. 738, 74 Am. St. Rep. 189; *Dunbar v. American Telephone & Telegraph Co.*, 224 Ill. 9, 23, 24, 79 N. E. 423, 427, 115 Am. St. Rep. 132), are alike declared to be illegal by this law. In the construction and enforcement of this statute, corporations are persons, they are legal entities distinct from their stockholders, and the combination of two or more of them in restraint of trade is as unlawful as the combination of individuals.

By the trust of 1899 more than 30 corporations were combined with the principal company, and that corporation was given the power to fix the rates of transportation and the purchase and selling prices which all these companies should pay and receive for petroleum and its products throughout the republic and in the traffic with foreign nations. The principal company and many of the subsidiary corporations were then and still are engaged in interstate and international commerce, many of them were capable of competing with each other in that trade, and would have been actively competitive if they had been owned by different individuals or different groups of individuals. Thus the principal company in 1899 owned and operated several refineries in New Jersey, West Virginia, and Maryland, which in the year 1906 had a capacity of 19,854,900 barrels of crude oil yearly. The Standard Oil Company of New York, one of the subsidiary companies, owned and operated several refineries in the state of New York, which in the year 1906 had a capacity of 6,732,060 barrels yearly. These companies drew much of the crude oil which they refined from, and marketed much of their products, beyond the limits of the states in which their refineries were located. The majority of the stock of the New York Company and of 18 other corporations engaged in different branches of the production, manufacture, and sale of petroleum and its products was conveyed to the New Jersey Company in exchange for its stock, and the latter has ever since controlled and operated all these corporations and those which they controlled, and has prevented them from competing with it or with each other.

In *Northern Securities Company v. United States*, 193 U. S. 197, 321, 322, 24 Sup. Ct. 436, 48 L. Ed. 679, Mr. Hill, Mr. Morgan, and their associates acquired the control of a majority of the voting stock of two competitive railway companies, and by means of that ownership the power to prevent them from actually competing. This group of stockholders subsequently transferred their controlling interest in the stock of each of these companies to the Northern Securities Company in exchange for its stock, and the Supreme Court decided that this transaction constituted a combination in restraint of commerce among the states, and affirmed a decree of this court which enjoined the continuance of its operation. The defendants and their associates ac-

quired the control of a majority of the stock of more than 30 corporations, many of which were potentially and naturally competitive, prevented their competition by means of this ownership, and then by the transfer of the stock of 19 of them to the principal company in exchange for its stock placed in that company the control and management of all of them. If it was a violation of the anti-trust act to combine the control of competitive corporations in a third in the case of the Northern Securities Company, why was it not as much a violation of it to combine the control of 10 or 20 or 30 of these corporations in one of their number in the case in hand?

The defendants answer: (1) Because these corporations were not competitors, and had not been such since 1879; (2) because the stockholders of the principal company were the joint owners of the stock of the subsidiary companies, and had the right to convey their stock in the latter to the former in trust for themselves, and Congress was without power to restrict their acquisition, their method of holding, or their disposition of their title to their property, or their use of it; (3) because the corporations whose stock was vested in a holding company in the Northern Securities Company's Case were railway companies, which were charged with the discharge of public duties, their performance of which was peculiarly subject to regulation by the nation and the state, while the corporations whose stock was vested in the Standard Oil Company in this case were private corporations; and (4) because, if any restraint of trade resulted from the trust of 1899, it was neither direct, immediate, nor substantial.

1. The first two answers were overruled by the Supreme Court in the case of the Northern Securities Company, and the questions they present are not debatable here. It is true, with negligible exceptions, that the stockholders of the defendant corporations were the joint equitable owners of them from 1879, or from their subsequent organizations, respectively, until July 1, 1899; but the great majority of these stockholders never held the legal title to their stock, except during a few months between 1896 and 1900. In 1899 the stockholders of the principal company were the stockholders of the subsidiary companies, and each stockholder held the same share or interest in each of the corporations. By means of this joint ownership and the trusts of 1879 and 1882, the natural competition between these corporations had been prevented for a much longer time in 1899 than had the competition between the two railway companies when their stocks were vested in the holding company in 1901 in the Northern Securities Company's Case. But this fact cannot constitute a material difference, and in all other respects the facts of the two cases regarding competition are practically identical. Hill, Morgan, and their associates acquired control of the two railway corporations long before they placed their stock in the Securities Company in 1901. *Pearsall v. Great Northern R. Co.*, 161 U. S. 646, 16 Sup. Ct. 705, 40 L. Ed. 838. Those companies were natural and potential competitors; but this group of stockholders held the power to prevent them from actively competing, and it is as incredible that they were actually doing so after they came under the control of that group as it is that the defendant corpora-

tions were engaged in actual competition during the nineties. It was the granting of the power to prevent competition to the holding company, not the subsequent exercise of that power, that in the opinion of the Supreme Court brought the combination under the ban of the law (*Harriman v. Northern Securities Company*, 197 U. S. 244, 297, 25 Sup. Ct. 493, 49 L. Ed. 739); and a similar, but greater, power was vested in the principal company in this case by the trust of 1899. For some time, therefore, before the transfer in each of these cases, a group of stockholders controlled a majority of the stock of potentially competitive corporations which they vested in the holding company, so that the latter had the power to operate them together without competition, and the rule which governs one must control the other.

2. The contention that Congress has no power to restrict the acquisition, the method of holding the title, and the disposition and the use of property, was forcibly urged upon the attention of the courts in many forms in the case of the Northern Securities Company, 193 U. S. 272, 273, 24 Sup. Ct. 436, 48 L. Ed. 679; but the answer to it was, as it must be here, that no question of the mere acquisition, or method of holding or of disposition, of the title to property, was there or is here in issue; that the question there was, as it is here, whether a certain method of holding the stocks which control several corporations may be used to prevent competition between them in interstate and international trade. And Congress has plenary and indisputable power under the commercial clause of the Constitution to restrict and regulate the use of every instrumentality employed in interstate or international commerce, so far as it may be necessary to do so in order to prevent the restraint thereof denounced by the anti-trust act of 1890. *Northern Securities Company v. United States*, 193 U. S. 197, 334, 338, 346, 350, 24 Sup. Ct. 436, 48 L. Ed. 679; *United States v. Northern Securities Company (C. C.)* 120 Fed. 721, 729; *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, 228, 229, 20 Sup. Ct. 96, 44 L. Ed. 136; *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 284, 29 C. C. A. 141, 46 L. R. A. 122; *Smiley v. Kansas*, 196 U. S. 447, 456, 25 Sup. Ct. 289, 49 L. Ed. 546; *New Haven R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 398, 26 Sup. Ct. 272, 50 L. Ed. 515; *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242, 245, 26 Sup. Ct. 628, 50 L. Ed. 1011; *Armour Packing Co. v. United States*, 209 U. S. 56, 82, 28 Sup. Ct. 428, 52 L. Ed. 681; *Shawnee Compress Company v. Anderson*, 209 U. S. 423, 433, 28 Sup. Ct. 572, 52 L. Ed. 865; *United States v. American Tobacco Company (C. C.)* 164 Fed. 700, 718.

3. It is true that railway corporations owe duties to the public which do not rest upon trading, manufacturing, and private transportation companies, such as the duty to operate continually their railroads and the duty to carry persons and property presented for transportation at reasonable rates; but the power of Congress to regulate interstate and foreign commerce and the exertion of that power manifested in the anti-trust act embrace all persons and corporations engaged in such commerce, as is amply illustrated in the various applications of the act which have been made in the several decisions here cited. The mis-

chief against which that law was leveled is not less threatening from a vast combination of private corporations owning and using in interstate and foreign commerce property worth hundreds of millions of dollars than from a combination of two railway companies. The act makes no distinction between them, it excepts neither class, and where Congress has made no exception it is not the province of the courts to do so. No countervailing reason overcomes these considerations, and the vesting of the majority of the stock of many potentially competitive private corporations engaged in interstate commerce in a holding company, which would be violative of the anti-trust act if made by the stockholders of railway companies of that character, must be subject to the condemnation of that statute.

The purpose of the act of July 2, 1890, was to prevent the stifling and the substantial restriction of competition in interstate and international commerce. The test under that act of the legality of a combination or conspiracy is its direct and necessary effect upon such competition. If its necessary effect is but incidentally or indirectly to restrict competition, while its chief result is to foster the trade and increase the business of those who make and operate it, it is not violative of this law. *Hopkins v. United States*, 171 U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. United States*, 171 U. S. 604, 606, 19 Sup. Ct. 50, 43 L. Ed. 300; *United States v. Joint Traffic Association*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136. But if its necessary effect is to stifle, or directly and substantially to restrict, free competition in commerce among the states or with foreign nations, it is a combination or conspiracy in restraint of that trade, and it falls under the ban of the act. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; *United States v. Joint Traffic Association*, 171 U. S. 505, 576, 577, 19 Sup. Ct. 25, 43 L. Ed. 259; *United States v. Northern Securities Company* (C. C.) 120 Fed. 721, 722.

And the power to restrict competition in interstate and international commerce, vested in a person or an association of persons by a contract or combination, is indicative of its character; for it is to the interest of the parties that such a power should be exercised, and the presumption is that it will be. In the case under consideration it has been exercised, and thereby the principal company has prevented competition between the corporations it controls since 1899. In *Harriman v. Northern Securities Company*, 197 U. S., at page 291, 25 Sup. Ct. 503, 49 L. Ed. 739, Chief Justice Fuller, speaking of the decision in the case of the Northern Securities Company, said:

"For the purposes of that suit it was enough that in any capacity the Securities Company had the power to vote the railway shares and to receive the dividends thereon. The objection was that the exercise of its powers, whether those of owner or of trustee, would tend to prevent competition, and thus to restrain commerce. Some of our number thought that, as the Securities Company owned the stock, the relief sought could not be granted; but the conclusion was that the possession of the power, which, if exercised, would prevent

competition, brought the case within the statute, no matter what the tenure of title was."

4. Counsel argue with persuasive force that the transfer of the stock of the 19 corporations to the principal company wrought no substantial restriction of competition, because the owners of that stock had and exercised the same power of restraint before that transfer that was vested in the Standard Oil Company of New Jersey thereafter. But the power of the principal company after the transfer of 1899 to fix the prices at which the 30 corporations should buy and sell the articles in which they dealt, the terms of their purchases and sales, their rates for the transportation of oil and its products, and all the infinite details of their vast operations in which they might compete, and thereby to prevent their competition, was greater, more easily and quickly exercised, and hence more effective, than it could have been in the hands of 3,000 scattered stockholders. The trust deed of 1879, the trust agreement of 1882, the withholding of the separate certificates of shares of stock in each corporation from the holders of the trust certificates in the dissolution of that trust until they took their shares in all of the corporations, bear convincing testimony to the soundness of this proposition. The combination formed by that transfer and its power to restrict competition were less liable to be destroyed, more reliable and permanent, than those springing from the joint ownership by 3,000 stockholders of each corporation. There is much more probability that corporations potentially competitive will separate and compete, when each of their stockholders has a separate certificate of his shares of stock in each corporation, which he is free to sell, than when a majority of the stock of each of the corporations is held by a single corporation, which has the power to vote the stock and to operate them. And although the group of stockholders led by Mr. Hill and Mr. Morgan had the same power to prevent competition between the two railway companies that the stockholders of these corporations had to prevent competition between them, the Supreme Court held in the case of the Northern Securities Company that their transfer of their stock to the holding company granted to that corporation a power so much greater and more effective than that held by the stockholders of the railway companies that the necessary effect of it was a restriction of competition so direct and substantial that it made it an illegal combination in restraint of interstate commerce.

Because the power to restrict competition in interstate commerce granted to the Standard Oil Company of New Jersey by the transfer to it of the stock of the 19 companies and of the authority to manage and operate them and the other corporations which they controlled was the absolute power to prevent competition among any of these corporations, because this power was greater, more easily exercised, more effective, and more durable than that which the 3,000 stockholders of these corporations previously had, because many of these corporations were potentially competitive and were engaged in interstate commerce, and the necessary effect of the transfer of the stock of the 19 companies to the holding company was, under the decision in the case of the Northern Securities Company, a direct and substantial restric-

tion of that commerce, that transfer and the operation of the companies under it constituted a combination or conspiracy in restraint of interstate and international commerce in violation of the anti-trust act of July 2, 1890.

This court is not authorized to punish past violations of this law in this suit. Its power is "to prevent and restrain violations of this act," and the defendants insist that the United States is entitled to no relief, because it has failed to prove that they are now violating, or that when the bill was filed they were violating, this law. But the power to vote the stock, to elect the officers of the subsidiary corporations, to control and operate them, and thereby to restrict their competition in interstate and international commerce, was illegally granted to the Standard Oil Company of New Jersey in 1899, and that company ever since has exercised unlawfully and is still so using that authority, the seven individual defendants are dominating and directing its exercise of this power, the subsidiary corporations are knowingly submitting to and assisting that exercise, and all of them are participating in the fruits of it. These are menacing and continuing violations of the act which Congress has imposed the duty upon the courts to restrain and prevent.

The second section of the anti-trust act declares that:

"Every person who shall monopolize, or attempt to monopolize, or combine, or conspire, with any other person or persons to monopolize any part of trade or commerce among the several states or with foreign nations shall be guilty of a misdemeanor."

The United States alleges in its bill that the object and effect of the illegal combination and conspiracy, which has been found to exist, were to monopolize, and that the defendants combined and conspired to monopolize, a substantial part of interstate and international commerce in petroleum and its products, in violation of this section of the law. It also avers that at various times between 1870 and the date of the filing of the bill the defendants (1) secured from common carriers preferential rates and rebates; (2) made contracts with some of their competitors which limited the production, output, and markets of the latter; (3) operated companies represented to be independent, when they were not so; (4) procured from employes of railroads information of the trade of competitors, and used it to destroy the latter's business and to secure the commerce for themselves; and (5) sold their products at times and places where there was competition below remunerative prices, and recouped their losses by selling such products at high prices at other times and places.

The gist of the violation of the second section of the act charged in the bill, however, is not the monopolization of interstate or international commerce by a single person or corporation. It is the combination and conspiracy of the numerous defendants, many of them formerly competitors, to restrain trade and to monopolize that commerce, and the burden of its prayer is that the continuance of this combination and conspiracy may be enjoined.

The proof is conclusive that the defendants have secured and now enjoy a very substantial part of the interstate and international commerce in petroleum and its products. But counsel for the defendants in-

sist that this does not constitute an unlawful monopoly, that such a monopoly does not result from the magnitude or proportion of the commerce obtained by one or more individuals or corporations, unless unlawful means are used to obtain it, and that the power of the court to enjoin under the second section is limited to the prohibition of the use of continuing or threatened unlawful means and their like which have a direct and substantial effect to continue the illegal monopoly.

Undoubtedly every person engaged in interstate commerce necessarily attempts to draw to himself, to the exclusion of others, and thereby to monopolize, a part of that trade. Every sale and every transportation of an article which is the subject of interstate commerce evidences a successful attempt to monopolize that trade or commerce which concerns that sale or transportation. If the second section of the act prohibits every attempt to monopolize any part of interstate commerce, it forbids all competition therein, and defeats the only purpose of the law; for there can be no competition, unless each competitor is permitted to attempt to draw to himself, and thereby to monopolize, some part of the commerce. This is not, it cannot be, the proper interpretation of this section. It must be so construed as to abate the mischief it was passed to destroy and to promote the remedy it provided. It was enacted, not to stifle, but to foster, competition, and its true construction is that, while unlawful means to monopolize and to continue an unlawful monopoly of interstate and international commerce are misdemeanors and enjoined under it, monopolies of part of interstate and international commerce by legitimate competition, however successful, are not denounced by the law, and may not be forbidden by the courts. *Whitwell v. Continental Tobacco Co.*, 60 C. C. A. 290, 298, 125 Fed. 454, 462, 64 L. R. A. 689; *Phillips v. Iola Portland Cement Company*, 61 C. C. A. 19, 20, 125 Fed. 593, 594.

But in the case under consideration the combination and conspiracy in restraint of trade and its continued execution, which have been found to exist, constitute illegal means by which the conspiring defendants combined, and still combine and conspire, to monopolize a part of interstate and international commerce, and by which they have secured an unlawful monopoly of a substantial part of it, and this conspiracy constitutes as clear and complete a violation of the second as of the first section of the act. Upon the ground that the defendants have thus violated, and are violating, the second section of the act, as fully as upon the ground that they have violated its first section, the decree in favor of the government must be, and is, based.

The combination and conspiracy, including in those terms the illegal devices by which they were created and are continued, were the source, and they are the support, of the unlawful monopoly. Without them it would not have existed and cannot continue, and the continued use of these and like means, including the distribution of the stock of the various defendants ratably among the shareholders of the Standard Oil Company, and the conveyance of the physical property and business of the defendants to one of their number to perpetuate the unlawful monopoly, must be, and it is, prohibited by the decree herein.

As illegal means whereby the unlawful monopoly was created and is maintained have been proved and found in the combination and con-

spiracy, and as their use to prolong the unlawful monopoly must be enjoined, the questions whether or not the charges in the bill that other unlawful means were or are employed are true, and whether or not the power of the court to prevent the existence or continuance of a monopoly is limited to the prohibition of the use of illegal means and their like have become moot, and it is unnecessary to express any opinion upon them.

It is a grave and delicate task to determine the exact limits of the relief to which the government is entitled. The prohibition of the court must forbid the performance of the continuing and threatened illegal acts which have had, and are having, a direct and substantial effect to restrain commerce among the states and with foreign nations, and to continue the unlawful monopoly and all like acts which have the same effect. But it may not prohibit all possible violations of the law, and thus put the whole conduct of the defendant's business at the peril of a summons for contempt. Past unlawful competition does not deprive parties of their right to conduct lawful competition. *New York, N. H. & H. R. R. v. Interstate Commerce Commission*, 200 U. S. 361, 404, 26 Sup. Ct. 272, 282, 50 L. Ed. 515. The court must steer as best it may (*Swift & Company v. United States*, 196 U. S. 375, 396, 25 Sup. Ct. 276, 279, 49 L. Ed. 518) between its duty "to prevent and restrain violations of" this act of Congress and its duty not to deprive the defendants of their right to engage in lawful competition for interstate and international commerce. In our opinion this duty will be discharged, the rights of the defendants to engage in lawful competition for interstate and international commerce will not be infringed, and the full relief to which the United States is entitled under the law and the evidence will be granted by a decree in its favor to the following effect:

That the Standard Oil Company of New Jersey, the seven individual defendants, and all of the subsidiary defendant companies engaged in commerce in petroleum or its products among the states or with foreign nations controlled by the principal company, have entered into and are operating a combination or conspiracy in restraint of trade and commerce among the several states, such as is denounced as illegal by section 1 of the anti-trust act of July 2, 1890, and have combined and conspired to monopolize, have secured thereby an unlawful monopoly of, and are combining and conspiring to continue to monopolize, a substantial part of interstate and international commerce in violation of section 2 of that act; that the Standard Oil Company of New Jersey be enjoined from voting the stock in any of these defendant companies which it acquired by virtue of that combination, and from exercising or attempting to exercise any control, direction, supervision, or influence over the acts of any of these companies by virtue of its holding of the stock and power secured through that combination; that the other defendant companies which are parties to the combination be enjoined from declaring or paying any dividends to the Standard Oil Company on account of any stock acquired by it through that combination, from permitting that company to vote such stock or to direct the policy of any of said companies, or to exercise any control whatsoever over their corporate acts by virtue of the stock or power

which it secured by means of that combination; that the seven individual defendants and the corporations and partnerships that became parties to this combination be enjoined from continuing it or carrying it out, and from entering into or performing any like combination the effect of which is, or will be, to restrain or monopolize, or to continue their unlawful monopoly of interstate commerce in petroleum and its products, in violation of the anti-trust act, either (1) by placing the control of any of said corporations in a trustee, or in a group of trustees, by means of the holding of its stock or property by others than its equitable owners, by causing the conveyance of the physical property and business of two or more potentially competitive parties to the combination to any party thereto, or by any other such act, or (2) by making any express or implied agreement or arrangement together, or one with another, like that adjudged illegal hereby, relative to the control or management of any of said corporations, or the price or terms of purchase or of sale, or the rates of transportation of petroleum or its products in interstate or international commerce, or relative to the quantities thereof purchased, sold, transported, or manufactured by any of said corporations, which will have a like effect in restraint of commerce among the states, in the territories, and with foreign nations to that of the combination the operation of which is hereby enjoined; that the defendants who are parties to the combination be enjoined from engaging or continuing in interstate commerce in petroleum and its products during the continuance of the illegal combination; that the United States recover its costs of the defendants who are parties to the combination, and that the other defendants be dismissed.

VAN DEVANTER, HOOK, and ADAMS, Circuit Judges, concur.

HOOK, Circuit Judge (concurring). The principal conclusions, upon which we are all agreed, may be briefly stated as follows: A holding company, owning the stocks of other concerns whose commercial activities, if free and independent of a common control, would naturally bring them into competition with each other, is a form of trust or combination prohibited by section 1 of the Sherman anti-trust act. The Standard Oil Company of New Jersey is such a holding company. The defendants, who are in the combination, are enjoined from continuing it, and from forming another like it. The holding company is enjoined from exercising the rights of a stockholder in the subordinate companies, and they are enjoined from allowing it to do so or to benefit therefrom in the way of dividends. A means of dissolving the present form of combination is left open, to wit: The distribution among the stockholders of the holding company of the stocks it owns in the subordinate companies, to the end that each corporate member of the combination engaging in interstate or foreign commerce shall in the future have and exercise corporate independence, with its own particular set of stockholders not united with or tied to those of its competitors, actual or potential, under a single or common control. Until the defendants discontinue the operation of the combination, they are denied the right to engage in commerce among the states or in

the territories. The defendants in the combination are also monopolizing interstate and foreign commerce in petroleum and its products, contrary to section 2 of the act. A wrongful method employed to gain the monopoly is found to exist in the unlawful combination above mentioned, and it therefore becomes unnecessary to determine the other charges upon that subject in the petition of the government. It is thought that with the end of the combination the monopoly will naturally disappear; but lest, instead of resulting that way, the monopoly so wrongfully gained be perpetuated by the aggregation of the physical properties and instrumentalities by which it is maintained in the hands of a member of the combination and the liquidation and retirement from business of the other members, it is held that such a course would violate the decree.

The issues in the case before us and the scope of the arguments of counsel make it not inappropriate that I express more fully, but in a general way, my views of the proper construction of the anti-trust act, particularly of the second section, directed against the monopolizing of interstate and foreign commerce. The extent and limitations of the first section have been pretty well defined in the many adjudged cases. The construction of the act should not be so narrow or technical as to belittle the work of Congress; but, on the contrary, it should accord with the great importance of the subject of the legislation and the broad lines upon which the act was framed. The language employed in the act is as comprehensive as the power of Congress in the premises, and the purpose was not to hamper business fairly conducted, but adequately to promote the common interest in freedom of competition and to remove improper obstacles from the channels of commerce that all may enter and enjoy them. The wisdom of a law lies in its spirit as well as in its letter, and unless they go together in its construction and application justice goes astray.

The true test to apply to a case under the first section is not whether the restraint upon competition imposed by the contract or combination in question should be regarded as reasonable or as unreasonable, but whether it is direct and appreciable. Conceptions of the reasonable and unreasonable are much too diverse to afford a stable, uniform rule for construing a law which contains no mention of those terms. So much depends upon the point of view, that it frequently happens that what appears to one to be wholly unreasonable is thought entirely reasonable by another. But if the restraint is direct and appreciable, and not merely incidental to some contract having a lawful purpose, it falls clearly within the prohibition of the statute, and there is no room for further construction. There are many contracts which, in the days when the common law was forming, would have been adjudged contrary to public welfare, as being in restraint of the narrow trade of those times, but which in a commercial age like the present have such a negligible effect in that direction as to be no longer evil within the meaning of the law. Their effect is so indirect and inappreciable that it is properly referable to the class *de minimis*, and it is not to be supposed Congress had them in view when it legislated to preserve freedom of competition in the broad field of interstate and foreign

commerce. Vital principles, however, have not changed; the change is merely in the conditions upon which they operate.

The second section of the act provides:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor," etc.

Manifestly this section is quite distinct from the first, and was not intended to cover precisely the same ground. To say otherwise would be to impute to Congress the doing of the unnecessary and useless. Though the natural tendency of a combination in restraint of trade declared illegal by section 1 may be and generally is towards monopoly denounced by section 2, and may even accomplish it, yet the scope of the latter section is far broader and was designed to extend also to monopolies secured by other means than by contracts, combinations, and conspiracies in restraint of trade, which, as those terms necessarily imply, require concert between two or more persons or corporations. One person or corporation may offend against the second section by monopolizing, but the first section contemplates conduct of two or more. A cursory reading of the act shows this. That it was the intention of Congress to condemn monopolies, not based on illegal combinations among several, but secured by single persons, natural or artificial, by other means, also appears from the history of the legislation. The bill originally introduced in the Senate bore slight resemblance to the law finally enacted, and there was uncertainty as to the particular constitutional authority for the legislation. At one time it was thought by some to rest upon the jurisdiction of the courts of the United States of controversies between citizens of different states, and at another there were provisions regarding competition between the products and manufactures of one state with those of another. Finally, after much difference of view, the bill, with many amendments, was referred to the judiciary committee of which Senator Edmunds was chairman, and reframed by it under the commerce clause of the Constitution. It was then reported in the simple, comprehensive form in which it finally became a law. A motion was made to amend the second section by striking out the words "monopolize or attempt to monopolize" so it would read:

"Every person who shall combine or conspire with any other person or persons to monopolize," etc.

But it was rejected.

What is a monopoly in contravention of the statute? I would not say that every person who strives to gain as much as he can of the commerce in a commodity is thereby attempting to monopolize that commerce, within the meaning of the term as it is employed in legislative acts and understood in the courts. Magnitude of business does not, alone, constitute a monopoly, nor effort at magnitude an attempt to monopolize. To offend the act the monopoly must have been secured by methods contrary to the public policy as expressed in the statutes or in the common law. The wrongful element in a monopoly under the act is not necessarily the violation of some penal statute, but

may consist of other acts or conduct which the law condemns and the benefit of which, if sought in a civil court of justice, could not be obtained. And it may be observed in this connection that there is more of the Decalogue in the common law respecting the trading of merchants than is sometimes supposed. On the other hand, Congress did not intend to impede legitimate commercial activity, nor put a limit to its fruits. The genius and industry of man, when kept to ethical standards, still have full play, and what he achieves is his; and this applies as well to a corporation, in which the energies of many are concentrated under the authority of law in a single organization. A railroad company, for instance, which has extended its lines across the continent and conquered the waste or wilderness, is not a monopoly within the statute merely because its capital is great and it alone serves the tributary country; and so of an industrial corporation, the wisdom and business sagacity of whose managers have foreseen and taken advantage of the natural tendencies of trade and caused it to outstrip all competition. Success and magnitude of business, the rewards of fair and honorable endeavor, were not among the evils which threatened the public welfare and attracted the attention of Congress. But when they have been attained by wrongful or unlawful methods, and competition has been crippled or destroyed, the elements of monopoly are present. A governmental grant of special privileges is no longer essential, though in England the Crown was for a period the frequent source of monopolies, which were condemned by the courts and finally by Parliament as contrary to public welfare. It was these Bacon had in mind in his advice to Villiers:

"But especially care must be taken that monopolies, which are the cankers of all trading, be not admitted under specious colors of public good."

The modern doctrine is but a recognition of the obvious truth that what a government should not grant, because injurious to public welfare, the individual should not be allowed to secure and hold by wrongful means. The baneful effect is the same, whether the monopoly comes as a gift from a government or is the result of individual wrongdoing. Nor can arguments of reduced prices of product, economy in operation, and the like, have weight. One English sovereign was accustomed to recite in the preambles of royal grants of monopolies the special benefits to be derived; but it was then, and is now, almost universally believed that the ultimate, if not the immediate, effect upon the development of trade and commerce is detrimental, and that belief, so generally prevalent and enduring, has been embodied in legislation, the policy of which is not open to question in the courts.

During the discussion of the amendment above referred to, apprehension was expressed over the broad language of the second section of the proposed act, and inquiry was made whether the committee having the bill in charge intended it should make it an offense if an individual engaged in interstate and foreign commerce, "by his own skill and energy, by the propriety of his conduct generally, shall pursue his calling in such a way as to monopolize a trade." Assurances were given that the term "monopolize" had no such signification, but that it contemplated the employment of means which prevented others

from engaging in fair competition, the engrossing of the trade, and the like. Undoubtedly this view prevailed at the passage of the law.

DECREE.

After deliberation, it is ordered, adjudged, and decreed:

Section 1. That in and prior to the year 1899 there were 20 corporations, organized, respectively, under the laws of various states, engaged in commerce in petroleum and its products, either among the states, or in the territories, or with foreign nations, and these corporations held a majority of the stock and controlled the business and operations of many other corporations engaged in that commerce; that one of these corporations was the Standard Oil Company of New Jersey, hereafter called the Standard Company, which had a capital stock of \$10,000,000; that since the year 1890 the defendants named in section 2 of this decree have entered into and are carrying out a combination or conspiracy in pursuance whereof about the year 1899 they caused the capital stock of the Standard Company to be increased to \$100,000,000, caused a majority of the stock of the 19 companies, and the power to control them, and to manage their trade, and the power to control the corporations which they controlled and to manage their trade, to be vested in and held by the Standard Company in exchange for its stock, which was issued to the former holders of the stock of the 19 companies, and caused the Standard Company ever since to control all these corporations, hereafter called the subsidiary corporations, and to manage their trade without competition among themselves as the trade and business of a single person; that this combination or conspiracy is a combination or conspiracy in restraint of trade and commerce in petroleum and its products among the several states, in the territories, and with foreign nations, such as an act of Congress approved July 2, 1890 (26 Stat. 209, c. 647 [U. S. Comp. St. 1901, p. 3200]), entitled "An act to protect trade and commerce against unlawful restraints and monopolies," declares to be illegal.

Section 2. That the defendants John D. Rockefeller, William Rockefeller, Henry H. Rogers, Henry M. Flagler, John D. Archbold, Oliver H. Payne, and Charles M. Pratt, hereafter called the seven individual defendants, united with the Standard Company and other defendants to form and effectuate this combination, and since its formation have been and still are engaged in carrying it into effect and continuing it; that the defendants Anglo-American Oil Company (Limited), Atlantic Refining Company, Buckeye Pipe Line Company, Borne-Scrymser Company, Chesebrough Manufacturing Company, Consolidated, Cumberland Pipe Line Company, Colonial Oil Company, Continental Oil Company, Crescent Pipe Line Company, Henry C. Folger, Jr., and Calvin N. Payne, a copartnership doing business under the firm name and style of Corsicana Refining Company, Eureka Pipe Line Company, Galena Signal Oil Company, Indiana Pipe Line Company, Manhattan Oil Company, National Transit Company, New York Transit Company, Northern Pipe Line Company, Ohio Oil Company, Prairie Oil & Gas Company, Security Oil Company, Solar Refining Company, Southern Pipe Line Company, South Penn Oil Company, Southwest Pennsylvania Pipe Lines Company, Standard Oil Company of California, Standard Oil Company of Indiana, Standard Oil Company of Iowa, Standard Oil Company of Kansas, Standard Oil Company of Kentucky, Standard Oil Company of Nebraska, Standard Oil Company of New York, Standard Oil Company of Ohio, Swan & Finch Company, Union Tank Line Company, Vacuum Oil Company, Washington Oil Company, and Waters-Pierce Oil Company, have entered into and became parties to this combination and are either actively operating or aiding in the operation of it; that by means of this combination the defendants named in this section have combined and conspired to monopolize, have monopolized, and are continuing to monopolize a substantial part of the commerce among the states, in the territories, and with foreign nations, in violation of section 2 of the anti-trust act.

Section 3. That the defendants Argand Refining Company, American Lubricating Oil Company, Acme Oil Company, Baltimore United Oil Company, Buffalo Natural Gas Fuel Company, Bush & Denslow Manufacturing Company,

Camden Consolidated Oil Company, Commercial Natural Gas Company, Connecting Gas Company, Eastern Ohio Oil & Gas Company, Eclipse Lubricating Oil Company, Florence Oil & Refining Company, Franklin Pipe Company (Limited), Lawrence Natural Gas Company, Mahoning Gas Fuel Company, Mountain State Gas Company, National Fuel Gas Company, Northwestern Ohio Natural Gas Company, Oil City Fuel Supply Company, Oswego Manufacturing Company, Pennsylvania Gas Company, Pennsylvania Oil Company, People's Natural Gas Company, Pittsburg Natural Gas Company, Platt and Washburn Refining Company, Republic Oil Company, Salamanca Gas Company, Standard Oil Company of Minnesota, Taylorstown Natural Gas Company, Tide Water Oil Company, Tide Water Pipe Company (Limited), United Natural Gas Company, and United Oil Company, have not been proved to be engaged in the operation or carrying out of the combination, and the bill is dismissed as against each of them.

Section 4. That in the formation and execution of the combination or conspiracy the Standard Company has issued its stock to the amount of more than \$90,000,000 in exchange for the stocks of other corporations which it holds, and it now owns and controls all of the capital stock of many corporations, a majority of the stock or controlling interests in some corporations, and stock in other corporations as follows:

Name of Company.	Total Capital Stock.	Owned by Standard Oil Company.
Anglo-American Oil Company (Limited).....	£ 1,000,000	£ 999,740
Atlantic Refining Company.....	\$ 5,000,000	\$5,000,000
Borne-Scrymser Company.....	200,000	199,700
Buckeye Pipe Line Company.....	10,000,000	9,999,700
Chesebrough Manufacturing Company, Consolidated	500,000	277,700
Colonial Oil Company.....	250,000	249,300
Continental Oil Company.....	300,000	300,000
Crescent Pipe Line Company.....	3,000,000	3,000,000
Eureka Pipe Line Company.....	5,000,000	4,999,400
Galena Signal Oil Company.....	10,000,000	7,079,500
Indiana Pipe Line Company.....	1,000,000	999,700
Lawrence Natural Gas Company.....	450,000	450,000
Mahoning Gas Fuel Company.....	150,000	149,900
Mountain State Gas Company.....	500,000	500,000
National Transit Company.....	25,455,200	25,451,650
New York Transit Company.....	5,000,000	5,000,000
Northern Pipe Line Company.....	4,000,000	4,000,000
Northwestern Ohio Natural Gas Company.....	2,775,250	1,649,450
Ohio Oil Company.....	10,000,000	9,999,850
People's Natural Gas Company.....	1,000,000	1,000,000
Pittsburg Natural Gas Company.....	310,000	310,000
Solar Refining Company.....	500,000	499,400
Southern Pipe Line Company.....	10,000,000	10,000,000
South Penn Oil Company.....	2,500,000	2,500,000
Southwest Pennsylvania Pipe Lines.....	3,500,000	3,500,000
Standard Oil Company of California.....	17,000,000	16,999,500
Standard Oil Company of Indiana.....	1,000,000	999,000
Standard Oil Company of Iowa.....	1,000,000	1,000,000
Standard Oil Company of Kansas.....	1,000,000	999,300
Standard Oil Company of Kentucky.....	1,000,000	997,200
Standard Oil Company of Nebraska.....	600,000	599,500
Standard Oil Company of New York.....	15,000,000	15,000,000
Standard Oil Company of Ohio.....	3,500,000	3,499,400
Swan & Finch Company.....	100,000	100,000
Union Tank Line Company.....	3,500,000	3,499,400
Vacuum Oil Company.....	2,500,000	2,500,000
Washington Oil Company.....	100,000	71,480
Waters Pierce Oil Company.....	400,000	274,700

That the defendant National Transit Company, which is owned and controlled by the Standard Oil Company as aforesaid, owns and controls the amounts of the capital stocks of the following named corporations and limited partnerships stated opposite each, respectively, as follows:

Name of Company.	Total Capital Stock.	Owned by National Trans- it Company.
Connecting Gas Company.....	\$ 825,000	\$ 412,000
Cumberland Pipe Line Company.....	1,000,000	998,500
East Ohio Gas Company.....	6,000,000	5,999,500
Franklin Pipe Company (Limited).....	50,000	19,500
Prairie Oil & Gas Company.....	10,000,000	9,999,500

That the Standard Company has also acquired the control, by the ownership of its stock or otherwise, of the Security Oil Company, a corporation created under the laws of Texas, which owns a refinery at Beaumont, in that state, and the Manhattan Oil Company, a corporation which owns a pipe line situated in the states of Indiana and Ohio; that the Standard Company, and the corporations and partnerships named in section 2, are engaged in the various branches of the business of producing, purchasing, and transporting petroleum in the principal oil-producing districts of the United States, in New York, Pennsylvania, West Virginia, Tennessee, Kentucky, Ohio, Indiana, Illinois, Kansas, Oklahoma, Louisiana, Texas, Colorado, and California, in shipping and transporting the oil through pipe lines owned or controlled by these companies from the various oil-producing districts into and through other states, in refining the petroleum and manufacturing it into various products, in shipping the petroleum and the products thereof into the states and territories of the United States, the District of Columbia, and to foreign nations, in shipping the petroleum and its products in tank cars owned or controlled by the subsidiary companies into various states and territories of the United States and into the District of Columbia, and in selling the petroleum and its products in various places in the states and territories of the United States, in the District of Columbia, and in foreign countries; that the Standard Company controls the subsidiary companies and directs the management thereof, so that none of the subsidiary companies competes with any other of those companies or with the Standard Company, but their trade is all managed as that of a single person.

Section 5. That the stocks of the various corporations which are named in section 2 and described in section 4 of this decree, held by the Standard Company, were acquired and are held by it by virtue of the illegal combination; that the Standard Company, its directors, officers, agents, servants, and employes, are enjoined and prohibited from voting any of the stock in any of the subsidiary companies named in section 2 of this decree and from exercising or attempting to exercise any control, direction, supervision, or influence over the acts of these subsidiary companies by virtue of its holding of their stock. And these subsidiary companies, their officers, directors, agents, servants, and employes are, and each of them is, enjoined and prohibited from declaring or paying any dividends to the Standard Company on account of any of the stock of these subsidiary companies held by the Standard Company, and from permitting the latter company to vote any stock in, or to direct the policy of, any of said companies, or to exercise any control whatsoever over the corporate acts of any of said companies by virtue of such stock, or by virtue of the power over such subsidiary corporation acquired by means of the illegal combination. But the defendants are not prohibited by this decree from distributing ratably to the shareholders of the principal company the shares to which they are equitably entitled in the stocks of the defendant corporations that are parties to the combination.

Section 6. That the defendants named in section 2 of this decree, their officers, directors, agents, servants, and employes, are enjoined and prohibited from continuing or carrying into further effect the combination adjudged illegal hereby, and from entering into or performing any like combination or conspiracy, the effect of which is, or will be, to restrain commerce in petroleum or its products among the states, or in the territories, or with foreign

nations, or to prolong the unlawful monopoly of such commerce obtained and possessed by defendants as before stated, in violation of the act of July 2, 1890, either (1) by the use of liquidating certificates, or other written evidences, of a stock interest in two or more potentially competitive parties to the illegal combination, by causing the conveyance of the physical property and business of any of said parties to a potentially competitive party to this combination, by causing the conveyance of the property and business of two or more of the potentially competitive parties to this combination to any party thereto, by placing the control of any of said corporations in a trustee, or group of trustees, by causing its stock or property to be held by others than its equitable owners, or by any similar device, or (2) by making any express or implied agreement or arrangement together, or one with another, like that adjudged illegal hereby relative to the control or management of any of said corporations, or the price or terms of purchase, or of sale, or the rates of transportation, of petroleum or its products in interstate or international commerce, or relative to the quantities thereof purchased, sold, transported, or manufactured by any of said corporations, which will have a like effect in restraint of commerce among the states, in the territories, and with foreign nations to that of the combination the operation of which is hereby enjoined.

Section 7. The defendants named in section 2 of this decree are enjoined and prohibited, until the discontinuance of the operation of the illegal combination, from engaging or continuing in commerce among the states, or in the territories of the United States.

Section 8. The United States shall recover its costs herein, to be taxed by the clerk of the court, and shall have execution therefor.

Section 9. This decree shall take effect thirty (30) days after its entry in case no appeal is taken from it. If an appeal is taken from this decree by the defendants, or by any of them, and a bond in the amount of fifty thousand dollars (\$50,000) conditioned to operate as a supersedeas approved by one of the circuit judges is given within thirty (30) days after the entry of this decree, then this decree, unless reversed or modified, shall take effect thirty (30) days after the final decision of this case by the Supreme Court upon the appeal.

PULLMAN CO. v. TAMBLE, County Trustee.

(Circuit Court, M. D. Tennessee. August 7, 1909.)

No. 3,581.

1. TAXATION (§ 608*)—INJUNCTION TO RESTRAIN COLLECTION OF TAX—GROUNDS OF EQUITY JURISDICTION.

The illegality or unconstitutionality of a tax imposed by state authority is not of itself a ground for equitable relief in a federal court; but to give equity jurisdiction, and authorize the granting of relief by injunction in such courts, other circumstances must be shown, which bring the case under some recognized head of equity jurisdiction and show inadequacy of remedy at law.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.*]

2. TAXATION (§ 608*)—SUIT TO RESTRAIN COLLECTION OF TAX—EQUITY JURISDICTION.

That the validity of a tax may be more conveniently tested by a suit in equity than in an action at law does not justify a resort to equity.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.*]

3. TAXATION (§ 608*)—SUIT TO RESTRAIN COLLECTION OF TAX—EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW.

Acts Tenn. 1873, p. 71, c. 44, which authorizes the payment of taxes under protest and their recovery by an action at law, if it shall be deter-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mined that they were wrongfully collected, affords an adequate remedy; and a federal court of equity is without jurisdiction to enjoin the collection of a tax in that state, unless special facts giving such jurisdiction are shown.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. § 608.*]

4. INJUNCTION (§ 118*)—PLEADING—JURISDICTIONAL ALLEGATIONS.

A general allegation of irreparable injury is insufficient to show a case of equitable cognizance, without the further allegation of facts to support it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 232; Dec. Dig. § 118.*]

5. TAXATION (§ 608*)—SUIT TO RESTRAIN COLLECTION OF TAX—EQUITY JURISDICTION.

An allegation, in a bill to enjoin the collection of a tax, of a threat to levy on and sell cars owned by defendant and used in interstate commerce, is not sufficient to confer jurisdiction on a federal court of equity, in the absence of any averment of complainant's inability to pay the tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. § 608.*]

6. TAXATION (§ 608*)—SUIT TO RESTRAIN COLLECTION OF TAX—EQUITY JURISDICTION.

A bill against an officer of one county to enjoin the collection of a tax by him does not state a case of equitable cognizance, on the ground of preventing a multiplicity of suits, by alleging that similar conditions exist in other counties, the officers of which are not parties to the suit and would not be bound by the decree.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1240; Dec. Dig. § 608.*]

7. TAXATION (§ 608*)—SUIT TO RESTRAIN COLLECTION OF TAX—EQUITY JURISDICTION.

That an officer is proceeding to collect a tax by an unconstitutional method or without legislative authority is not sufficient to give a court of equity jurisdiction to grant an injunction, where complainant has an adequate remedy at law.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1236; Dec. Dig. § 608.*]

In Equity. Bill by the Pullman Company against Peter M. Tamble, Trustee of Davidson County, Tenn., to enjoin collection of taxes. On motion for preliminary injunction. Motion denied.

This bill was filed by the Pullman Company, an Illinois corporation, against Peter M. Tamble, trustee of Davidson county, Tenn., to enjoin the collection of certain ad valorem taxes on the sleeping cars, dining cars, and parlor cars of the complainant. The bill, which was sworn to, alleged, in substance:

That, on motions made by the revenue agent for Middle Tennessee, the predecessor of the defendant had assessed for taxation certain cars of the complainant, for state and county purposes, for the years 1904 to 1908, as property omitted from the previous assessment of taxes, and had rendered judgments against the complainant for such taxes in favor of the state and of Davidson county, with interest and penalties. That the complainant had appealed from the trustee to the State Board of Equalization, composed of the Comptroller, Secretary of State, and Treasurer of the State, which board had reviewed said assessment, and had rendered judgment in favor of the state of Tennessee and of Davidson county, and against the complainant, for the amount of said taxes for said years, aggregating, with interest and penalties, \$30,743.30, together with the costs of the proceeding. That this assessment had been certified by the Board of Equalization to the defendant Tamble, trus-

tee of Davidson county, and he would, unless restrained, proceed to collect the taxes set out in said judgment, which would cause complainant irreparable injury and loss.

That the general offices of the complainant were located in, and its general officers resided in, Cook county, Ill., and that it had no office or place of business in Davidson county, Tenn., other than an agent in said county during said years, whose duty it was to care for its cars coming into and passing through said county.

That the property thus assessed for taxes consisted of all the cars of the complainant which had been in Davidson county, Tenn., on the 10th day of January of each of the years for which the taxes had been so assessed, but that none of said cars had been located in said county on any of said days for any other reason than that they had finished one journey and had been disconnected from the railroad trains to which they had been attached for the purpose of being used on another journey, except a few emergency or protection cars, which had been sent into said county for the purpose of being sent from there to other points on sleeping car lines running into said county, as emergency or necessity might require. That some of the cars so assessed had been in said county on a portion of said day, and in other counties of Tennessee on the same day, in making their respective journeys.

That similar motions for the assessment of complainant's cars were pending, for the years 1904 to 1907, in Shelby county, Hamilton county, and Knox county, Tenn., for the purpose of assessing, for state and county purposes, all cars of complainant which happened to be in said counties on the 10th of January of such years, including many of the cars which had been so assessed for taxes in Davidson county, as aforesaid.

That neither the defendant, Tamble, trustee of Davidson county, nor the State Board of Equalization, had or was given any jurisdiction by the Legislature of Tennessee to assess any of said cars for taxation, and that it was the intention of the Legislature that the privilege tax imposed upon complainant, and which it had paid for each of said years, should be the only tax which it should pay. That none of said cars were subject to assessment in Davidson county or in the state of Tennessee, or had ever had a domicile or a situs for taxation, or for any other purpose, in said county or state, and the situs of all of said cars on the 10th of January of each of said years was outside of the state of Tennessee, and not in said state. That said assessment was absolutely void and of no effect.

That the State Board of Equalization had furthermore overvalued said cars, and had intentionally valued the same at an amount in excess of their actual cash value, and had refused to equalize the assessed value thereof with other property assessed for valuation for said years in said county, which had generally been assessed, through the intentional action of the taxing authorities, at from one-fourth to one-third less than its actual cash value, and the assessment on complainant's property would result in complainant's being compelled to pay taxes on a higher valuation than other property was generally assessed for taxation in said county, and would deprive it of its property without due process, and deny it the equal protection of the laws, in violation of the fourteenth amendment of the Constitution of the United States.

That, furthermore, under the taxing system of the state for said years, freight and passenger cars owned by railroad companies operating in Tennessee were assessed upon the basis of the number of miles operated in Tennessee, and only that part of the value of such cars proportionate to the mileage in Tennessee was assessed for taxation. That, if the taxing system of Tennessee authorized the assessment of complainant's cars upon the basis attempted by the State Board of Equalization, it was an unjust and unlawful discrimination, and denied the complainant the equal protection of the laws, in violation of the fourteenth amendment of the Constitution of the United States.

That the State Board of Equalization had, furthermore, intentionally declined to assess each particular car separately, and it was impossible from the assessment to ascertain the value of any of the cars included in the assessment, and for this reason the assessment was void and of no effect.

That the only property complainant had in Tennessee was its cars coming into the state and passing through the state, and operated between points in

the state, on the various railroads entering said county. That said cars were necessary for the accommodation of the traveling public, and any interference therewith would be a serious inconvenience and irreparable loss to such railroads, the complainant, and the traveling public. That the defendant would, unless restrained, issue process and have the same levied upon said cars for the collection of the taxes claimed under said assessment, which would prevent said cars being used in complainant's business in connection with the railroads operating trains into said county, and be a serious interference with and irreparable loss to the traveling public. That the said assessment and tax was an unjust burden upon, and an unlawful interference with and regulation of interstate commerce, and the enforcement of the same, and any levy or process upon any of said cars, would be an unlawful interference with and a burden upon interstate commerce, and would impede the carrying on of interstate commerce, contrary to section 8 of article 1 of the Constitution of the United States.

Wherefore, as complainant could have no adequate relief, except in this court, it prayed for process, and for a preliminary injunction restraining and enjoining the defendant from taking any action looking to the enforcement or collection of said taxes, and from interfering with complainant's cars, and from issuing any process, or having any execution or other process issued or levied upon any of complainant's property, and in any manner interfering with complainant or undertaking to deprive it of its property without due process of law, and that upon final hearing the assessment be declared void and set aside, and the preliminary injunction made perpetual, and for general relief.

The case was heard on the complainant's application for preliminary injunction, on the bill; the defendant resisting this application on the ground, in effect, of want of equity in the bill.

W. L. Granbery, for complainant.

Edw. E. Barthell, for defendant.

SANFORD, District Judge (after stating the facts as above). Without deciding the important questions involved in determining whether or not the assessment of the taxes whose collection is sought to be enjoined in this case was illegal and void, I am of opinion that the complainant's motion for a preliminary injunction should be denied for want of equity in the bill. It is a guiding rule of equity, crystallized into statute form by the sixteenth section of the judiciary act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 82; Rev. St. § 723 [U. S. Comp. St. 1901, p. 583]), that it will not assume jurisdiction in cases where a plain, adequate, and complete remedy may be had at law. *New York Guaranty Co. v. Water Co.*, 107 U. S. 205, 214, 2 Sup. Ct. 279, 27 L. Ed. 484; *Boise Artesian Water Co. v. Boise City*, 213 U. S. 279, 29 Sup. Ct. 426, 53 L. Ed. 796.

In applying this rule in the federal courts in cases where it has been sought to enjoin the collection of taxes or other impositions made by state authority, and in the exercise of a proper reluctance to interfere with the fiscal operations of state governments in all cases where the federal rights of the person could otherwise be preserved unimpaired, it has been uniformly held that the illegality or unconstitutionality of the tax or imposition is not of itself a ground for equitable relief in the federal courts, but that the aggrieved party will be left to his remedy at law, where that remedy is as complete, practicable, and efficient as the remedy in equity, and that in order to give equity jurisdiction, and before the preventive remedy by injunction can be invoked, there must be shown, in addition to the illegality or unconstitutionality of the tax

or imposition, other circumstances bringing the case under some recognized head of equity, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, would throw a cloud upon the complainant's title. *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Hannewinkle v. Georgetown*, 15 Wall. 547, 21 L. Ed. 231; *State R. R. Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. Ed. 610; *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; *Allen v. Pullman Co.*, 139 U. S. 658, 11 Sup. Ct. 682, 35 L. Ed. 303; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; *Pittsburg Ry. v. Board of Public Works*, 172 U. S. 39, 19 Sup. Ct. 90, 43 L. Ed. 354; *Arkansas B. & L. Ass'n v. Madden*, 175 U. S. 269, 20 Sup. Ct. 119, 44 L. Ed. 159; *Cruickshank v. Bidwell*, 176 U. S. 73, 20 Sup. Ct. 280, 44 L. Ed. 377; *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651; *Boise Artesian Co. v. Boise City*, *supra*; *Taylor v. Louisville R. R.*, 88 Fed. 350, 31 C. C. A. 537.

Applying these governing principles, I think it clear that the circumstances set forth in complainant's bill do not show inadequacy of remedy at law or bring the case within any recognized head of equity jurisdiction.

1. The general averment that the complainant "can have no adequate relief, except in this court," is a mere matter of inference, and insufficient, without the averment of facts sustaining such conclusion. *Shelton v. Platt*, 139 U. S. 591, 596, 11 Sup. Ct. 646, 35 L. Ed. 273. Such facts are not averred in the complainant's bill.

The mere illegality of the tax, and the threatened levy upon complainant's property to enforce its collection, is insufficient to give equitable jurisdiction, as the party of whom an illegal tax is collected has ordinarily an ample remedy by an action at law, which is presumably adequate, against the officer making the collection, or to whom the tax is paid, to recover the money. *Dows v. Chicago*, 78 U. S. 108, 112, 20 L. Ed. 65; *Shelton v. Platt*, 139 U. S. 591, 594, 11 Sup. Ct. 646, 35 L. Ed. 273; *Cooley on Taxation*, p. 538. And the possibility that the validity of the tax may be more conveniently tested by a bill in equity than by an action at law does not justify a resort to equity. *Arkansas B. & L. Ass'n v. Madden*, *supra*; *Boise Artesian Co. v. Boise City*, *supra*.

Furthermore, under the express provisions of the Tennessee act of 1873 (Acts 1873, p. 71, c. 44), where an officer charged by law with the collection of revenue due the state takes any steps for the collection of such revenue claimed to be due the state, a party conceiving the tax to be unjust or illegal may pay it under protest, and sue the officer to recover the money, and, if the court determines that it was wrongfully collected, then, upon its certificate to that effect, the Comptroller shall issue his warrant for the same, which shall be paid in preference to other claims on the treasury; the act further providing that there shall be no other remedy in any case of the collection of revenue, and no writ or other process for the prevention of such collection or to hinder and delay it shall in any wise issue.

This act, which has been sanctioned and applied by the Supreme Court of Tennessee in *Railroad v. State*, 8 Heisk. 663, and *Nashville v. Smith*, 86 Tenn. 213, 6 S. W. 273, provides a remedy at law which has been twice pronounced by the Supreme Court of the United States to be "simple and effective." *Tennessee v. Sneed*, 96 U. S. 69, 75, 24 L. Ed. 610; *Shelton v. Platt*, 139 U. S. 597, 11 Sup. Ct. 646, 35 L. Ed. 273. And again in *Allen v. Pullman Co.*, 139 U. S. 658, 661, 11 Sup. Ct. 682, 35 L. Ed. 303, it was held that the jurisdictional averments in a bill seeking to restrain the Comptroller of Tennessee from collecting privilege taxes from the complainant on the ground of their unconstitutionality did not make out a case for equity intervention, for the reasons given in *Shelton v. Platt* and in view of the act of Tennessee of 1873. And, as has been expressly held, the taxpayer, after paying the tax under protest may in the same action recover the tax paid for county purposes, as well as those paid to the state. *Railroad v. Williams*, 101 Tenn. 147, 46 S. W. 448.

2. The general allegation in the bill that the collection of these taxes "will cause (complainant) irreparable injury and loss" is insufficient to show a case of equitable cognizance. The mere assertion that the apprehended acts will inflict irreparable injury is not enough, and, without the allegation of facts from which the court can reasonably infer that such would be the result, is fatally defective. *Cruickshank v. Bidwell*, 176 U. S. 73, 81, 20 Sup. Ct. 280, 44 L. Ed. 377.

Nor is irremediable injury shown or jurisdiction conferred by the fact that the tax has been levied on cars which are instrumentalities of interstate commerce, and which would be subject to levy in payment of the tax, in the absence of any averment of complainant's inability to pay the tax, since, in so far as appears, the complainant could avert all the consequences, which it deprecates as likely to ensue if the collection of the tax is not restrained, by paying the tax and suing for its recovery. *Shelton v. Platt*, 139 U. S. 597, 11 Sup. Ct. 646, 35 L. Ed. 273; *Allen v. Pullman Co.*, 139 U. S. 661, 11 Sup. Ct. 682, 35 L. Ed. 303. In *Shelton v. Platt* the court said:

"The bill showed the company to be doing a vast business, and it was an unreasonable inference that it must submit to the sale of its wagons and horses, or that such a sale would work that kind of mischief which justifies the interference of equity in the application of a preventive remedy. Nor did the mere fact that its property might be used in the conduct of interstate commerce give jurisdiction."

3. As no question of real estate is involved in this case, the question of a cloud upon complainant's title as a ground of equitable jurisdiction, does not arise.

4. The bill does not make out a case of equitable jurisdiction on the ground of preventing a multiplicity of suits. While the bill, which is brought against the trustee of Davidson county alone, alleges that similar motions for the purpose of the back-assessment of complainant's property are pending in Shelby, Hamilton, and Knox counties, yet, so far as appears from the bill, the trustees of these counties may adopt the view of the law upon which complainant insists, and may decline to back-assess its property at all; and, even if they do proceed with such back-assessment, yet, not being parties to this suit, they

would not be bound by an injunction against the trustee of Davidson county, and further litigation would not, as a matter of law, be prevented by this suit.

The case is therefore clearly distinguishable from *Taylor v. Louisville R. Co.*, 88 Fed. 350, 357, 31 C. C. A. 537, in which it was held that the State Board of Equalization might be enjoined from certifying an illegal tax to the various counties and cities who were to collect it, thereby preventing at least 35 suits at law, which would otherwise be necessary to vindicate complainant's rights, and giving equitable jurisdiction in order to prevent multiplicity of suits, as well as upon the ground that the illegal tax created a cloud upon the complainant's property, and all similar cases, such as *Sanford v. Poe*, 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641, and *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761, in which a general state board or auditor was enjoined from certifying an illegal general state tax to the several county auditors of the state for purposes of collection; the case where the illegal tax is still in the hands of one central authority, and multiplicity of suits may be prevented by restraining its certification by such central authority to local collection officers throughout the state, being manifestly different from the case at bar, in which only one tax judgment is involved, which has already been certified for collection to the defendant trustee, who is alone a defendant in the case, and in which no injunction could be issued that would restrain the assessment or collection of other similar taxes by the trustees of the other counties referred to in the bill, being only three in number, or in any manner prevent, as a matter of law, litigation in regard thereto.

For similar reasons, the present case is clearly distinguishable from *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, in which it was held that the collection of an illegal tax against a street car company might be enjoined for want of adequate remedy at law, where it would require a multiplicity of suits against various taxing authorities to recover the tax paid, a portion of which would go to the state, against which no action would lie, and that the amount of the tax was so great that it would cause the insolvency of the company, and a levy upon its property embarrass and injure the public.

5. The authorities do not, I think, sustain the contention that an exception is made to the rule of the federal courts denying equitable relief where there is an adequate remedy at law, and the circumstances do not bring the case within a recognized head of equity jurisdiction, merely because the tax is levied upon an unconstitutional basis or without statutory authority. In *People's National Bank v. Marye*, 191 U. S. 272, 288, 24 Sup. Ct. 68, 48 L. Ed. 180, the court merely reaffirmed the rule, long before announced in *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663, that a complainant, seeking equitable relief against an excessive tax, must first offer to pay that part of the tax which under its construction was not illegal, and expressly declined to intimate an opinion as to whether the bill was otherwise maintainable. In *Fargo v. Hart*, 193 U. S. 490, 503, 24 Sup. Ct. 498, 501, 48 L. Ed. 761, where the State Auditor was enjoined from certifying an assessment of taxes against an express company to the auditors of the several

counties of the state, the court, after expressly stating that it did "not abate at all from the strictness of the rule that in general an injunction will not be granted against the collection of taxes," said that the course adopted "avoids the necessity of suits against the officers of each of the counties of the state, and we are of opinion that the bill may be maintained." From which statement and the authorities cited in its support, including *Union Pac. Ry. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098, it is clear that the equitable jurisdiction in the case was rested upon the prevention of the multiplicity of suits if the tax were certified to all the auditors of all the counties in the state.

The case of *Taylor v. Louisville Railroad*, *supra*, is furthermore a direct authority against the complainant's contention. In that case the complainant, as stated in the opinion, sued the persons composing the State Board of Equalization, "seeking to enjoin them from doing certain acts which they assert to be by lawful authority of the state, but which the complainant avers to be without lawful authority." Page 356 of 88 Fed., page 543 of 31 C. C. A. Yet the court stated that, in order that the suit might be entertained in a court of equity, it must appear that the wrong about to be inflicted was such "that the remedies in a court of law are inadequate, and so bring the case under some recognized head of equity jurisdiction," and rested such jurisdiction specifically on the two grounds of preventing multiplicity of suits and removing a cloud upon the title to complainant's property. Page 357 of 88 Fed., page 544 of 31 C. C. A.

In the absence of threatened multiplicity of litigation, or other recognized ground of equitable jurisdiction, I can see no reason, on principle, why there should be stronger ground for equitable relief, as a matter of equity jurisdiction, merely because the officer whom it is sought to enjoin from the collection of taxes is alleged to have proceeded under an unconstitutional method or without legislative authority—as in the *Taylor Case* and the case at bar—than if it were averred that he was proceeding under an unconstitutional or void statute. This cannot affect the cardinal rule of equity that it will not assume jurisdiction or grant relief where a plain and adequate remedy exists at law.

It appears that the defendant, Tamble, who is sued in this case as the county trustee of Davidson county, is proceeding to collect a back tax assessed upon complainant, by his predecessor in office, by virtue of the general back-tax assessment laws of the state, vesting authority to make back-assessments in the county trustees, and under his construction of the Constitution of Tennessee and of the Tennessee assessment and revenue acts of 1903 and 1907 (Acts 1903, p. 632; Acts 1907, p. 2046), under which the taxes in question are claimed; and that the complainant, in accordance with the Tennessee statutes, appealed from the trustee to the State Board of Equalization and removed the proceedings to that board, by whom the trustee's assessment was affirmed, with added interest and costs, and certified back to the trustee for collection. As the trustee is an officer charged by law with the collection of revenue due the state, and as the act of 1873 provides that

the taxpayer may pay under protest and sue to recover any such tax "alleged or claimed to be due" by such officer, the complainant's right to pay the tax in question and sue for its recovery, if void, obviously exists as fully when the tax is claimed without legislative warrant as when the legislation under which it is claimed is unconstitutional.

Being of opinion, therefore, that the case presents no ground of equitable relief, and that the complainant has a complete and adequate remedy at law for such wrongs, if any, as it may suffer from the collection of the tax in question, if void, the motion for a preliminary injunction will be denied.

An order will be entered accordingly.

Ex parte LONG LOCK.

(District Court, N. D. New York. October 14, 1909.)

1. ALIENS (§ 32*)—CHINESE PERSON—DEPORTATION PROCEEDINGS—BURDEN OF PROOF.

Where, in deportation proceedings against a Chinese person, he presented a commissioner's judgment dismissing former similar proceedings on the ground that the person described therein was a citizen of the United States, claiming that such determination was *res judicata*, the burden was on him to establish that he was the identical person named and described in such judgment.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

2. ALIENS (§ 32*)—CHINESE PERSON—DEPORTATION PROCEEDINGS—REVIEW—HABEAS CORPUS.

The decision of a commissioner of immigration in Chinese deportation proceedings, affirmed by the Department of Commerce and Labor, is only reviewable by the courts on habeas corpus in case it is alleged that the petitioner has not been given a full and fair hearing and opportunity to prove his right to remain in the United States, or in the event of arbitrary or illegal action or abuse of discretion; the credibility of the witnesses and the question of identification being questions of fact for the administrative officers, whose decision, after full and fair hearing, is conclusive on the courts.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. § 32.*]

3. ALIENS (§ 32*)—CHINESE PERSONS—EXCLUSION—HEARING.

The determination of a commissioner, affirmed after retrial on additional testimony by the Department of Commerce and Labor, that accused, a Chinese person, had not established to their satisfaction that he was the identical person who in a former proceeding had been held entitled to remain in the United States as a citizen, *held* neither arbitrary, nor an abuse of discretion, but justified by the facts.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 32.*]

Application by Long Lock, a Chinese person, for a writ of habeas corpus to obtain his release from imprisonment under a deportation warrant. Writ dismissed, and petitioner remanded.

George J. Moore, for petitioner.

H. E. Owen, Asst. U. S. Atty.

RAY, District Judge. The petitioner applied for admission into the United States at Malone, N. Y., July 10, 1909, and his case was in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quired into by E. G. Sperry, immigration officer in charge of said port of entry, touching his right to enter, viz.: Was Long Lock born in the United States? Said immigration officer, after a full hearing, decided and adjudged that the petitioner was an alien Chinese person, not entitled to enter the United States and that he had not established such right, and admission was refused. An appeal was taken to the Department of Commerce and Labor, and after full consideration and further inquiry the appeal was dismissed on the merits. The record shows that a full and fair investigation and inquiry was had and made, and additional evidence taken and considered, and decision made on a question of fact.

The petitioner contends that he has established as matter of law his right to enter the United States as a citizen thereof, and that he was born in the United States. In substance, his contention is that he was arbitrarily denied admission. He contends that the question of his right to be and remain in the United States, on the ground he was born here, has been tried and adjudicated in his favor before one of the United States commissioners in the district of Vermont, and that such adjudication is final, *res adjudicata*, not having been appealed from, set aside, or reversed. There is no proof, outside the mere uncorroborated statement of the petitioner, that he was born in the United States, unless the adjudication referred to is to be deemed conclusive proof of that fact. The government does not contend that the judgment of the commissioner is not conclusive, if Long Lock, the petitioner here, is the identical person who was tried in deportation proceedings before such commissioner. The government does contend that the burden was on Long Lock to establish to the satisfaction of the immigration officer (1) that such trial and adjudication was had and made; and (2) that Long Lock, the person now applying for admission, the petitioner here, is the same person whose right to enter and be in the United States was so favorably adjudicated.

The record shows as follows: (1) That October 16, 1897, a Chinese person bearing the name Long Lock was before United States Commissioner George E. Johnson, at Burlington, Vt., in deportation proceedings on the charge he was an alien Chinese person and not within the exempt class or classes; (2) that after the hearing of evidence on the question whether or not said person, going by the name of Long Lock, was born in the United States, the commissioner decided that he was there born, and thereupon discharged him; (3) an order or judgment to that effect was entered by the commissioner. Thereupon said commissioner delivered to the person so tried and discharged a certificate reading as follows:

"United States of America, District of Vermont.

"I, George E. Johnson, United States commissioner, within and for the district of Vermont, hereby certify that a complaint was exhibited before me by John H. Senter, United States attorney within and for said district, on the 16th day of October, A. D. 1897, charging, in substance, that on or about the 14th day of October, A. D. 1897, at Richford, in said district, one Long Lock, a person of Chinese descent, did unlawfully come into and was within the United States, in violation of section — of the Revised Statutes of the United States; and on the 16th day of October, A. D. 1897, the defendant was brought before me at my office in the city of Burlington, in said district, and

after a full hearing on said charge, the said United States attorney being present, it was adjudged by me that said Long Lock had the lawful right to be and remain in the United States, having found that he is an American citizen by reason of having been born in the United States, and he was thereupon discharged from custody.

"Given under my hand and official seal at the city of Burlington, in the district of Vermont, this 16th day of October, A. D. 1897.

"[Seal.]

Geo. E. Johnson,

"United States Commissioner, District of Vermont."

No photograph of said Chinese person was attached thereto, and, so far as appears, he had no distinguishing marks. There is no evidence or proof that the petitioner here, Long Lock, is the same person, the same Long Lock, who was tried before said commissioner and discharged, and to whom the certificate was delivered, except that this petitioner swears he is that person, and evidence was given tending to show that in 1905 he exhibited same to Inspector Wylie at New York, and that in September, 1907, ten years after its date, this petitioner, Long Lock, produced such certificate to one James V. Storey, a notary public of the borough of Manhattan, N. Y., with a certified copy of the record of proceedings before said Johnson, and made oath as follows:

"State of New York, County of New York, Borough of Manhattan—ss.:

"Long Lock, being duly sworn, deposes and testifies as follows, viz.: My name is Long Lock. My address is No. 216 Richmond Terrace, West Brighton, Staten Island, New York. I do further swear that I am a citizen of the United States by reason of having been born therein, at San Francisco, California; that I am the holder of an original certificate of discharge issued to me by United States Commissioner Geo. E. Johnson at Burlington, Vermont, on the 16th day of October, 1897, and which certificate recited the fact that I was born in the United States and in consequence a citizen thereof. A copy of a certified copy of the transcript of record is attached hereto, the original of which is in my possession, together with the original certificate of discharge.

"[Signed]

Long Lock.

"Sworn to before me this 11th day of September, 1907.

"James V. Storey, Notary Public. [Seal.]"

To this affidavit his photograph was attached. At that time one Lue Chung also made an affidavit before said Storey as follows:

"State of New York, County of New York, Borough of Manhattan—ss.:

"The undersigned, being duly sworn, deposes and testifies as follows: That I have read the affidavit of Long Lock annexed hereto, and have seen the photograph attached to said affidavit, and recognize the same to be the photograph of Long Lock, with whom I am personally acquainted, and whom I know to be the lawful possessor of an original certificate of discharge issued by United States Commissioner Geo. E. Johnson at Burlington, Vermont, on the 16th day of October, 1897.

"[Signed]

Lue Chung,

"216 Richmond Terrace, W. B., N. Y.

"Sworn to before me this 11th day of September, 1907.

"James V. Storey, Notary Public. [Seal.]"

This petitioner, Long Lock, seems then to have been in the United States. I find no evidence given by Storey. In October, 1907, the petitioner says he went to China on a visit, and a paper was produced, stamped "Departed from Malone, N. Y., Oct. 23, 1907." This fact does not seem to be questioned. The petitioner says he had been em-

ployed as laundryman at 16 Richmond street, Richmond Terrace, S. I. This is not disproved. The only knowledge Lue Chung, or Jow, had that Long Lock was tried at Burlington, was what Long Lock told him. Lue Chung, sworn in this matter at New York before Inspector Wylie, said that he knew petitioner 10 or 11 years ago at 10 Pell street, New York; that the petitioner then told him he was born at San Francisco, and showed him a paper; but he does not appear to recognize or identify it as the one the petitioner had in 1897. He did not read it, and gave no evidence tending to so identify it. Lee Yen, or Lee Len Men, when shown the photograph of petitioner, said he recognized it.

"Q. As whom? A. I forget: Leong. He has two names, you know. Q. Give me the name you knew him under. A. Shue Hen."

He says the petitioner had a laundry at Staten Island, bought stuff of him, and that before he went to China in 1907 he showed him (witness) a paper which had a piece torn off, and that he took petitioner to Storey to have some papers drawn up.

The petitioner, on being sworn, told of being taken to China when 5 years of age, but, of course, had no memory of the transaction; of living in China until 18 years of age, when he came to the United States, and, as he says, was arrested and tried in the deportation proceedings at Burlington, Vt. He gives a short description of his journey from Montreal to Burlington; but, as the inspector says, there is nothing in his story that could not be learned in a few minutes. He states that he is 30 years of age; was born in February or March, 1880; that his mother's name was Wong She, and that she died 5 years ago; that his father's name is Long Hing Yen, now living in China, to which place he returned from the United States in September or October, 1904; that he is an only child, was born at 712 Dupont street, San Francisco, Cal., as he was informed by his parents; that he went to China when 5 years of age, and returned in September or October, 1897; that he was married in China early part of twenty-third year of K. S., and left for the United States the eighth month of same year; that he had a son born on the 11th day of the tenth month of the twenty-fourth year of K. S., and that his eldest son was born on the 6th day of the seventh month of the twenty-third year of K. S., or August 3, 1897; that his older son was born 7 months after his marriage, and that he made a mistake in first stating dates of birth; that his older son was born the 6th day of the seventh month of the twenty-third year of K. S., and his youngest son on the 3d day of the third month of the twenty-fourth year of K. S., and that his second son was born eight months after the birth of the first one; that his father lived in San Francisco 15 years, and was a laboring man. He says Lee Len Men, now in China, knows of his birth and lived in San Francisco at the time. He says he made a mistake when he first gave the dates of his marriage and the birth of his children. When asked why he hesitated so long in answering, when he was shown it was impossible for his sons to have been born as at first stated by him, he answered:

"I realized I made a mistake, and my heart failed me."

Inspector H. R. Sisson, of New York, in his letter of July 17, 1909, to the inspector at Malone, N. Y., says:

"The census records of this office show that this applicant, Long Lock, was residing at 216 Richmond Terrace, West Brighton, Staten Island, on June 1, 1905, and presented the discharge certificate which forms a part of this record; the initials of Inspector Wylie appearing upon the reverse side thereof in the upper left-hand corner."

It is conceded, therefore, that in June, 1905, the petitioner had possession of such certificate, and the evidence tends to show he had it in September, 1907. He had it on his return from China. His residence of some nine or ten years in the United States, in New York and vicinity, was unmolested by the United States, if he was not born in the United States, he had no right to be and remain here during that time. He went away, leaving a record of his departure, in 1907, and in 1905 he had shown the certificate of Commissioner Johnson, referred to, to Inspector Wylie. He has been denied admission on the ground he has not identified himself as the Long Lock tried and discharged by Commissioner Johnson in 1897. It was conceded on the hearing before me that Johnson is dead, and that the evidence of John H. Senter, then United States attorney having charge of that proceeding, cannot be had by reason of his death or some other cause. The father of the petitioner is in China. It was, therefore, impossible to produce any one who was present at such hearing and identify the petitioner as the Long Lock tried and discharged by Johnson.

It is possible, of course, that this petitioner is not the Long Lock then arrested, tried, and discharged. It is possible that this petitioner obtained, prior to 1905, this certificate from the Long Lock who was so tried and discharged; that there was another person bearing that name. It appears that this petitioner, at Staten Island, went by another name, Shue Hen, which was not his married name, as that is Long Wah. Certain presumptions arise from the possession of certain documents; but they are rebuttable. In this case I find no explanation of the fact that this petitioner bore two names in New York and Staten Island prior to his going to China. If he was "Long Lock" when tried at Burlington, Vt., why was he "Shue Hen" when living at New York and Staten Island in the succeeding years? Why was he passing under that name? It does not appear that any investigation was made as to the identity of the person presenting the certificate with the one named therein when it was marked by Inspector Wylie in 1905 in connection with the census records.

It seems to me that the question presented is narrowed to this: Was the burden on the petitioner to establish to the satisfaction of Inspector Sperry in the first instance, and to the satisfaction of the Department of Commerce and Labor on appeal, that he was the same person tried and discharged by Commissioner Johnson in 1897? and was the possession of the certificate in 1905, and 1907, and on his return from China, with his statement under oath that he was such person, conclusive of the fact, in view of all the evidence and circumstances? If, under the evidence and circumstances of the case, a fair question of fact as to identity was presented for the determination of

the inspector and department, and he and it have decided that question on evidence from which two different conclusions may be arrived at, the courts should not assume to disturb the finding and arrogate to itself the powers confided by the Congress of the United States to that executive officer and that executive department. The court has no right to compel the admission of a Chinese person applying therefor on the ground it would have arrived at a different conclusion on the evidence from that arrived at by the inspector in charge and affirmed by the department, when a fair question of fact is presented for decision; there being no abuse of discretion. *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040. This was the case of a person of Chinese descent seeking admission into the United States.

In *United States v. Sing Tuck and 31 Others*, 194 U. S. 161, 166, 24 Sup. Ct. 621, 48 L. Ed. 917, the Supreme Court decided that Congress has the power, and has exercised it, to confer upon executive officers and an executive department of the government the determinations of questions of fact as to the right of a person of Chinese descent to enter the United States, including the question of fact whether or not he was born in the United States. In that case the court held that in case of adverse decision the applicant for admission must pursue his remedy by appeal to the Department of Commerce and Labor before he could avail himself of the remedy of writ of habeas corpus. It did not decide whether or not a further trial of the question could be had on writ of habeas corpus or other proceedings after adverse decision by the department.

In *United States v. Ju Toy*, supra, the question was squarely up and before the court, and it decided:

"Even though the fifth amendment does apply to one seeking entrance to this country, and to deny him admission may deprive him of liberty, due process of law does not necessarily require a judicial trial, and Congress may intrust the decision of his right to enter to an executive officer. Under the Chinese exclusion and the immigration laws, where a person of Chinese descent asks admission to the United States, claiming that he is a native-born citizen thereof, and the lawfully designated officers find that he is not, and upon appeal that finding is approved by the Secretary of Commerce and Labor, and it does not appear that there was any abuse of discretion, such finding and action of the executive officers should be treated by the courts as having been made by a competent tribunal, with due process of law, and as final and conclusive; and in habeas corpus proceedings, commenced thereafter, and based solely on the ground of the applicant's alleged citizenship, the court should dismiss the writ, and not direct new and further evidence as to the question of citizenship. A person whose right to enter the United States is questioned under the immigration laws is to be regarded as if he had stopped at the limit of its jurisdiction, although physically he may be within its boundaries."

This in effect was a holding that the decision of the Commissioner of Immigration, affirmed by the Department of Commerce and Labor, is final, if the applicant was given a full and fair hearing and opportunity to prove his citizenship, and there was no arbitrary or illegal action or abuse of discretion.

In *Chin Yow v. United States*, 208 U. S. 8, 11, 28 Sup. Ct. 201, 52 L. Ed. 369, the question was again up. In that case the court below dismissed the writ for want of jurisdiction; the Commissioner of Im-

migration having denied admission, and such action having been affirmed by the Department of Commerce and Labor. This action was clearly a misapprehension of the decision of the Supreme Court in *United States v. Ju Toy*, supra. The petitioner alleged arbitrary action and deprivation of the right to procure and present evidence of his birth in the United States, and that he could have done so, had he been given the opportunity. On appeal Mr. Justice Holmes gave the opinion of the court, and after reciting the above facts said:

"The question is whether he is entitled to a writ of habeas corpus in such a case as that? Of course, if the writ is granted, the first issue to be tried is the truth of the allegations last mentioned (those of arbitrary action and the denial of an opportunity to present his evidence of citizenship). If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair, though summary, hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the district court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And, by way of caution, we may add that jurisdiction (to grant the writ) would not be established simply by proving that the Commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. But, supposing that it could be shown to the satisfaction of the District Judge that the petitioner had been allowed nothing but the semblance of a hearing, as we assume to be alleged, the question is, we repeat, whether habeas corpus may not be used to give the petitioner the hearing that he has been denied. The statutes purport to exclude aliens only. They create or recognize—for present purposes it does not matter which—the right of citizens outside the jurisdiction to return to the United States. If one alleging himself to be a citizen is not allowed a chance to establish his right in the mode provided by those statutes, although that mode is intended to be exclusive, the statutes cannot be taken to require him to be turned back without more. The decision of the department is final; but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter, and of persons alleging themselves to be citizens to have a chance to prove their allegation on the one side and the conclusiveness of the Commissioner's fiat on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts. In order to decide what we must analyze a little. * * * But, unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

The Supreme Court here plainly holds, as it has repeatedly held, that the truthfulness of Chinese witnesses, of the applicant for admission, and the question of identification, are questions of fact for the Commissioner of Immigration and Department of Commerce and Labor, and that their decision on these questions, where a full and fair hearing has been had, is final and binding on the courts. See *Fong Yue Ting v. United States*, 149 U. S. 698, 713, 729, 13 Sup. Ct. 1016, 37 L. Ed. 905; *Nishimura Ekiu's Case*, 142 U. S. 660, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Ah How v. United States*, 193 U. S. 65, 76, 78, 24 Sup. Ct. 357, 48 L. Ed. 619; *Chin Yow v. United States*, 208 U. S. 8, 11, 28 Sup. Ct. 201, 52 L. Ed. 369.

In *Ah How v. United States*, supra, Mr. Justice Holmes said:

"Of course, if the burden of proof was on the appellants, the commissioner and judge might not be satisfied by the affirmative evidence produced."

The learned justice cited *Fong Yue Ting v. United States*, supra, to show the decision of the lower courts could not be reviewed on the question of fact. At page 78 of 193 U. S., page 359 of 24 Sup. Ct. (48 L. Ed. 619), on the question of establishing identity, the same justice said:

"Apart from the possibility that the Commissioner in the present hearing was not satisfied of the identity of the party," etc.

In *Chin Yow v. United States*, supra, as already quoted, the court held that a writ of habeas corpus cannot be granted on the ground that the inspector and department has refused to accept certain sworn statements as true, even though no contrary or impeaching testimony was introduced. Inspector Sperry expressly states here that he did not think the identity of this petitioner with the Long Lock of the certificate had been established. The Department of Commerce and Labor was not satisfied, and this court is far from satisfied, that this petitioner is the Long Lock apprehended and tried before and discharged by Commissioner Johnson in 1897. Where and when he obtained the certificate issued by Johnson is not shown, except by the bare testimony of the petitioner himself, who bore and was known by a different name in 1905 and 1907, and whose credibility was shaken on his examination before Inspector Sperry. It is not shown that from 1897 to 1905 the petitioner bore the name Long Lock.

This petitioner was before Inspector Sperry, who saw him and observed his manner of giving testimony. The inspector was far better able to judge of his candor and truthfulness than any court or judge can be, and, under the decisions of the Supreme Court, in my judgment, it would be an unwarranted assumption of power to override the prior determinations of the executive officers and department to whom Congress has lawfully and constitutionally confided the decision of the question of fact. No bias is shown; no violation of law; no denial of a full and fair hearing; no arbitrary or illegal action; no abuse of discretion. In fact, a full and broad opportunity was given for the introduction of all evidence bearing on the case. As decided in *Chin Yow v. United States*, 208 U. S. 8, 11, 28 Sup. Ct. 201, 52 L. Ed. 369, this court can only examine the evidence to see (1) was a full and fair and unbiased hearing had? and (2) was the decision based on such a state of facts that a question of fact was presented for the decision of the inspector? or (3) was the evidence conclusive, as matter of law, so that the decision, affirmed by the Department of Commerce and Labor, was arbitrary and unwarranted? I think the decision and order was fully warranted.

The writ is dismissed, and the person, Long Lock, remanded, to be dealt with according to law.

MEEKER et al. v. KAELIN et al.

(Circuit Court, W. D. Washington, W. D. October 11, 1909.)

No. 1,396.

1. INDIANS (§ 18*)—INDIAN LANDS—ALLOTMENT—WIFE OF ALLOTTEE.

Where the wife of a Puyallup Indian allottee died prior to the approved of the allotment list by the Commissioner of Indian Affairs, the Secretary of the Interior, and the President, her heirs took nothing under the allotment list or patent subsequently issued to her surviving husband.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 18.*]

2. INDIANS (§ 18*)—INDIAN LANDS—ALLOTMENT—"PUBLIC LANDS"—PATENTS.

Lands in an Indian reservation are not "public lands," within Rev. St. § 2448 (U. S. Comp. St. 1901, p. 1512), providing that, where patents for public lands are issued pursuant to any law of the United States to a person who dies before the date of the patent, the title shall become vested in his heirs; nor are patents issued to Indian allottees of reservation lands issued pursuant to a law of the United States within such section.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5793-5795; vol. 8, p. 7772.]

3. INDIANS (§ 18*)—INDIAN LANDS—DESCENT—INDIAN CUSTOMS.

So long as Indian tribal relations were maintained prior to the Indians becoming citizens of the United States, the rules of descent of Indian property would be governed by the customs of the Indians, if such customs existed, subject, however, to treaty provisions.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 49; Dec. Dig. § 18.*]

4. INDIANS (§ 18*)—CUSTOMS—OCCUPATION OF PROPERTY—DEATH OF WIFE.

In accordance with Indian customs, the death of an Indian's wife caused no change in his right to occupy the ground which had theretofore been used by him and his family.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 18.*]

5. INDIANS (§ 13*)—INDIAN LANDS—PATENT.

Where a Puyallup Indian patent was issued to an Indian allottee who was the head of the family, the fee vested in him; the other members of the family taking no interest, though named in the patent.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.*]

6. INDIANS (§ 18*)—INDIAN LANDS—DESCENT—COMMUNITY PROPERTY.

The state law governing the descent of community property did not apply to the descent of Indian reservation lands patented to a Puyallup Indian allottee who was the head of a family.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 18.*]

7. INDIANS (§ 13*)—INDIAN LANDS—PATENTS—DEPARTMENTAL OPINION.

A ruling by the Interior Department and the Indian Bureau that Puyallup Indian patents granted the land to all the persons named therein, whether minors or adults, as tenants in common, was erroneous, and not binding on the courts.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 13.*]

8. INDIANS (§ 15*)—INDIAN LANDS—ALLOTMENT—TRANSFER.

Since Puyallup Indian allottees had no powers of alienation prior to March 3, 1903, when the restriction against alienation was removed, they could not, by estoppel, acquiescence, or otherwise, prior to that date, transfer a title which had vested in them either by patent or inheritance; nor

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

could a transfer of such land, prohibited by treaty and by the patent, be accomplished by departmental construction.

[Ed. Note.—For other cases, see *Indians*, Dec. Dig. § 15.*]

9. LANDLORD AND TENANT (§ 62*)—DENIAL OF LANDLORD'S TITLE.

Where defendants were in possession of property patented to an allottee, who held the fee under his patent, and while in possession such allottee conveyed the land to defendants, the fact that they had held the property under a lease from the allottee and others claiming an interest in the land did not estop them to deny the title of such other lessors, under the rule that where a tenant, in possession at the time he accepts a lease, is induced to accept it by mistake or misrepresentation of the lessor, or by mutual mistake of both parties, as to the law regarding the lessor's title, the tenant is not estopped, at least after the term has expired.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 153; Dec. Dig. § 62.*]

10. INDIANS (§ 13*)—INDIAN LANDS—ALLOTMENTS.

When the Supreme Court of the state and the United States Circuit Court of the district where an Indian reservation is situated have concurred for about eight years in a certain construction of the patents issued to the allottees in such reservation, and there are no decisions of such courts to the contrary, that construction will be regarded as a rule of property, and will be adhered to, although it does not agree with the construction adopted by the Interior Department.

[Ed. Note.—For other cases, see *Indians*, Dec. Dig. § 13.*]

At Law. Ejectment by John Meeker and others against Martin Kaelin and others. Judgment for defendants.

Chas. Bedford and Elmer E. Todd, U. S. Atty., for plaintiffs.

Boyle, Warburton & Brockway and S. F. McAnally, for defendants.

DONWORTH, District Judge. The plaintiffs in this action were originally members of the Puyallup band or tribe of Indians, and are now citizens of the state of Washington by virtue of Act of Cong. Feb. 8, 1887, c. 119, 24 Stat. 388. The defendants are also citizens and residents of the state of Washington. The action is brought in this court as one arising under the laws of the United States and treaties made under their authority. Plaintiffs sue for possession of an undivided one-half of a tract of land situated in Pierce county, state of Washington, and described as the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 1, in township 20 N., range 3 E. of the Willamette meridian, containing 40 acres, except a certain railway right of way along the south line thereof. The land in dispute is part of what was formerly the Puyallup Indian reservation, created by executive orders pursuant to the treaty of December 26, 1854 (10 Stat. 1132; *Abbott's Real Property Statutes*, 1129), between the United States and the Nisqually and other bands of Indians. The treaty contains the following language:

"The President may, * * * at his discretion, cause the whole or any portion of the lands hereby reserved or of such other lands as may be selected in lieu thereof, to be surveyed into lots and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The sixth article of the treaty with the Omahas of March 16, 1854 (10 Stat. 1044), is as follows:

"The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one-quarter section; to each family of three and not exceeding five, one-half section; and to each family of six and not exceeding ten, one section; and to each family over ten in number, one-quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years, and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a state Constitution, embracing such lands within its boundaries, shall have been formed, and the Legislature of the state shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations as may hereafter be prescribed by the Congress or President of the United States. No state Legislature shall remove the restrictions herein provided for, without the consent of Congress."

It is admitted that William Tocanum (sometimes called William Adams) was a member of the Puyallup tribe and died some time after the year 1903; that he was twice married; that his first wife was called Lucy and his second wife Sarah. The documentary evidence submitted shows that, in order to comply with the foregoing provisions of the treaty, a list containing a large number of proposed allotments was prepared by Edwin Eels, Indian agent in charge of the reservation, on February 1, 1884. In this list the tract of land in controversy and also another tract containing 120 acres are entered as allotted to William Tocanum, and opposite his name appear the words "head of family," while on the line immediately below there is written the name "Lucy" and opposite to it the word "wife." This list was approved by the Commissioner of Indian Affairs on October 20, 1884, by the Secretary of the Interior on October 21, 1884, and by the President on October 23, 1884. R. H. Milroy, a former reservation agent, had prepared in 1877 a proposed list of allotments, which was approved the same year by the Commissioner of Indian Affairs and the Secretary of the Interior; but no evidence is presented of its having been approved by the President or submitted to him. In the Milroy list the name of William Tocanum appears without naming any wife, and the 40-acre tract in controversy is listed to him.

On January 30, 1886, patents were executed by the President for the several allotments set forth in the list prepared by Agent Eels; all being in the same form, except as to names of allottees and descriptions of the lands. The patent covering the premises involved in this controversy is as follows:

"Whereas, by the sixth article of the treaty concluded on the twenty-sixth day of December, Anno Domini one thousand eight hundred and fifty-four, between Isaac I. Stevens, Governor and Superintendent of Indian Affairs of Washington Territory, on the part of the United States, and the chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Hom-anish, Ste-Chass, T'Peeksin, Squitaitl and Sa-heh-wamish tribes and bands of Indians, it is provided that the President 'at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other lands as may be selected in lieu thereof, to be surveyed into lots and assign the same to such individuals or families, as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas so far as the same may be applicable.'

"And whereas, there has been deposited in the General Land Office of the United States an order bearing date January 20, 1886, from the Secretary of the Interior, accompanied by a return dated October 30, 1884, from the office of Indian Affairs, with a list approved October 23, 1884, by the President of the United States, showing the names of members of the Puyallup band of Indians who have made selections of land in accordance with the provisions of the said treaties, in which list the following tracts of land have been designated as the selection of William Tocanum, the head of the family, consisting of himself and Lucy, viz.: The southwest quarter of the southwest quarter of section one, (40.00) acres, in township twenty north, and the east half of the southwest quarter and the southeast quarter of the northwest quarter of section fifteen, (120.00) acres, in township twenty-one north, of range three east of the Willamette meridian, Washington Territory, containing in the aggregate of one hundred and sixty acres.

"Now know ye, that the United States of America in consideration of the premises and in accordance with the directions of the President of the United States under the aforesaid sixth article of the treaty of the sixteenth day of March, Anno Domini one thousand eight hundred and fifty-four, with the Omaha Indians, has given and granted and by these presents does give and grant unto the said William Tocanum as the head of the family as aforesaid, and to his heirs, the tracts of land above described, but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians that the said tracts shall not be aliened or leased for a longer term than two years, and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force until a state Constitution embracing such lands within its boundaries shall have been formed and the Legislature of the State shall remove the restriction, and 'no state Legislature shall remove the restriction without the consent of Congress.' To have and to hold the said tracts of land, with the appurtenances, unto the said William Tocanum as the head of the family as aforesaid, and to his heirs, forever, with the stipulation aforesaid.

"In testimony whereof, I, Grover Cleveland, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

"Given under my hand at the city of Washington, this thirtieth day of January, in the year of our Lord one thousand eight hundred and eighty-six, and of the independence of the United States the one hundred and tenth.

"By the President:

"Grover Cleveland,

"By M. McKean, Secretary.

"[Seal.]

S. W. Clark, Recorder of the General Land Office.

"Recorded Vol. 1, page 59."

The restrictions against alienation of these lands were terminated March 3, 1903, by virtue of the act of Congress of March 3, 1893 (27 Stat. 633, c. 209), and certain state legislation of an earlier date.

Lucy Tocanum, before her marriage with William, had been married to another Puyallup Indian, by whom she had one daughter, Elizabeth. She had no children by her second marriage. Elizabeth, about 1878 or 1879, was married to John Meeker, one of the plaintiffs. The other plaintiffs, Maggie Davis and Annie Squally, are married daughters of John and Elizabeth Meeker. There was a third child of the same marriage, Joseph, who died a minor and unmarried, after the death of his mother, Elizabeth, which occurred about 1895. Plaintiffs claim to be the owners of an undivided half interest in the 40-acre tract above described, as the heirs of Lucy Tocanum. Defendants claim to be the sole owners of the tract under a deed executed by William Tocanum to them, dated April 21, 1903, purporting to convey the entire premises.

The most important fact which the evidence leaves in dispute is the date of the death of Lucy Tocanum. Some of the evidence introduced by the plaintiffs tends to show that she died in the spring of 1886, some two months after the execution of the patent. A number of defendants' witnesses fixed the date of her death in the spring of 1883. The defendants have also introduced a written affidavit, made in August, 1901, by William Tocanum himself, John Meeker, one of the plaintiffs, and Joe Young, another Indian (who was also a witness upon this trial), stating that she died in the spring of 1883. In the making of this affidavit the present counsel for plaintiffs acted as notary public. This affidavit, made by the persons who must have had the best knowledge of the facts, before any litigation arose concerning the subject-matter, I consider very strong evidence. Mr. Eels, who was in charge of the reservation from 1882 to 1895, and who prepared the list of allotments before mentioned, was also a witness at the trial. He testifies that he moved to the reservation in August, 1883, and that Lucy died "not very long after I went on the reservation; a year or two, something like that." In answer to the question whether Lucy was living at the time he made the list in 1884, he says:

"She certainly was, to the best of my knowledge and belief. I would not send on any list with a dead person, if I knew of it."

Most of the witnesses state that she died in the spring or early summer. In view of all this testimony, and having regard particularly to the affidavit of William Tocanum and John Meeker, the allotment list, and the testimony of Mr. Eels, I find that Lucy died in the spring or early summer of 1884, and that she was dead at the time of the approval of the allotment list by the Commissioner of Indian Affairs, the Secretary of the Interior, and the President. She being dead, nothing passed to her or her heirs under the allotment list or the patent.

Section 2448, Rev. St. (U. S. Comp. St. 1901, p. 1512), providing that, where patents for public lands are issued in pursuance of any law of the United States to a person who dies before the date of the patent, the title shall become vested in the heirs of the deceased patentee, does not apply to this case. The lands in the Indian reservation

were not public lands, nor were these patents issued in pursuance of a law of the United States, within the meaning of that section. The evidence shows that Lucy's daughter, Elizabeth, was married to the plaintiff, John Meeker, several years prior to Lucy's death. At the time of the execution of the allotment list and patents, John and Elizabeth Meeker did not live on the tract in controversy, but had taken another allotment, which was regularly included in the Eels list, and for which a patent issued along with the other patents. Neither they nor any of their children were ever members of William Tocanum's family. When the patents were issued the Puyallup Indians were not citizens of the United States. They did not become such until February 8, 1887. 24 Stat. 388, c. 119. Before that date, so long as tribal relations were maintained, the rules of descent would be governed by the custom of the Indians, if any such custom existed, subject, however, to the terms of the treaty. *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49. At the trial the parties introduced evidence touching the Indian custom with respect to descents. The evidence is far from satisfactory. It tends to show that in the case of personal property the brothers of a decedent took the whole estate to the exclusion of the children; that as to land the Indians had not evolved any such principle as private ownership of the soil transmissible to one's heirs, and that they recognized only possessory rights. I think, however, it is a fair inference that the death of an Indian's wife caused no change whatever in his right to occupy the ground which had theretofore been used by him and his family. In view of the other facts found, the provisions of the treaty, and the decisions hereinafter mentioned, I do not consider the Indian custom of practical importance in this case.

Even if it be assumed that the patent covering this land relates back and takes effect as of the date of the making of the allotment list by Agent Eels (which assumption I do not consider correct), nevertheless in my opinion it would follow that William Tocanum alone was the patentee, and that his sole deed, made April 21, 1903, conveyed the entire premises to the defendants. The Supreme Court of the state of Washington in March, 1901, decided the case of *Bird v. Winyer*, 24 Wash. 269, 64 Pac. 178, and there held that the entire interest granted by the United States in these Puyallup Indian patents vested in the head of the family therein named, and that the other members of the family acquired no interest, though named in the patent. This ruling was followed by this court, speaking by Judge Hanford, in the case of *Bird v. Terry* (C. C.) 129 Fed. 472. The state Supreme Court reaffirmed this construction of the patents in *Guyatt v. Kautz*, 41 Wash. 115, 83 Pac. 9. It is true that in *Bird v. Winyer* it was held that only a possessory interest passed under the patents, and that no title to the fee was conveyed. This position was opposed to the construction adopted by this court in *Bird v. Terry*, and on reconsidering the question in *Guyatt v. Kautz* the state Supreme Court changed its view regarding the nature of the estate granted, and held that the "estate actually conveyed was one of inheritance, being a base fee-simple title, temporarily restricted as to alienation, and subject to forfeiture in the event of the patentee or his family failing to till the soil or upon their returning to nomadic habits of life." 41 Wash. 122, 83 Pac. 11. In

view of these decisions, which have been consistently adhered to by both the state and federal courts in the state and district where the lands are situated, I hold it to be a rule of property in this jurisdiction that the patents issued to the Puyallup Indians vested the entire estate conveyed in the head of the family named in the patent, and that the other members of the family named therein took no interest. I consider it unnecessary to state the reasons sustaining this construction of the patents. It is in accordance with decisions in other jurisdictions under similar grants. *Summers v. Spybuck*, 1 Kan. 394; *Hicks v. Buttrick*, 3 Dill. 413, Fed. Cas. No. 6,458. See, also, *Wilson v. Wall*, 6 Wall. 83, 18 L. Ed. 727. A rule of property so established should be adhered to. *Francis v. Francis*, 203 U. S. 233, 27 Sup. Ct. 129, 51 L. Ed. 165.

In *Guyatt v. Kautz* the patent was issued to Napoleon Gordon as a head of a family consisting of himself and his wife, Sarah. Napoleon died some nine months after execution of the patent and before the passage of the act making these Indians citizens of the United States. That case and the present case, therefore, have in them the common element that the claim of one party is based on an alleged descent from an Indian who died before the conferring of citizenship upon the members of the tribe. They are distinguished by the fact that in that case it was the head of the family who died; in this case, the wife. The court there held that on the death of Napoleon the entire estate passed to his wife Sarah. In arriving at such conclusion the court made particular reference to the provisions of the treaty, which disclose an intention to secure the possession and enjoyment of the land and improvements to the family in case of the death of the head thereof, and also referred to the state law governing the descent of community property. I do not concur in the view that the community property law has any application to the question involved. That law is primarily a law defining the property rights of husband and wife during their joint lives, and only incidentally treats of descents. It provides that property acquired by either husband or wife, with certain exceptions, shall belong to both of them. In determining what persons became originally vested with interests in the land by virtue of these patents, granted by the national government to effectuate the terms of a treaty, recourse can be had only to the treaty, the patents, and the laws of the United States. *McCune v. Essig*, 199 U. S. 382, 26 Sup. Ct. 78, 50 L. Ed. 237. In actions properly brought before them the state courts undoubtedly had jurisdiction to decide all such questions; but the state Legislature could not make any person a grantee or affect in any way the original vesting of the title. While the tribal relations existed, and before Congress and the President had seen fit to make the laws of descent of the state of Washington apply, the most satisfactory basis for deciding questions of descent, in the absence of evidence of an Indian custom, was the treaty itself. The treaty provides that the President of the United States may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. Even if it does not appear that any specific rules or regulations were ever prescribed by the President prior to the

act of 1887, it is the duty of the courts to give effect to the plain intention of the treaty, so long as its provisions remained the sole legislation on the subject. This was done, in effect, by the decision in *Guyatt v. Kautz*. On the death of the patentee in 1886, leaving a wife, but no children, the entire estate would pass to the only other member of the family, namely, the wife, because the treaty, construed according to its plain intent, so provided, and that without reference to the community property law of the state. For like reasons even if it could be held in this case that Lucy Tocanum, the wife, acquired a vested interest in these premises, I think it would violate the spirit of the treaty to hold that on the death of a member of the family other than the head (while the tribal relations continued) any part of the estate passed to persons not members of the family.

It follows, therefore, that the patent vested in William Tocanum the entire estate granted. In coming to this conclusion, I have not overlooked the argument that the Department of the Interior and the Indian Bureau have construed the patents as granting the lands to all the persons named therein, minors as well as adults, as tenants in common; that this construction was followed by the special commission which for a time was intrusted with certain duties with respect to these lands under an act of Congress; and that the construction given to a law or treaty by the executive department charged with its execution should be followed by the courts where the meaning is doubtful. Neither the Secretary of the Interior nor the special commission possessed any judicial power, and they never even attempted anything in the nature of a judicial investigation and determination of the question of title between the different claimants. Their rulings on questions of law could not operate to divest one person of his property and vest the title in another. As the Indians had no power of alienation before March 3, 1903, they could not, by estoppel, or acquiescence, or otherwise, transfer before that date a title which had vested by patent or by inheritance, and neither could a transfer of title prohibited by the treaty and the patent be accomplished by mere departmental construction. The cases of *Bird v. Winyer* and *Bird v. Terry* were decided before the restrictions on alienation were removed, and, in so far as there was a conflict between them and the previous official construction, they are controlling.

But it is urged that the defendants have recognized the plaintiffs as landlords and are estopped to deny their title. The evidence shows that in 1893 William Tocanum and his second wife, Sarah, leased the premises for one year to defendant Kaelin and another; the lease expiring April 1, 1894. This lease was renewed for two years in 1894, and again for two years in 1896, at which time the lease ran to both of the present defendants. The possession of the premises was acquired by the defendants under these leases. Later, during the year 1896, the defendants were served with a typewritten notice, prepared by the reservation authorities and signed by William Tocanum and the plaintiff John Meeker (for himself and the other plaintiffs), stating that the land was owned by Tocanum, one-half, and by the plaintiffs, heirs of Elizabeth Meeker, deceased, one-half, and that the signers had agreed that all rents due and to become due should be paid one-

half to Tocanum and one-half to John Meeker. The defendants complied with this notice and paid the rent accordingly. The subsequent leases to the defendants were executed by Tocanum and the plaintiffs jointly; the last lease expiring April 1, 1903. The defendants continued to hold possession of the land, and on April 21, 1903, consummated a purchase from Tocanum, whereby he made to them a deed of the entire premises. In my opinion the circumstances of this case bring it within the exceptions to the rule that estops a tenant from denying his landlord's title. William Tocanum was not estopped by his joining in the above-mentioned notice and leases, because he had no power of alienation at the time. After the expiration of the last lease on April 1, 1903, he was free to assert (as by his deed he did assert) his exclusive ownership of the premises, and to compel the defendants to attorn to him. The fact that whatever the Indians or their tenants did on the reservation up to March 3, 1903, the time that the right of alienation became effective, was practically subject to the control of the department, which held to a mistaken view of the ownership of the land, is not to be overlooked. Where the tenant did not take possession of the property under the lease, but was in possession at the time he took the lease, and he was induced to take the lease by mistake or misrepresentation on the part of the lessor, or acted under a mistake mutual to both parties, as to the law in regard to the title of the lessor, the tenant is not estopped, at least after the term has expired. *Lakin v. Dolly* (C. C.) 53 Fed. 333; *Taylor, Landlord & Tenant*, § 707; 2 *Herman on Estoppel*, § 866; *Blankenship v. Blackwell*, 124 Ala. 355, 27 South. 551, 82 Am. St. Rep. 175; *Hammers v. Hanrick*, 69 Tex. 412, 7 S. W. 345; *Berridge v. Glassey* (Pa.) 7 Atl. 749; *Hammons v. McClure*, 85 Tenn. 65, 2 S. W. 37. And see *Camp v. Camp*, 5 Conn. 291, 13 Am. Dec. 60, 61, with notes.

I conclude that the defendants are the sole owners of the land in controversy, and entitled to the possession thereof, and judgment will be entered in their favor.

PATTON et al. v. MEADOWS CO. et al.

(Circuit Court, W. D. North Carolina. September 17, 1909.)

REMOVAL OF CAUSES (§ 30*)—RIGHT OF REMOVAL—SEPARABLE CONTROVERSIES.

Where plaintiff's declaration in an action on a contract in a state court against three defendants alleged that the defendant which made the contract in its own name acted in doing so as the agent for its codefendants, who were the real parties, they cannot be treated as merely nominal or unnecessary parties to the suit, for the purposes of removal of the cause to the federal court.

[Ed. Note.—For other cases, see *Removal of Causes*, Cent. Dig. § 70; Dec. Dig. § 30.*]

Separable controversies, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

Justice & Broadhurst and Pleas Winburn, for plaintiffs.

J. Norman Powell, Watson, Hudgins & Johnson, and Locke Craig, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

NEWMAN, District Judge. This case was removed from the superior court of McDowell county, and during the present term an order was made remanding it to that court on the ground that it was improperly removed to this court. Plaintiffs are, and were at the time of the commencement of this suit, residents of the state of Virginia. The Meadows Company is a corporation created under and by the laws of the state of New Jersey, and the South & Western Railroad Company is a North Carolina corporation, as is the Carolina, Clinchfield & Ohio Railroad Company. The case was removed to this court by the Meadows Company, and it was remanded on the authority of *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. As the case was then presented to the court, it was as if it had been removed on the ground of a separable controversy between the Meadows Company and the plaintiffs.

A motion has been made for a rehearing of the matter and has been argued by counsel. Counsel for the plaintiffs claim that, since the former argument, they have discovered that the defendant in the Meadows Company had put in a general appearance in the case in various ways not necessary to enumerate (in view of the direction that must be given the motion), and contended that, following the rule laid down in many cases, and especially by the Supreme Court of the United States, as to waiver by the plaintiffs, the order to remand should be set aside and the case retained in the Circuit Court. Counsel cite: *Foulk v. Gray* (C. C.) 120 Fed. 126; *Corwin, etc., Co. v. Henrici, etc., Co.* (C. C.) 151 Fed. 938; *Louisville, etc., Co. v. Fisher*, 155 Fed. 68, 83 C. C. A. 584, 11 L. R. A. (N. S.) 926; *Proctor Coal Co. v. U. S. Fidelity, etc., Co.* (C. C.) 158 Fed. 211; *Moyer, etc., Co. v. Chicago, etc., Co.* (C. C.) 168 Fed. 105; *Western, etc., Co. v. Bute, etc., Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101; *Matter of Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904.

In the declaration, which is brought to this court as a transcript of record in the state court, there appears, after the averments as to citizenship, the following:

"That on and prior to the 14th day of November, 1906, the Meadows Company was, as plaintiffs are informed and believe, an agent acting for the South & Western Railroad Company, and continued so to do and act until about April, 1908, when the said defendant the Meadows Company became the agent of the Carolina, Clinchfield & Ohio Railroad Company, and as such agent and representative of said two companies, as well as for its own self and its own behalf, contracted with various subcontractors, and among others, with the plaintiffs, to construct a part of a line of railroad for the South & Western Railroad Company, which said contract with the plaintiffs was for the benefit of the Carolina, Clinchfield & Ohio Railroad Company, upon its succeeding the said South & Western Railroad Company in the construction and operation of the line of railroad theretofore owned and operated by the South & Western Railroad Company, as well as for the benefit of the defendant the Meadows Company. That the Meadows Company and, as plaintiffs are informed and believe, the South & Western Railroad Company are bound under a contract with the Meadows Company made with these plaintiffs, as hereinafter set out; and, as these plaintiffs are informed and believe, the said the Carolina, Clinchfield & Ohio Railroad Company, about April, 1908, took over the said railroad from the South & Western Railroad Company, and became obligated to these plaintiffs in the same manner and to the same extent that the South & Western Railroad Company was obligated to them, of all of which these plaintiffs are advised and believe. That on and prior to the 11th day of October, 1906,

the defendant the Meadows Company professed to have a contract with the South & Western Railroad Company to build for it its line of road from the Tennessee-North Carolina line at a point on the line of Mitchell county, North Carolina, through the counties of McDowell, Mitchell, and Rutherford, to Bostic, in the county of Rutherford, state of North Carolina; that the said Meadows Company did have, as these plaintiffs are informed and believe, authority to contract with subcontractors to do said railroad work in constructing the said line of railroad, and thereby bind itself and also the South & Western Railroad Company to do and perform the things undertaken and agreed to by the said Meadows Company. That upon the incorporation of the Carolina, Clinchfield & Ohio Railroad Company, and its taking over the railroad formerly belonging to the South & Western Railroad Company, it thereupon, as these plaintiffs are informed and believe, became liable to the plaintiffs for the performance of the matters and things undertaken with the plaintiffs to be done and executed by the Meadows Company, as hereinafter alleged."

Then appears in the declaration a statement of the grounds on which plaintiffs claim damages for a breach of contract, concluding with a prayer for judgment against the defendants. A second cause of action is set out, which is not material for present purposes. The theory of the plaintiffs' case clearly is that the Meadows Company was merely the agent of the two railroad companies—first of the South & Western, and afterwards of the Carolina, Clinchfield & Ohio, when it acquired the rights of the South & Western, and that the Meadows Company acted for the railroad company in making the subcontracts with the plaintiffs. The petition for removal alleges (and this is really the main ground relied on for removal) that the two railroad companies are unnecessary parties to the suit, and were joined for the purpose of defeating the jurisdiction of the courts of the United States and to prevent a removal of the cause.

The trouble about this contention is that the suit is in reality brought against the two railroad companies; and, while it is against the Meadows Company also, the whole case is based upon the theory that the Meadows Company was acting for and on behalf of the railroad companies in making the contract as to which the plaintiffs claim they were wronged. As the theory of the plaintiffs' case is that the two railroad companies are mainly responsible and liable to them for the damages claimed, to pass on this motion as requested by counsel for plaintiffs would be to determine the merits of the case. Plaintiffs' action is based and grounded upon the idea that the Meadows Company, in making this contract, while authorized by the railroad company to act in its own name, was simply acting for the railroad company, and that it was the latter's contract. Therefore, according to the declaration, the Meadows Company is more nearly the nominal party than the two railroad companies, and the railroad companies are the real and substantial parties defendant to the litigation. Counsel for plaintiffs have stated in open court that this is the view taken by them of their case, and the one that they expect to establish by evidence, and the declaration bears out this statement.

I see no reason why the plaintiffs may not, if they can, go behind what appears on the mere face of the contract between them and the Meadows Company, and show that the Meadows Company, although appearing to be an independent contractor, was in reality merely the

agent of the railroad companies. Of course, I do not know that they can show this; but this is what they propose by their pleadings to do. The court cannot change the plaintiffs' case for them. They have made the two railroad companies the real and substantial parties defendant to this suit. Viewing the case in the light of the theory on which the declaration is framed, there can be no possible reason for the removal of the case on the ground that the two railroad companies are merely nominal parties and improperly joined. The matter of waiver is, therefore, immaterial.

I am perfectly clear that the case is not removable, and consequently the motion must be denied, and the order heretofore made, remanding the case to the superior court of McDowell county, must be adhered to.

UNITED STATES v. SMITH et al.

(District Court, D. Indiana. October 28, 1909.)

No. 6,922.

CRIMINAL LAW (§ 97*)—JURISDICTION—LOCALITY OF OFFENSE.

Defendants were owners and publishers of a daily newspaper at Indianapolis, Ind., which was also their place of residence. About 50 copies of such paper were deposited in the post office in Indianapolis and sent by mail to Washington, D. C., to subscribers and others ordering the same. Defendants maintained no office or agency in Washington, or the District of Columbia, for the circulation of the paper. *Held*, that an alleged criminal libel printed in such paper was published in Indiana only, and not in the District of Columbia, and that under the sixth constitutional amendment, which gives an accused the right to a trial by a jury of the state or district wherein the crime shall have been committed, a court in the District of Columbia was without jurisdiction to try defendants for such alleged libel.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 180, 190; Dec. Dig. § 97.*]

On application for a warrant of commitment for Delavan Smith and Charles R. Williams, and an order for their removal to the District of Columbia for trial on indictment for criminal libel. Defendants discharged.

Charles W. Miller, U. S. Atty., Stuart McNamara, Sp. Asst. U. S. Atty., and Clarence W. Nichols, Asst. U. S. Atty.

Ferdinand Winter and John D. Lindsay, for defendants.

Before ANDERSON, District Judge.

ANDERSON, District Judge (orally). This has been a very interesting discussion. It involves very interesting constitutional questions and questions which are always interesting to lawyers—questions of procedure. I suppose that, when you take into consideration the general interest taken in this case, the nature of the circumstances out of which it grew, the unusual features of the proceeding itself, and the important questions involved, I would be entirely justified in reserving my decision and taking time to put down on paper the con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

clusions that I have come to. But I have other things to do besides write, and in the immediate future my engagements are such as will preclude my taking time from other business to put down on paper carefully, as I would like to do, the views that I entertain upon these questions. So, at the risk of being somewhat misunderstood and incorrectly reported—with no reflection on the reporters, however—I will give my views upon this case at this time, and decide the question, so far as it is up to me to decide.

I carefully read over the brief which was handed to me yesterday morning by Mr. Lindsay, which, upon its face, purports to have been prepared by himself and Mr. Delancey Nicoll, and I was much impressed with the learning and the research shown in that brief, and, if it were necessary to a decision of the question before me, I would try to go into it further, and see whether or not my conclusions would accord with theirs. I do not feel now, however, that I am called upon to decide the questions presented in that brief, and for that reason I do not propose to go further into them at this time.

I was very strongly impressed this morning with Mr. Winter's argument on the proposition that these articles are not libelous. Up to that time it had not occurred to me that there was any question about their being libelous. But I am not so sure about it. I think, myself, that there is a good deal in the proposition that when articles charge people with swindling, or with thievery, and in the articles there is contained a statement of the facts upon which the charges are based, it does not necessarily follow that, because the words "thieving" and "swindling" are used, the articles are libelous per se. On two other questions that have been discussed I have more definite notions. I will take these up in their order, in the order in which they have been discussed and presented during this hearing.

In the first place, it is seriously contended, earnestly contended here, by the defendants' counsel, that these articles are conditionally privileged. When one undertakes to find a definition of privilege, or conditional privilege, it is very difficult to find one that is satisfactory. Under the head of "Malice," subhead "Privilege and Justification," American and English Encyclopædia of Law, I find this statement:

"The reconciliation of the two classes of cases mentioned above—those in which motive is material and those in which motive is not material—is to be sought in an extension of the concept of privilege, as understood in the law of libel, or in a coherent application of the idea of justification or excuse. The conception of privilege in the law of defamation is that an individual may with immunity commit an act which is a legal wrong, and, but for his privilege, would afford a good cause of action against him; all that is required, in order to raise the privilege and entitle him to protection, being that he shall act honestly in the discharge of some duty which the law recognizes, and shall not be prompted by a desire to injure the person who is affected by his act."

Let us go back a little. I have had occasion to say before that a newspaper has a certain duty to perform. It was well stated by a former President of the United States that it is the duty of a newspaper to print the news and tell the truth about it. It is the duty of a public newspaper, such as is owned and conducted by these defendants, to tell the people, its subscribers, its readers, the facts that it may find

out about public questions, or matters of public interest; and it is its duty and its right to draw inferences from the facts known—draw them for the people. I might just digress long enough to suggest that it is not everybody that can draw an inference.

Here was a great public question. There are many very peculiar circumstances about the history of this Panama Canal, or Panama Canal business. I do not wish to be understood as reflecting upon anybody, in office or out, in connection with that matter, except such persons as I may name in that way. The circumstances surrounding the revolution in Panama were unusual and peculiar. The people were interested in the construction of a canal. It was a matter of great public concern. It was much discussed. A large portion of the people favored the Nicaragua route. Another portion of those who were interested in it, officially or personally, preferred the Panama route. A committee was appointed to investigate the relative merits of the two routes. They investigated, and reported in favor of the Nicaragua route. Shortly afterwards—I do not now recall just how soon afterwards—they changed to the Panama route. Up to the time of that change, as I gathered from the evidence, the lowest sum that had been suggested, at which the property of the Panama Canal Company could be procured, was something over \$100,000,000. Then rather suddenly it became known that it could be procured for \$40,000,000. There were a number of people who thought there was something not just exactly right about that transaction. And I will say for myself that I have a curiosity to know what the real truth was. Thereupon a committee of the United States Senate was appointed to investigate these matters—about the only way the matter could be investigated. The committee met. As stated in those articles, the man who knew all about it—I think that is the proper way to speak of Mr. Cromwell, who knew all about it—was called before the committee. Mr. Cromwell, upon certain questions being put to him, more or less pertinent, stood upon his privilege as an attorney and refused to answer. That was the state of the case, as shown by the evidence, when we adjourned last June.

At this session certain parts of the record showing the proceedings before the Senate Committee have been introduced by the government, and the impression made upon my mind from such parts as the government has seen fit to introduce is not more favorable to Mr. Cromwell's position than it was upon the former hearing. So far as the record has been read—and that is all the part that I have any acquaintance with—Mr. Cromwell stood upon his privilege whenever questions were asked, the answers to which would or might reflect upon him and his associates. But whenever a question was asked which gave him an opportunity to say something in their behalf, he ostentatiously thanked the examiner for the question and proceeded to answer. To my mind that gave just ground for suspicion. I am suspicious about it now. Subsequently, upon further examination in this matter, I suppose knowing that he would be examined about certain transactions in connection with it, he took the pains to get the privilege released by his then client; and the reasons given for varying his conduct in that instance from his conduct in the former instance, were about as unsub-

stantial as the reasons given upon the first instance for not answering then. So we have this situation: Here was a matter of great public interest, public concern. I was interested in it. You were interested in it. We were all interested in it. Here was a newspaper printing the news, or trying to. Here was this matter up for discussion, and I cannot say now—I am not willing to say—that the inferences are too strongly drawn. I am not approving of the inferences. I am simply saying that I am not able to say that they were too strongly drawn. Now, if that is the situation—and, as I understand the facts, that is the way it stands—the question is: Did these defendants, under the circumstances, act honestly in the discharge of this duty of which I have spoken, and which the law recognizes? Or were they prompted by a desire to injure the persons who were affected by their acts? If it were necessary to decide this case upon the question of privilege, the lack of malice, I would hesitate quite a while before I would conclude that it was my duty to send these people to Washington for trial.

But that is not all. This indictment charges these defendants with the commission of a crime in the District of Columbia. The sixth amendment to the Constitution of the United States provides:

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state or district wherein the crime shall have been committed, which district shall have been previously ascertained by law.”

I will state what I find the evidence to be, and if I am mistaken about it in any way I will be glad to be corrected, because upon that I shall proceed to a conclusion. The Indianapolis News is owned, the evidence shows, by these defendants, is printed and published by them in the city of Indianapolis, in the state of Indiana, and at the time covered by this indictment it had a daily circulation of about 90,000 copies. All but about 2,000 of these copies were circulated and distributed in the state of Indiana. Some 400 or 500 were distributed in one or two adjoining states, and to the District of Columbia there were sent by mail, daily, about 50 copies, to subscribers and persons who ordered them sent there. The defendants have no agent, or bureau, or office, and maintain no agency, bureau, or office, in the city of Washington, or the District of Columbia, for the circulation of papers within that District. I think that is what the evidence in this case shows as to the way in which these papers are published and circulated. It is perfectly manifest that so far as this case is concerned the publication and the circulation of these papers anywhere except in the District of Columbia may be disregarded for the moment. So the question is: Do the defendants, when they print and publish 50 copies in the city of Indianapolis and deposit them in the United States post office in this building, to be transmitted by mail to 50 subscribers in Washington—do they publish those 50 papers in Washington? If they do, that court has jurisdiction of the offense. I will not go so far as to say that it has jurisdiction of the defendants. But, if they do not, then that court has neither jurisdiction of the offense nor of the defendants.

Let us look at it a little further. To my mind there is but one inference, one conclusion, that can be drawn. These statutes, which provide that where an offense is begun in one jurisdiction, in one

county, for example, and completed in another, or where an act is done in one county and the effect results in another, throw considerable light upon the question we have here. In other words, if a man stand near the edge of Marion county, this county, and within this county, and fires a shot at a man in an adjoining county, and kills him, were it not for the statute authorizing prosecution for the murder in the county in which the man dies, at common law he could be tried, convicted, and punished only in the county where he fired the shot. It is only because of the statute that he can be tried in either county, and if it were not for the statute there would be no jurisdiction whatever to try him in the adjoining county. That is illustrated by a number of cases.

But that is not this case. These defendants, as shown by the evidence, have not committed an act, a part of the doing of which was here and part of it in Washington. It is not that kind of a case. A United States statute, I might stop to say, which would make a case triable in a district different from the district where the act was committed, would be unconstitutional. Their acts are not shown by the evidence to have been acts part of which were committed in this district and part of them in Washington. It is not that kind of a case. Nor are they charged with doing an act here, the effect of which results in Washington. It is not that kind of a case. Everything that the evidence shows that the defendants did, they did in the district of Indiana, in the city of Indianapolis, in the county of Marion. I am not saying that if these defendants had an agent in Washington, to whom they sent for circulation copies of this paper, they might not be amenable to prosecution in Washington, if they could be arrested in Washington. We must distinguish that sort of a case from this.

It seems to me that I am compelled to take one of two views upon this question, and there is no middle ground between them. I cannot compromise it. When a newspaper owner or proprietor does what the evidence in this case shows these defendants did—composed, printed, and deposited in the mails for circulation these papers containing, for the purpose of this statement, libelous articles—either they are guilty here, and in every county and district and jurisdiction into which those papers go, or they are only guilty here. When these defendants put newspapers containing the alleged libelous articles into the post office here in Indianapolis, which went through the mails throughout the country, to various states, counties, and districts of the United States, either they committed a separate crime every time one of those papers went into another county, another state, or another district, or there was but one crime, and that crime was committed here.

In the case put during the argument, where a paper is deposited here in Indianapolis and circulates throughout the 92 counties of Indiana, when I asked counsel for the government whether it would be an offense in each county, he thought it would. And in the absence of the Indiana statute cited by the government's counsel, according to their theory, it would be. Then the question is: Suppose there was a conviction, say in Posey county; would that be a bar to a prosecution in Marion county? Counsel for the government think it would. I do not think it would, at all. Let us see if it would. The theory is that it

becomes a crime in each jurisdiction where it is circulated. If so, it must be a separate crime. If there is something in the circulation of it in the other county, or district, or jurisdiction, which makes it a crime there, it must be a separate crime. There is no escape from that. If it is a separate crime, a conviction or acquittal of it, of course, could not be pleaded in bar of a prosecution for another crime. I think that, as between those two views, the view that the offense, if any, was committed here is the more reasonable one, and the correct one. I am not saying, now, that there may not be circumstances where the publisher of a newspaper circulated throughout the country might be guilty of and prosecuted for more than one offense. I am speaking of the facts as shown by the evidence here—where people print a newspaper here, and deposit it in the post office here, for circulation throughout other states, territories, counties, and districts, there is one publication, and that is here. If that is true, then there was no publication, under the evidence, in Washington.

The discussion as to the hardship of taking a man away from his home to a distant place, to be tried, and the discussion pro and con as to the desirability of the District of Columbia and the city of Washington as a place for trial, was interesting. But those considerations, as suggested in one of the decisions of the Supreme Court, are not controlling, and I am not compelled to resort to anything of that kind to satisfy myself about what ought to be done here. To my mind that man has read the history of our institutions to little purpose who does not look with grave apprehension upon the possibility of the success of a proceeding such as this. If the history of liberty means anything, if constitutional guaranties are worth anything, this proceeding must fail.

If the prosecuting officers have the authority to select the tribunal, if there be more than one tribunal to select from, if the government has that power, and can drag citizens from distant states to the capital of the nation, there to be tried, then, as Judge Cooley says, this is a strange result of a revolution where one of the grievances complained of was the assertion of the right to send parties abroad for trial.

The defendants will be discharged.

IN re MAAGET.

(District Court, S. D. New York, October 13, 1909.)

BANKRUPTCY (§ 216*)—STAY OF ACTIONS AGAINST BANKRUPT—VACATION.

A court of bankruptcy may properly permit an attachment creditor, where the bankrupt had given a bond, to prosecute his action to judgment against the bankrupt for the purpose of perfecting his right of action against the surety, where the estate is protected from loss.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 331; Dec. Dig. § 216.*]

In Bankruptcy. In the matter of Israel Maaget, bankrupt. On motion to vacate stay. Motion granted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Marks & Marks, for bankrupt.
Hayes, Hershfield & Wolf, for creditor.

HAND, District Judge. When this matter came before me in July, I considered only the question as to whether the creditor should give a bond, so as to secure the repayment to the estate of so much of the recovery as would equal the value of the indemnity held by the surety. A question now arises as to whether I should allow the creditor to proceed to judgment against the bankrupt upon a provable debt, merely for the purpose of fulfilling the condition of the bond, and so of perfecting his right against the surety. The case of *Hill v. Harding*, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083, shows that this may be done, at least in case the attachment was levied more than four months prior to the petition. I do not think that it makes any difference when the attachment was levied. It is quite true that, when the creditor comes to sue the surety, he may be met by the defense that, as the attachment was void, there was no consideration for the bond; but that is a question for the state court in that action. I am quite satisfied that it is not a question for the bankruptcy court, because it does not concern any personal right of the bankrupt, nor any portion of his estate, certainly not in case the creditor is obliged to secure the estate to the extent of any indemnity in the surety's hands, as he must do in this case. The case of *Klipstein v. Allen-Miles Co.*, 14 Am. Bankr. Rep. 15, 136 Fed. 385, 69 C. C. A. 229, decides that the creditor cannot recover against the surety in such an action; but that is a decision upon an action at law, brought by the creditor against the bankrupt and surety. It was not a motion in the bankruptcy court.

I shall, therefore, vacate the stay permitting the creditor to sue the bankrupt and to take judgment, but not to issue execution. The creditor may then sue the surety and determine the question of the validity of the bond in some other tribunal, which alone has, it seems to me, the authority to determine that question. In relation to the motion to compel the creditor to surrender the bond, I will deny this motion, conditionally upon the creditor's filing an undertaking equal to the value of the indemnity which is held by the surety. If the parties cannot agree upon the value of the indemnity, I must direct a reference, as indicated in my former opinion upon that issue. By so insuring the estate against any loss through an invalid attachment, it seems to me I have gone as far as the bankruptcy court can go.

In re HOFFMAN et al.

(District Court, E. D. Wisconsin. October 18, 1909.)

1. BANKRUPTCY (§ 228*)—REVIEW OF DECISION OF REFEREE—FINDINGS OF FACT.

The finding of a referee in bankruptcy on an issue of fact is entitled to great weight, and should not be set aside unless clearly erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

2. BANKRUPTCY (§ 272*)—FEES OF ATTORNEYS—ATTORNEYS IN SUIT BY TRUSTEE.

The decision of a referee that a former allowance of \$1,500 to the attorneys for a trustee in bankruptcy for services rendered in a proceeding against the wife of a bankrupt to recover a sum fraudulently secured from the estate was sufficiently affirmed, where the litigation was expensive to the estate and resulted in no benefit to it; but a claim for actual disbursements held improperly disallowed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 573; Dec. Dig. § 272.*]

In Bankruptcy. In the matter of Herman Hoffman and Sigmund Engel, bankrupts. Heard on review of order of referee. Modified and affirmed.

This is a proceeding to review the order of the referee disallowing a claim for \$1,000 additional attorney's fees, and \$202.96 for disbursements actually advanced by such attorneys in the conduct of the case. The claimants were attorneys for the trustee. The adjudication took place on the 20th of November 1906. The assets of the estate had been converted into money by virtue of a sale made by the receiver, and the estate was practically ready for settlement when an examination of the books of the bankrupt aroused a suspicion of fraud. Further investigation strengthened the theory that Sarah, the wife of one of the bankrupts, had appropriated and made away with a large sum of money that belonged to the estate. At the first meeting the creditors were keen for a fight to uncover the fraud. Thereupon proceedings were vigorously begun for an examination of all parties concerned. Volumes of testimony were taken, and large expenses incurred. In May, 1907, the former referee allowed the claimants \$1,500 on account of attorney's fees. The referee decided against the trustee on the merits, and held that no sufficient case had been made out to establish spoliation. An appeal was taken to the District Court, which reversed the referee, and found that Sarah Hoffman had appropriated some \$6,000 of the assets of the estate. Whereupon an order was made directing her to pay over such sum. An appeal was then taken by the bankrupt to the Circuit Court of Appeals, which appeal was dismissed on technical grounds.

After all this litigation, the attorneys for the trustee, not discovering any way to enforce the order of the court, or to obtain any efficient remedy, again called the creditors together and advised them that it was very doubtful whether any recovery could be made against Sarah Hoffman. Thereupon the creditors voted to discontinue the proceedings, and the same were accordingly dropped. No pecuniary benefit was derived by the estate from the litigation. Some of the larger creditors may have considered it, from their point of view, desirable to prevent a discharge of the bankrupts, for its moral influence on the trade; but, so far as the estate and the creditors at large were concerned, the litigation was fruitless. The referee disallowed the claim for additional compensation in toto. He found that the \$202.96 had been actually paid by the attorneys for necessary disbursements of the litigation, and held that \$1,500 already paid was under the circumstances a liberal allowance for all services and disbursements. To review this conclusion this proceeding is brought.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Bloodgood, Kemper & Bloodgood, for trustee.

QUARLES, District Judge (after stating the facts as above). It is perhaps the most delicate and difficult task that a judge has to perform to pass upon questions involving the compensation of counsel. That a large amount of professional work was done by the attorneys for the trustee there can be no doubt. Their energy and skill in uncovering a wretched fraud cannot be too highly commended. From a personal standpoint it would give me pleasure to allow them all they claim. But the referee, who has greater familiarity with the circumstances and with the record, has passed upon the issue of fact, and the court ought not to overrule such finding unless it clearly appears from the evidence that such ruling is erroneous. In cases of this kind the finding of the referee is entitled to great weight, and is not to be lightly set aside. *Collier on Bankruptcy* (7th Ed.) 504, and cases cited. An examination of these cases will show that the courts are inclined to hold the findings of the referee on issues of fact as conclusive as the report of a special master or the verdict of a jury. In *re Royce Dry Goods Co.* (D. C.) 133 Fed. 100, 103, the court well remarks:

"Any other rule would plague the court with sitting as in a trial *de novo* in the vast multitude of claims passed on by the referee. The burden of this work of review is becoming almost insupportable. It occupies much of the time of the court, with records of testimony running into hundreds of pages. It is so easy and inexpensive for defeated counsel to have the cases certified to the court for review that the per cent. of them is far in excess of the merits or importance of the questions involved."

The proposition upon which the referee seems to have based his opinion is that the litigation was not only fruitless, but exceedingly expensive to the estate. The referee was entirely right in treating the case as though this were an original application for an allowance of \$2,500 for attorney's fees. The order of the former referee allowing \$1,500 on account was not final or conclusive of any question here involved. The referee in his opinion says:

"I have carefully examined the records and files in this proceeding, and am of opinion that it would be a gross violation of my duty to administer bankrupt estates economically for me to allow any further attorney's fees in the matter; and it is my judgment that the \$1,500 already received by counsel herein is more than a reasonable compensation for all their services and disbursements in said proceeding."

See, also, *In re Simon* (D. C.) 151 Fed. 507.

The referee evidently had in mind the fact that the estate had been put to enormous expenses by reason of the legal proceedings, aside from attorney's fees, and the record fully justifies the correctness of this conclusion. Large amounts were paid to expert accountants, stenographers, witnesses, and court officers. It is undoubtedly true that the success or failure of an attorney is an important factor to be considered in determining the value of his services. Success is the test applied by the business world in measuring compensation. It is largely so in the courts. As a rule, professional services, however able or prolonged, which yield no results, command no high reward. I would not hold that an attorney is to be held an insurer of results; but a is clearly incumbent upon him, before he launches an estate into a

tedious and expensive litigation, to look ahead and determine whether, in the event of success in the court, he will be able to secure any practical result.

This litigation involved the pursuit of a married woman, the wife of one of the bankrupts, who was suspected of having appropriated and concealed some \$6,000 worth of assets. It was known at the outset that the woman had no tangible property upon which a writ could be levied, and there was every reason to anticipate that the money had passed beyond her control. It is suggested in the proofs that she fled beyond the jurisdiction; but just when she absconded does not appear. It should have been foreseen that the only way to enforce such an order against her was by proceeding for contempt, which was a precarious remedy. Counsel, in their zeal to uncover fraud, seem to have lost sight of this prudential consideration; and it was not until the end of this long litigation that any serious consideration seems to have been given to this aspect of the case. Thus three years were devoted to a bitter contest to secure an order which proved barren and practically worthless. Under these circumstances I do not feel warranted in disturbing the findings of the referee. It is impossible for me to make thorough examination of these volumes of testimony and lengthy proceedings. I must adopt the conclusion at which the referee arrived as to the additional claim for attorney's fees. That portion of the finding of the referee will be affirmed.

On the second branch of the case, involving disbursements of \$202.96, I can see no reason why counsel should not be repaid the money actually expended for proper disbursements. The certificate of the referee seems to cover the fact of the expenditure and the propriety of the outlay. In my judgment this should not be confused with the question of attorney's fees; and that portion of the finding of the referee disallowing said sum of \$202.96 is reversed, and an order should be entered for the payment of such disbursements to the claimants.

The record will be returned to the learned referee for further proceedings in accordance with this opinion.

HUSSONG DYEING MACH. CO. v. PHILADELPHIA DRYING MACHINERY CO. et al.

(Circuit Court, E. D. Pennsylvania. September 30, 1909.)

EVIDENCE (§ 558*)—CROSS-EXAMINATION OF EXPERT IN PATENT SUIT.

Where the direct testimony of an expert, testifying for complainant in a patent case, was confined to the making of a *prima facie* case by describing the invention in suit, and the alleged infringing device, and the expression of an opinion as to infringement, defendant cannot, on cross-examination, require him to compare the patent in suit with one in the prior art, which is a matter of defense.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2377; Dec. Dig. § 558.*]

In Equity. On motion to compel witness to answer question. Motion denied.

Howson & Howson, for complainant.
Joseph C. Fraley, for defendants.

J. B. McPHERSON, District Judge. The witness is a patent expert and was called by the complainant. His direct examination was confined to a description and explanation of the inventions in suit, a description of the defendants' machines, and the expression of an opinion that these machines infringed the claims relied upon. His answer to the third question of this examination simply described the devices of the patents. On cross-examination he was asked for the first time whether he was acquainted with the British patent to Pollock, and to this he answered, "Yes." Thereupon the cross-examination proceeded as follows:

"XQ. 20. In giving your definition of the invention set forth in the two patents in suit (see answer to question 3), have you set forth any particulars wherein said invention can be differentiated from the apparatus shown and described in said Pollock British patent?

"A. Yes.

"XQ. 21. Please point out specifically each and every portion of your said answer which is addressed to this particular subject.

"A. My direct examination was simply directed to an explanation of what is set forth in the patents in suit, and a comparison between the subject-matter of said patents and the defendant's machines. Accordingly, no portion of my answers was addressed to the particular subject of comparison between the patents in suit and the Pollock British patent. As the apparatus of the Hussong patents is different from that of the Pollock British patent, my explanation of the patents in suit involved reference to the features possessed by the apparatus of the Hussong patents not present in the Pollock patent. To refer to the matter more specifically would require, on my part, a full discussion and explanation of the Pollock patent and a detailed comparison with the patents in suit.

"XQ. 22. I call your attention to the fact that your answer to question 3 (to which alone my question relates) does not deal with any comparison between the subject-matter of the patents in suit and the defendant's machine, but simply describes and defines the invention of the patents in suit. You have stated (in answer to question 20) that in said answer to question 3 you have set forth particulars wherein the invention can be differentiated from that of the Pollock British patent. I now ask you to refer me to each and every of those particulars.

"A. I could not do that without making a detail comparison between Pollock and Hussong, and that would involve an explanation and discussion of everything set forth in the Pollock patent."

These three questions were all objected to upon the ground that the witness was asked to consider a patent in the prior art and to compare it with the patents in suit. Then followed question 23, which was also objected to, and presents, with the reply of the witness, the point involved in the pending motion:

"XQ. 23. In order that the defendant may be apprised of the exact meaning of the definition given in your answer to question 3, I now ask you to fully and clearly point out these particulars, and am quite willing that, if necessary, you shall make the comparison referred to.

"A. As I cannot answer the question without making a detail comparison between Pollock and the Hussong patents, I decline to answer the question, as instructed by counsel."

Defendant's counsel attempts to distinguish the cases of *Thompson-Houston Electric Co. v. Johns Mfg. Co.* (C. C.) 105 Fed. 249, and *Æolian Co. v. Simpson-Crawford Co.* (C. C.) 157 Fed. 320, where rulings adverse to his position were made by Judge Lacombe and Judge Ward, respectively, contending that the answer of the witness to question 20 opened the door to further cross-examination and justified the defendant in asking the witness to expand that answer, so as to describe in detail the difference between the patents in suit and the British patent to Pollock. The argument is not without force, and is also recommended by the undoubted fact that the testimony in patent causes would often be greatly shortened if the complainant was obliged to disclose at the outset his attitude toward the prior art. As the practice now stands, the complainant's *prima facie* case may leave the defendant in substantial ignorance on this subject, and may thus compel him to put in much evidence that turns out afterwards to be useless. The real contest does not ordinarily begin until the defendant puts in the prior art, and under the present practice the complainant thus secures whatever advantage may exist in having the final word in rebuttal upon this matter. But, while these considerations deserve attention whenever a change of future procedure is contemplated either by Congress or by the courts, I do not feel justified in taking such a step on a motion of this kind, and I shall therefore follow the foregoing cases in declining to compel the witness to answer the question referred to. His answer to question 20 is satisfactorily explained by the answers to questions 21 and 22, and I think the clear intent of question 23 was to introduce the Pollock patent on cross-examination, in spite of the fact that no ground for such a course could be found in the direct examination of the witness. As already intimated, thus to widen the scope of cross-examination may perhaps be a desirable innovation, but to permit it now would be at variance with what is at present the settled practice.

The motion is refused.

KYLE v. CHICAGO, R. I. & P. RY. CO. (two cases).

(Circuit Court, W. D. Arkansas, Ft. Smith Division. October 29, 1909.)

1. REMOVAL OF CAUSES (§ 107*)—MOTION TO REMAND—RECORD TO BE CONSIDERED.

On a motion to remand, the whole record as filed in the federal court is to be taken into consideration.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 227, 228; Dec. Dig. § 107.*]

2. REMOVAL OF CAUSES (§ 107*)—MOTION TO REMAND—AMENDMENT OF PETITION.

Where the complaint in an action in a state court against a railroad company alleges the citizenship of plaintiff, and that defendant does, and did when the cause of action arose, operate a certain railroad, and a petition for removal by defendant alleges that it is a citizen of another state, it is a reasonable inference that it was such when the action was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

commenced, and the court may properly allow an amendment specifically stating such fact.

[Ed. Note.—For other cases, see Removal of Causes, Cent Dig. § 229; Dec. Dig. § 107.*]

At Law. Actions by G. B. Kyle and E. P. Kyle against the Chicago, Rock Island & Pacific Railway Company. On motions to remand to state court. Motions denied.

Oscar L. Miles, for plaintiff.

Geo. B. Pugh, for defendant.

ROGERS, District Judge. These two cases are in this court on removal from the state circuit court of Logan county, Ark., and in both cases a motion is made to remand. No reason for remanding the cases is pointed out in the motions. The only reason urged at the hearing is that this court is without jurisdiction because it does not appear that at the institution of the suit the parties were citizens of different states.

In determining this question, the whole record, as it was filed in this court, should be considered. *Donovan v. Wells-Fargo Express Company*, 169 Fed. 363, decided by the Eighth Circuit Court of Appeals. In that case Judge Adams, delivering the opinion, said:

"In the light of the foregoing summary of principles which must control a determination of the present case, attention will now be given to the petition for removal in order to see whether it, taken in connection with the full record, disclosed on its face that the express company had the right of removal. If it did, the state court thereby lost jurisdiction of the cause, and its threatened exercise of it was an interference with the jurisdiction acquired by the Circuit Court to which the removal was taken, and, for reasons hereinafter stated, must be enjoined."

Looking at the record in this case, we find that the complaint alleges:

"That he (plaintiff) is a citizen and resident of the town of Magazine, in the county of Logan and in the state of Arkansas; that the Chicago, Rock Island & Pacific Railroad is a railroad corporation engaged in the business of a common carrier of freight and passengers for hire, and was so engaged on the day hereinafter set forth."

The date referred to, which is the date the negligence complained of is alleged to have occurred, was the 26th of June, 1908, and the complaint itself was filed in the Logan circuit court on the 11th of March, 1909. The allegations in both complaints are the same in substance and effect, and the damages laid in each complaint is \$10,000. The defendant, in apt time, filed its petition for removal, and gave the bonds required by the statute. In the application for removal it is alleged that the amount involved exceeds, exclusive of costs and interest, the sum of \$2,000; that the suit is of a civil nature; that the suit is between citizens and residents of different states, in this, to wit, that plaintiff is a citizen and resident of Arkansas, and of the Ft. Smith division of the western district thereof, and that the defendant is a corporation organized and incorporated under the laws of the states of Illinois and Iowa, with its residence and principal place of business therein.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

An analysis of this case shows conclusively that the plaintiff, at the time of the institution of the suit, was a citizen of the Ft. Smith division of the western district of Arkansas, that the amount in controversy was over \$2,000, and that the defendant is a corporation of the states of Iowa and Illinois; but it does not show specifically that, at the institution of the suit, the defendant company was a citizen of the states of Iowa and Illinois. The Supreme Court of the United States in the case of *Kinney v. Columbia Savings, etc., Association*, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, approved the cases of *Gibson v. Bruce*, 108 U. S. 571, 2 Sup. Ct. 873, 27 L. Ed. 825; *Akers v. Akers*, 117 U. S. 197, 6 Sup. Ct. 669, 29 L. Ed. 888; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914, in which it was held:

"Petitions and bonds for removal are in the nature of process. Where a petition for removal otherwise sufficient contains a general averment of diverse citizenship, with a specific and full averment of defendant's citizenship, and the requisite diverse citizenship of the plaintiff may also reasonably be inferred from the record, the Circuit Court has power, before any action has been had on the merits in the federal courts or any steps taken in the state courts after the removal, to permit the petition to be amended by the addition of specific and complete averments of the citizenship of the plaintiff."

The principles there stated cover this case. In that case the plaintiff's citizenship could reasonably be inferred from the record, and the defendant's citizenship was accurately stated. In this case the plaintiff's citizenship is accurately stated, but the defendant's citizenship may also be reasonably inferred, and that is the only difference. The principle is precisely the same. The reason why the Circuit Court of the United States may in such a case permit the record to be amended by stating specifically the diverse citizenship of the party is admirably stated by Mr. Justice Brewer, beginning at page 82 of 191 U. S., page 32 of 24 Sup. Ct. (48 L. Ed. 103), of that decision. The same doctrine is held in *Thompson et al. v. Stalman et al.* (C. C.) 131 Fed. 809, and *Kerr v. Modern Woodmen of America*, 117 Fed. 593, 54 C. C. A. 655, decided by the Eighth Circuit Court of Appeals. When the motion in this case to remand was presented, counsel for defendant asked leave to amend his petition by stating that at the commencement of the suit and at the time the petition was filed the defendant was a resident and citizen of the states of Illinois and Iowa. With that amendment made, the requirements of the statute for the removal of a case is complete.

The amendment will therefore be allowed, and the motion to remand overruled.

RIVERSIDE TRUST CO., Limited, v. EAST RIVERSIDE WATER CO.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1909.)

No. 1,707.

WATERS AND WATER COURSES (§ 254*)—CONTRACTS FOR SALE OF WATER—CONSTRUCTION.

The owner of certain lands and water rights constructed a canal to carry the waters from his land to lower lands, and entered into contracts with the owners of such lands by which he sold and conveyed to each a certain quantity of water, measured at the canal. The contracts provided that "it is understood and agreed * * * that water as above stipulated has been actually delivered to the vendee, and that said delivery and this conveyance are accepted by vendee in full satisfaction of all obligations of vendor to vendee." All of them also provided, in effect, that "vendee hereby covenants and agrees to bear his proportionate share of taxes and all expenses of maintaining and operating said canal system and all water sources and water rights and structures that may be connected therewith." *Held*, that such contracts must be construed to require the vendor to furnish continuously the stipulated quantity of water, and the covenants of the vendees to bear a proportionate share of the expenses related to the expenses of delivery only, and did not bind them to contribute to the expense of producing the water, or procuring additional sources of supply, when by reason of drouth the original supply became inadequate to fill the contracts.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 311; Dec. Dig. § 254.*]

In Error to the Circuit Court of the United States for the Southern Division of the Southern District of California.

Action by the Riverside Trust Company, Limited, against the East Riverside Water Company. Judgment for defendant on demurrer, and plaintiff brings error. Affirmed.

The plaintiff in error filed a complaint containing 31 separate counts on an equal number of separate contracts to recover certain expenses incurred by it in furnishing water to the defendant in error. To review the judgment of the court below, sustaining a demurrer to the complaint and each count thereof for want of facts sufficient to constitute a cause of action, the present writ of error was sued out. The plaintiff in error, which will be designated the plaintiff in this opinion, is the successor in interest of one Matthew Gage, who, between the years 1884 and 1890, executed the 31 several contracts which are the subject of the action. Gage was the owner of certain lands and water rights, and before the contracts were made was engaged in constructing a canal to carry the waters from the lands which he owned to lower lands, to the owners of which he desired to sell water rights, together with easements in the canal for the delivery of the water. On March 11, 1890, he conveyed the canal and the sources of the water to the plaintiff, and the plaintiff took the same, subject to the terms and conditions of the said contracts, and assumed and agreed to perform Gage's obligations therein expressed. Prior to January 1, 1890, the defendant in error, herein to be designated the defendant, succeeded to all the rights so granted by Gage in the contracts above referred to. The complaint alleges that prior to January 1, 1900, the water was derived from the sources referred to in the Gage contracts, and was supplied thereunder from living and running water in a stream and from flowing artesian wells, but that thereafter, and from that date to the commencement of the action, by reason of the extreme, unusual, and extraordinarily dry seasons and lack of rainfall, and from climatic and natural causes, and without fault on the plaintiff's part, it was scarce, low, depleted, and insufficient, and much less than the usual and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 173 F.—16

ordinary supply, and much less than at the times of the execution of the respective contracts, and that many of the flowing artesian wells ceased to flow, and that all the artesian wells, by reason of such conditions, became vastly depleted, and a water famine was imminent; that it became necessary, in order to overcome the effect of said dry seasons and lack of rainfall, to construct, bore, and establish other and additional artesian and other wells to get water into said canal system and supply, and it became necessary to purchase, construct, install, operate, and maintain pumping plants to secure and raise water from wells which had ceased to flow and did not flow to the surface. It is for the amount of such expenditures, made for the purchase and installing of pumping plants and the operation and maintenance of the same, that the action was brought; the plaintiff demanding of the defendant its proportion of such expenses, which proportion the defendant had refused to pay.

The contracts are made exhibits to the complaint. In those contracts the obligations of the parties of the second part are not expressed in uniform terms. In the first three, Gage agreed to construct a canal for irrigation and domestic use from a point on the Arroyo Tequesquite to the west boundary of Carit's land according to a designated survey, or to any other point where the party of the first part shall obtain a permanent and sufficient supply of water, and deliver the same to the party of the second part at the canal upon the basis of one inch to five acres of land, to be measured under a four-inch pressure. The party of the second part agreed to pay a certain sum in gross therefor, and further covenanted as follows: "Upon completion of the canal, the repairs and all expenses shall be done by parties owning the land, with the right of water from the canal in proportion as hereinbefore mentioned, from the date that water is ready to be delivered from said canal by party of the first part."

The fourth contract in point of time, and the one which provides for the greatest supply of water, was that which was made between Gage and the Iowa Land & Improvement Company on August 27, 1885. This agreement binds Gage to construct a canal for irrigation, "said canal to be supplied with water from the springs and water rights and from the flow of artesian wells bored and to be bored" on certain designated premises, and binds him to deliver water to the party of the second part, measured at the canal under a 4-inch pressure, the canal to be of sufficient capacity to carry at least 500 inches of water. It provides that the canal may be enlarged by Gage at any time within five years for the purpose of conveying additional water; that within two years from August 1, 1886, the canal shall be cemented on the bottom and sides at Gage's expense; that all distributing ditches required for irrigating its own lands shall be built by the party of the second part. The party of the second part agreed, upon the delivery by Gage of 335 inches of water, measured August 1, 1886, at the canal, under a 4-inch pressure, for the use of its lands, to pay therefor the sum of \$167,500, of which \$87,500 was acknowledged to have been paid, and the remainder was to be paid upon the completion of the canal to the south line of section 5, and the delivery of the 335 inches of water under a 4-inch pressure thereof, "together with a good title, free from all incumbrance, to said water, water courses, artesian wells, springs, and water rights"; and it was provided that the canal should be held in ownership by the party of the second part in proportion as the number of inches owned by it bears to the total number of inches which should be delivered from said canal when the final developments of water should have been made by Gage. It was distinctly understood that the party of the first part reserved the right to develop and procure water in addition to the 335 inches aforesaid by means of artesian wells and otherwise, and to convey the same in said canal for the use of his own and other lands. The obligation of the party of the second part as to the payment of expenses is as follows: "From the time of delivery of said water by party of the second part, it shall bear its proportionate share of the running expenses of said canal, but not for enlarging or cementing thereof." On November 10, 1886, Gage executed a deed to the defendant, which had become the successor in interest of the Iowa Land & Improvement Company, conveying a water right in the Gage canal system in accordance with the terms of the contract. In the deed it was recited as follows: "Vendee hereby covenants and agrees to bear his proportionate

share of taxes and all expenses of maintaining and operating said canal system, and all water sources and water rights and structures that may be connected therewith, and to pay the same monthly or whenever the same shall be demanded."

The other contracts were substantially the same as the contract with the Iowa Land & Improvement Company, excepting that 13 thereof were made for the supply of water in small quantities, ranging from four-tenths of an inch to 18 inches, aggregating 94.2 inches, and bearing dates between November 10, 1886, and March 5, 1888, in which contracts the obligation of the parties of the second part to pay expenses is thus expressed: "Vendee hereby covenants and agrees to bear his proportionate share of taxes and all expenses of maintaining and operating said canal system, and all water sources and water rights and structures that may be connected therewith"—and all of them contained the following provision: "It is understood and agreed, and said understanding and agreement are indicated by the acceptance of this conveyance, that water as above stipulated has been actually delivered to vendee, and that said delivery and this conveyance are accepted by vendee in full satisfaction of all obligations of vendor to vendee, his heirs and assigns."

John G. North and William J. Hunsaker, for plaintiff in error.
Collier & Carnahan, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge

GILBERT, Circuit Judge (after stating the facts as above). The allegations of the complaint must be construed, and the rights of the parties as to the subject-matter of the action must be determined, in the light of the contracts which were made between Gage and the respective parties of the second part thereto. The covenants upon the part of the parties of the second part in the 13 contracts last referred to in the foregoing statement, standing by themselves, and unaffected by the other provisions of the instruments in which they are contained, might be said to be sufficiently broad and inclusive to sustain the plaintiff's causes of action thereon. But, in determining their force and effect, we must not ignore the circumstances under which the contracts were entered into, and especially the subject of the grants and the covenants on the part of the grantor. Running all through these and all the contracts, and controlling the construction of the grantee's covenants, is the fact that there is in each a conveyance by the grantor of a certain designated supply of water, and there is an acknowledgment by the grantee, indicated by his acceptance of the conveyance, that the water as stipulated therein had been actually delivered to him, and that such delivery and the conveyance are accepted by him in full satisfaction of all obligations of the grantor to him, his heirs and assigns. This indicates that the grantor had covenanted to deliver continuously to the grantee the quantity of water so granted, and the covenants so made by the grantee to pay a proportionate share of the expenses must be deemed to be covenants to pay a share of the expenses of the delivery only of that which had been granted, the actual delivery of which the grantee had acknowledged, and not a covenant to contribute to the expenses of producing that which the grantor had granted.

This construction of the covenants of the grantees is even more clearly indicated in the other contracts and conveyances between Gage and the predecessors in interest of the defendant. It was therein mu-

tually agreed that Gage should construct a canal, for the purpose of irrigation, from a designated point or from any other point where he might obtain "a permanent and sufficient supply of water"; that the canal was to be supplied with water from the springs and water rights and from the flow of artesian wells bored and to be bored on certain described lands belonging to Gage; and that he was to deliver to the grantor in each case a specified quantity of water, measured at the canal. The consideration in each instance was to be paid upon the delivery of the water, and was to be a sum in gross in full payment for a perpetual supply thereof. In brief, the terms of the contracts import that upon Gage rested the burden of producing the water and causing the same to flow upon the surface, thence to be turned into a canal and delivered continuously and permanently, and that upon the vendees rested the burden of continuously contributing to the expenses of maintaining the canal and the branches thereof, and whatever other structure might be necessary to conduct to their lands the flow of water which was to be produced by Gage as a permanent supply from his springs and water rights and the flow of artesian wells bored or to be bored by him, and that they did not promise to contribute to the expense of boring other wells, or of supplying and operating pumps to develop new supplies of water, or to the expense of bringing such waters to the surface. The sources of water referred to in the contracts were evidently, at the time when the contracts were made, deemed sufficient to supply all the water which was to be delivered, and the installation of pumping plants was not in the contemplation of the contracting parties. The intervention of unusual droughts thereafter cannot be held to have imposed any additional obligation on the defendant, nor to have relieved the plaintiff from its obligation to supply the water which was to be furnished under the terms of the contracts. We think the demurrer was properly sustained.

It is contended that the court below erred in striking out a certain amendment to the complaint, which was inserted for the purpose of explaining the meaning of the parties to the contracts in the use of the terms "delivered at the canal" and "measured at the canal." By the amendment it was alleged that these terms did not mean, and were not intended by the parties to mean, that the water was to be delivered into the canal free of all expense required to maintain the flow thereof, but that the intention of the parties was that the water was to be delivered at the canal end of the lateral ditches or pipes, and that the purpose of the provision for the delivery at the canal was to relieve the owners of the canal of the expense of maintaining such laterals and that at all times the parties to the contracts and their successors in interest have interpreted and construed said contracts as so alleged, and have measured the water at the canal end of said laterals, and that the defendant and its predecessors in interest have paid their proportion of the expense incurred in maintaining the flow of water in said canal, including the cost of conveying it from the various wells near the head of the canal, and including the cost of diverting the flow of the Santa Ana river and conducting the same into the canal. We are unable to see how the matter so alleged could throw any light upon

the question whether the defendant in this action should be adjudged to pay any part of the expense of purchasing, installing, maintaining, and operating pumps and pumping plants. In any view of it, it is but an attempt to plead legal conclusions, and there was no error in striking it from the complaint.

The judgment is affirmed.

GRIFFIN WHEEL CO. v. SMITH.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1909.)

No. 1,689.

1. MASTER AND SERVANT (§ 270*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—EVIDENCE.

In an action by a servant against the master to recover for a personal injury resulting from the falling of a drawbridge, the construction of which was alleged to be defective and dangerous, it was not error to permit a workman, who assisted in building the bridge, and who testified that he told defendant's foreman in charge that the mode of construction was improper and dangerous, to state his reasons, by pointing out the defects, where such testimony was limited by the court to the purpose of showing that knowledge of the defective construction was brought home to defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 923; Dec. Dig. § 270.*]

2. WITNESSES (§ 380*)—RIGHT TO IMPEACH ONE'S OWN WITNESS—SURPRISE OF PARTY—USE OF PRIOR STATEMENT OF WITNESS.

Where a party has been surprised by the testimony of his own witness, he may, in the discretion of the court, be allowed to offer evidence to show that prior to the trial the witness made a contradictory statement, not for the purpose of impeaching the general character of the witness, but for the protection of the party calling him; but where the previous statement is in writing, and the party has been permitted to call the attention of the witness to the parts which contradict his testimony, it is not an abuse of discretion to exclude the entire statement, when offered in evidence for impeaching purposes.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1214, 1219; Dec. Dig. § 380.*]

3. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

The refusal of an instruction as to the assumption of risk, requested by defendant in an action by a servant for a personal injury, *held* not error, in view of the charge given, which sufficiently covered the subject.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657; Dec. Dig. § 260.*]

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

Action by John Smith against the Griffin Wheel Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The complaint of the defendant in error in the action which he brought against the plaintiff in error alleged that on and prior to July 18, 1907, the former was employed as a common laborer by the plaintiff in error at its foundry and machine plant, his duties, among other things, being to load and push slag cars over a narrow-gauge railroad from the foundry out to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dump; that the said railroad was intersected by a drawbridge, over which was laid the rails of the road; that the drawbridge was raised and lowered by means of a crank, which, when turned, revolved a sprocket wheel, around which ran a double belt chain, which chain, in turning, revolved another sprocket wheel attached to an iron bar at the upper end of the chain, causing the iron bar to revolve and wind up a rope, one end of which was attached to the bar, and the other end to the outer end of the bridge by means of an open hook; that the drawbridge, when raised, remained in a vertical position, and was held there by means of the said open hook attached to the end of the rope; that the said structure and the appliances for raising and lowering the same had been constructed in a negligent, dangerous, and defective manner, in that no ratchet or other contrivance had been furnished or attached to the crank, so as to prevent the crank from running back by reason of the weight of the drawbridge when the same was being raised or lowered, or in an upright position, and that the rope was allowed to run out and permit the drawbridge to fall from an upright position without warning; that the hook at the end of the rope was a defective and improper hook, for the reason that it was an open hook; that the construction of the said structure and its appurtenances was defective and dangerous for the further reason that "absolutely no safeguard or contrivance had been provided on such structure to prevent said drawbridge from falling backwards when in an upright position." The complaint alleged, further, that the defective and dangerous condition of the structure and its appurtenances had existed for a long time prior to the accident complained of, as was well known to the plaintiff in error, but that said defective and dangerous condition was not known to the defendant in error, and that the plaintiff in error, though well knowing said defective and dangerous condition, willfully and negligently and wantonly allowed and permitted it to remain, and to be used and operated, in such unsafe and defective condition, and negligently and wantonly failed to warn the defendant in error of such defective and dangerous condition. There was evidence upon the trial that the defendant in error had no knowledge or information of the danger of the use of the drawbridge or of its defective construction; that at the time of the accident he was using and operating said drawbridge in the manner in which he had been instructed to use it by the foreman of the plaintiff in error; that on July 18, 1907, while he was discharging his duties in the foundry, he was directed by the foreman to lower the drawbridge and then haul out slag; that the bridge was then approximately upright, leaning a little backwards, and resting upon a wooden crosspiece fastened by short nails to uprights on either side; that the defendant in error went behind the drawbridge, and pushed the same out, and manipulated the crank thereof in the manner in which he had been directed so to do by the foreman; that upon his pushing the drawbridge to a perpendicular position and placing his fingers upon the crank, the open hook fell out of the ring without his knowledge, and the drawbridge, weighing between 500 and 600 pounds, fell backwards, broke away the said crosspiece, and fell upon him, crushing him to the ground and inflicting upon him serious injuries; that the bridge was constructed under the direction of the said foreman, and at the time of its erection one Furrer, a carpenter working thereon, notified the foreman that it was being constructed in a dangerous manner, that it was unsafe because it played below the shaft when upright, and because the hook, being an open one, was unsafe, for the reason that it might slip out of the ring. There was testimony that the blacksmith who had made the hook had notified the foreman that an open hook was dangerous to use upon the structure, as it was likely to come out of the ring and permit the drawbridge to fall. The testimony of these two witnesses was permitted by the court for the purpose of showing knowledge of the defects on the part of the plaintiff in error. There was testimony that, as the bridge was first constructed, two men were required to raise it, but that before the accident it was refitted with different sprocket wheels, so that one man could operate it. The jury returned a verdict for the defendant in error in the sum of \$10,000, for which judgment was rendered.

Bamford A. Robb and Hudson & Holt, for plaintiff in error.
Flaskett & McMenamin, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). It is assigned as error that the court admitted in evidence the testimony of Furrer, the carpenter, as to the reason why he told the foreman that the bridge was dangerous at the time when it was being constructed. To that question he answered:

"Because when the bridge was up, when she got loose out of that hook, there was nothing—if it come unhooked, there was nothing—to hold it from falling either way; and, second, I didn't see any appliance or dog or ratchet on the cogwheel."

It was proper to permit the witness to testify that he warned the foreman of the plaintiff in error, at the time of constructing the bridge, that the bridge and its appliances as constructed were dangerous. But it is urged that it was error to permit him to testify as an expert as to the reasons why he considered it dangerous. The court, however, was careful to rule that the testimony was admitted only for the purpose of bringing home to the company knowledge of the defective construction of the drawbridge and its appliances, and for the purpose of presenting to the jury the question whether or not the plaintiff in error used such care as is ordinarily used by reasonably prudent persons under like circumstances; and in instructing the jury the court said of this testimony:

"It was not admitted as having any tendency to establish that the structure or appliances were not sufficient or properly made, for that is a question to be decided by you. It was admitted solely for the purpose of bringing home to the defendant knowledge of the condition of insufficiency, if it was insufficient."

As safeguarded by the ruling of the court, and the instruction to the jury, we cannot see that there was error in admitting the testimony. The witness having detailed fully the facts as to the nature of the construction and its defects as he saw them and the warning which he gave to the foreman, it was not improper to permit him to state the reason why he considered them dangerous. It was but another way of pointing out the defects which he observed in the structure, and to which he directed the attention of the plaintiff in error.

It is earnestly contended that the court erred in excluding from the evidence a certain written statement purporting to have been made by Walter Grunnert, a witness for the plaintiff in error. The statement was dated about four months after the date of the accident, and seven months before the trial. It consisted of several detached sheets of typewritten paper, the last of which only was signed by the witness. The witness identified the last sheet of the statement, but, on reading the other pages, testified that he could not say that it was an exact copy of what he had signed. He was interrogated as to the several distinct portions of the statements which were claimed to be contradictory of his testimony, and was asked whether or not he had so stated. He made no denial of having made any of the said statements so attributed to him. Some of them he admitted that he had made. As to one of them, he testified that he did not remember that he had made it, but

that he did not think the statement was true. Counsel for the plaintiff in error finally offered the whole statement in evidence "for the purpose of impeaching the testimony of the witness," and to the offer for that purpose an objection was sustained. The court said:

"Regardless of the objection, such statements as are in contradiction of what the witness now says are competent, for the purpose of showing the defendant may have been taken by surprise, but to go over the whole statement where it is not in conflict is not competent. Such statements as he now contradicts you may call to his attention."

If a witness unexpectedly gives material evidence against the party who calls him, he may, for the purpose of refreshing his memory or awakening his conscience, be asked if he has not made a certain contradictory statement. If he denies that he made it, a situation arises upon which the authorities are divided; many cases holding that the fact that he made it cannot be shown in evidence. But the rule which is sustained, as we think, by the weight of authority and the better reasoning, and which this court has heretofore expressly approved in *Tacoma Ry. & Power Co. v. Hays*, 110 Fed. 496, 49 C. C. A. 115, is that, where a party has been surprised by the testimony of his own witness, he may, in the discretion of the court, be allowed to offer evidence to show that, prior to the trial, the witness made a contradictory statement; and this, not for the purpose of impeaching the general character of the witness, but for the protection of the party who calls him. The question of the admissibility of such testimony resting, as it does, in the discretion of the court, we can discover in the record no ground for holding that discretion was abused in the present case. The jury, in view of the admissions of the witness as to his prior statements, had the benefit of practically all the contradictory testimony that his alleged prior statement contained. We find no error in the exclusion of the statement from the evidence.

The plaintiff in error contends that the trial court erred in sustaining the objection to the question, asked the defendant in error, as to whether he had not observed Grunnert, at different times letting down the bridge, holding his hand on the crank. But that ruling of the court is not among the assignments of error, and it is not of the character of those of which this court should take cognizance in the absence of assignment.

Error is assigned to the refusal of the court to give the jury certain instructions to the effect that if they found from the evidence that the defendant in error knew, or by the exercise of ordinary prudence could have known, that it was dangerous to operate the drawbridge, or that the danger of its use was alike open and obvious to him and the plaintiff in error, there could be no recovery, and that, by continuing in the employment of the plaintiff in error without complaint, the defendant in error assumed the risks and dangers of the employment which he knew, or which he should have known. But, while the instruction so requested might properly have been given, we are of the opinion that the charge which the court gave to the jury sufficiently covered all the essential features of the case, and that the omission to direct their attention more prominently to the rule that one who enters the employment of another as his servant assumes the

risks of defects resulting from the master's negligence, when those defects are obvious or plainly discernible by a person of ordinary prudence in the servant's situation, was not error for which the judgment should be reversed. The court charged that it was the duty of the defendant in error to observe the surroundings, and to use ordinary care to ascertain the state of repair and condition of the drawbridge contrivances, to heed the instructions given him, and to obey the orders of those selected to direct him, and that, if he failed in those respects, he could not recover; that, if he assumed the risks, he could not recover; that, if the accident was one which reasonable prudence could foresee or reasonable skill avoid, he could not recover; and that the burden was upon the defendant in error to show that the plaintiff in error had failed in its duty to provide him a reasonably safe place to work and reasonably safe appliances to work with. "To supply these," said the court, "was a positive duty, which the defendant could not avoid by delegating it to some one in charge of its works, or in any other way, and thereby relieve itself of liability, and the plaintiff had the right to assume, if he had not discovered to the contrary, or could not have discovered to the contrary by the use of ordinary care, that the appliances provided by the defendant, in so far as they related to the plan and construction, were sufficient for his protection." The foregoing is but an outline of the instructions given to the jury, the details of which it is unnecessary to repeat.

It is contended that the court erred in refusing to instruct the jury that if they found from the evidence in the case that the plaintiff in error had provided another workman to assist the defendant in error in lowering the drawbridge, and that the latter attempted to lower the same without such assistance, he assumed the risk thereof. The objection to this requested instruction is that there was no evidence to justify it. The testimony of Grunnert was that it was customary for one man to do the work; that of the superintendent, Duffles, was that the handle of the crank was only from eight to ten inches long, which would indicate that it was intended for one man; and that of Furrer was that one man could raise or lower it. The only testimony as to two men doing the work was that of Leonard, who testified that he had seen two men sent to do it; but he also testified that it was not impossible for one man to raise and lower the drawbridge, and that he had done it himself.

We find no error for which the judgment should be reversed. It is accordingly affirmed.

KELLOGG-MACKAY-CAMERON CO. v. HAVRE HOTEL CO. et al.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1909.)

No. 1,661.

1. GUARANTY (§ 85*)—ACTION BY CREDITOR—SUFFICIENCY OF COMPLAINT.

Defendants, who were building a hotel, let a contract for a heating plant for the building to one Brader, who placed an order for the materials needed with plaintiff. Shortly afterward defendants wrote plaintiff, reciting such facts and the terms of payment named in the order, followed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by the following statement: "We are prepared to meet these terms with Mr. Brader, so that you will be perfectly safe in shipping him this material." To this plaintiff replied as follows: "Your communication of the 7th instant, guaranteeing the account of P. H. Brader for the material which we are to ship him for the new Hotel Havre, and stating terms of payment on same, received. The same is satisfactory to us." To this letter defendants made no reply. *Held* that, in an action against defendants as guarantors of the account, the complaint properly alleged that defendants intended their letter as an offer to guarantee the account, and confirmed the same by their failure to reply to plaintiff's letter accepting the same as a guaranty, and that with such allegations the complaint stated a cause of action.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 99; Dec. Dig. § 85.*]

2. ESTOPPEL (§ 107*)—EQUITABLE ESTOPPEL—PLEADING AS ELEMENT OF CAUSE OF ACTION AT LAW.

The doctrine of estoppel in pais, while of equitable origin, is by the modern practice generally applied in actions at law, and facts constituting such an estoppel against a defendant may properly be pleaded in a complaint.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 297; Dec. Dig. § 107.*]

In Error to the Circuit Court of the United States for the District of Montana.

This was a suit brought by the plaintiff in error for the purpose of recovering judgment upon an alleged guaranty by defendants in error of an account of one P. H. Brader for goods, wares, and merchandise purchased by him from the plaintiff in error in November, 1904, for the purpose of furnishing the labor and materials for the installment of a heating plant and necessary plumbing and other pipe-fitting for the Havre Hotel at Havre, Mont. Plaintiff's original complaint, filed May 8, 1907, was superseded by an amended complaint filed August 12, 1907. To this amended complaint defendants demurred generally. The court overruled the demurrer, and by leave of court defendants filed a special demurrer on the ground of ambiguity and uncertainty. Upon the argument of the demurrer, plaintiff obtained leave of court to file a second amended complaint, which was filed November 15, 1907. This second amended complaint set forth in *hæc verba* a letter written by the defendants and plaintiff's reply thereto, alleged as constituting defendants' guaranty and plaintiff's acceptance. These letters appear hereafter in stating the material allegations of the third amended complaint. In other respects the second amended complaint was substantially identical with the first amended complaint. To this second amended complaint a general demurrer was interposed, which was sustained by the court. Thereupon plaintiff, on December 18, 1907, filed its third amended complaint which was in legal effect identical with the second amended complaint, with the addition of four new paragraphs relating to an alleged ambiguity in defendants' letter. The complaint charged that the defendants caused the ambiguity to exist, alleged the interpretation placed upon the letter by plaintiff, and charged that the defendants led plaintiff to believe that defendants' letter was an offer to guarantee the account of P. H. Brader. Defendants moved to strike out these four paragraphs as being irrelevant, immaterial, and redundant, and the court sustained the motion. By this motion the third amended complaint was left identical in legal effect with the second amended complaint, to which the court had sustained a general demurrer. Defendants did not plead to this third amended complaint, whereupon plaintiff entered a default and procured judgment thereon from Judge Dietrich, who at that time was occupying the bench in the absence of Judge Hunt, the resident judge of the district.

Immediately after the entry of this judgment defendants moved to vacate the same on the ground that the third amended complaint did not state facts

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sufficient to constitute a cause of action and therefore did not support the judgment; that the third amended complaint was identical with the second amended complaint, to which a general demurrer had been sustained; that the order of the court sustaining the demurrer to the second amended complaint became and was res judicata and the law of the case between the parties until reversed or set aside; that defendants had made a motion to strike out certain portions of the third amended complaint; that the court had ordered a stay of proceedings until such motion could be heard; that the time for answering or pleading to the third amended complaint was suspended during the pendency of said motion; that neither the defendants nor their attorneys had received any notice that such motion had been decided, and therefore the default judgment was entered prematurely; and that the judgment was of no force or effect. This motion was sustained, and the judgment was vacated on the ground that it had been entered by inadvertence of the court. Subsequently, upon application of plaintiff, the clerk of the court again entered a judgment by default. Defendants immediately moved to set aside this second judgment on the ground stated in the motion to set aside the first judgment, and a further ground that the former judgment, based on the same default and complaint, had been vacated and set aside. Upon the argument the court sustained the motion and set aside the second judgment. Plaintiff thereupon made two motions, namely: (1) To vacate the order setting aside the last-mentioned judgment; and (2) to enter a judgment on defendants' default. The court overruled both of these motions, and ordered that the default of the defendants for lack of answer or demurrer to the third amended complaint be set aside, and granted defendants ten days from the date of the order in which to plead to the third amended complaint. Defendants thereupon filed a general demurrer to this third amended complaint, which was sustained, and, plaintiff refusing to plead further, judgment was entered in favor of defendants, without the right given to plaintiff to plead further.

The material allegations of the third amended complaint, as it stood when the court sustained defendants' demurrer and entered the judgment against which the present writ of error is prosecuted, are substantially as follows:

That in the fall of 1904, and prior to November 7th of that year, defendant Havre Hotel Company entered into a contract with one P. H. Brader, by the terms of which Brader was to furnish the labor and materials for the installment of a heating plant and necessary plumbing and other pipe-fitting in a building known as the "Havre Hotel," then in course of construction at Havre, Mont.; the price of such labor and materials, as agreed upon in said contract, being about \$5,700. That shortly after entering into this contract Brader placed an order with the plaintiff at Minneapolis, Minn., for the necessary materials, supplies, and fixtures to be used by him in completing his contract with the Havre Hotel Company. That on November 7, 1904, defendants, for a valuable consideration, made, executed, and delivered to plaintiff a writing offering or proposing to guarantee the payment by Brader for the materials ordered of plaintiff by said Brader, which writing was as follows:

"Havre, Montana, Nov. 7th, 1904.

"Kellogg-Mackay-Cameron Co., Minneapolis, Minnesota—Gentlemen: Mr. P. H. Brader, of this place, was awarded the contract for plumbing and heating the new Hotel Havre, which is under construction here now, and informs us that he has placed the order for material for his work with your firm on terms that he is to pay you 60% of your bills when material is on the ground here (less freight), and balance in 60 days. We are prepared to meet these terms with Mr. Brader, so that you will be perfectly safe in shipping him this material."

That by this agreement defendants intended to and did offer to guarantee the payment by Brader for the materials which he had ordered from plaintiff. That defendants supposed and believed, when this writing was made, executed, and delivered, that plaintiff would understand said writing to be an offer to guarantee the payment by said Brader for the said materials when furnished by plaintiff. That on November 9, 1904, plaintiff, having received the said writing, believed and understood the same to be an offer by defendants to guarantee the proposed account of Brader, and plaintiff duly accepted the same as such; said acceptance being as follows:

"Your communication of the 7th instant, guaranteeing the account of P. H. Brader for the material which we are to ship him for the new Hotel Havre and stating terms of payment on same, received. The same is satisfactory to us."

That defendants believed and supposed at the time of the acceptance by plaintiff that plaintiff understood the writing to be an offer to guarantee the payment by Brader for the materials when furnished by plaintiff to him. That after defendants had received plaintiff's acceptance of the proposal to guarantee, by which acceptance plaintiff treated the proposal as a guaranty, defendants intentionally remained silent, and intentionally failed and neglected to notify plaintiff that they did not intend their proposal of November 7, 1904, to guarantee the account of said Brader. That defendants continued to remain silent until long after the order of Brader was accepted and the goods furnished, and until long after notified by plaintiff of the default in payment by Brader. That by their silence and failure to notify plaintiff they are estopped to deny that the said proposal of November 7, 1904, and its acceptance on November 9, 1904, did not create between plaintiff and defendant a contract of guaranty of the account of P. H. Brader. That, by their silence and failure to notify plaintiff that said proposal of guaranty was not in fact intended as such by defendants, the defendants intended to mislead and deceive plaintiff, to its damage, by inducing plaintiff to accept and act upon defendants' proposal as a guaranty of the account of Brader; and plaintiff, in reliance upon the silence of defendants, and relying upon their failure and neglect to notify plaintiff that their proposal of guaranty was not intended as such, and being misled and deceived by such silence, neglect, and failure, accepted the order of Brader, and in reliance upon the credit of the defendants furnished the materials to him. That plaintiff, but for such reliance, would not have accepted the order and would not have furnished the materials. That defendants are estopped to now deny that the said proposal to guarantee and the acceptance thereof did not create, as between the defendants and the plaintiff, a contract of guaranty of the account of Brader. That plaintiff, in reliance upon the guaranty made by the defendants, and in reliance upon the credit of the defendants, accepted the order of Brader for the materials, supplies, and fixtures so placed with it by the said Brader, and with the full knowledge of the defendants delivered to the said Brader the materials ordered by him; the same being for the agreed sum of \$3,577.84. That Brader thereafter made default in the payment of said amount for said materials, and failed, neglected, and refused to pay the amount according to the terms of the guaranty. That plaintiff used due diligence and its utmost endeavors to collect the same, failing in which it brought suit against Brader for the amount, and judgment was entered against him on April 26, 1906. That execution was issued, and the judgment returned partially satisfied, leaving a deficiency of \$3,147.61. That on January 7, 1907, plaintiff notified defendants of the default of Brader, and demanded that defendants pay the same in accordance with their guaranty. That they wholly failed, neglected, and refused to do so. Judgment was demanded against the defendants for the sum of \$3,147.61, with accruing costs and interest, and for costs of suit.

Galen & Mettler, for plaintiff in error.

F. N. Ulter and Clayberg & Horsky, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The defendants in error submit that the order sustaining the demurrer to the second amended complaint fully and finally determined that the facts stated in that complaint did not constitute a cause of action, and that such determination became and was *res judicata* of that question until reversed or set aside. The third amended complaint, after certain paragraphs had been struck out by the court, was the same in legal effect as the second amended complaint; and it is contended that

the ruling of the court on the demurrer to the second amended complaint disposed of the third amended complaint. The effect of sustaining the position of the defendants in error would be to hold that the judgment entered upon the third amended complaint was void and of no effect, and the writ of error would have to be dismissed—a result not entirely without justification, perhaps, in view of the earnest, but equally technical, contention of the plaintiff in error that the court abused its discretion in setting aside the default judgment in favor of the plaintiff. In a technical controversy of this character it may be well said that “they who take the sword shall perish with the sword.” But, without expressing an opinion upon these proceedings, we will consider the case upon its merits.

The important question of the case is whether the third amended complaint states a cause of action. The action as stated is based upon the letter written by defendants to plaintiff on the 7th of November, 1904, and a letter in reply, written by plaintiff to defendants on November 9, 1904, and received by defendants on November 11, 1904. The letter written by defendants refers to an order placed by one P. H. Brader with the plaintiff for material required in carrying out a contract for plumbing and heating a new hotel. The letter set forth the terms upon which the plaintiff was to furnish this material to Brader and said:

“We are prepared to meet these terms with Mr. Brader, so that you will be perfectly safe in shipping him this material.”

In reply to this letter the plaintiff wrote to the defendants:

“Your communication of the 7th instant, guaranteeing the account of P. H. Brader for the material which we are to ship him for the new Hotel Havre and stating terms of payment on same, received. The same is satisfactory to us.”

To this letter it is alleged defendants made no reply, and remained silent and failed to notify the plaintiff that they did not “guarantee the account” with Brader, as stated in plaintiff’s letter. Defendants’ letter is clearly a proposal relating to an order placed by Brader with plaintiff for the supply of material to enable Brader to carry out a contract for plumbing and heating a hotel. The terms of payment for this material were stated, and defendants said they were “prepared to meet these terms with Mr. Brader.” This sentence so far is obscure and uncertain as to its meaning, but the remainder of the sentence is not obscure or uncertain. It is: “So that you will be perfectly safe in shipping him this material.” This last part of the sentence must have been intended to convey an assurance that plaintiff would be paid for the material; otherwise, the letter would be meaningless. How safe? By the guaranty contained in defendants’ letter? This was obviously what plaintiff wanted to know, and accordingly plaintiff promptly wrote to defendants that their communication “guaranteeing the account” of Brader was satisfactory. Had defendants used this language in their letter, there would have been no controversy as to the guaranty. What did defendants do then? They remained silent. Could any inference relevant to the case be drawn from this silence? If so, it was a fact to be stated in the complaint, and the inference was

a question for the jury. A reasonable and legitimate inference was that the defendants assented to the interpretation placed upon the letter by plaintiff, and that they thereby intended to be understood as guaranteeing the account of Brader. Whether it was sufficient of itself to justify such an inference would be a question for the jury to determine under the instructions of the court. But our present concern is as to whether it was a statement of a fact which, taken in connection with the other facts alleged, constituted a cause of action. We think it did. We think it was properly stated, and constituted an important element in the sufficiency of the complaint.

The other charge, that defendants by their silence intended to mislead and deceive plaintiff by inducing plaintiff to accept and act upon defendants' proposal as a guaranty of the account of Brader, was stated to be for the purpose of setting up a legal estoppel; that is to say, that defendants by their conduct had placed themselves in a position where the law declares that they will not be heard to deny the guaranty. It is charged that, as they were silent when good faith required that they should have spoken, they cannot now be heard to say that that is not true which their conduct unmistakably declared was true, and upon the faith of which the plaintiff acted. This is an application of the doctrine of estoppel in pais, which, while originating in courts of equity, is now very generally applied in cases arising in courts of law. *Dickerson v. Colgrove*, 100 U. S. 578, 582, 25 L. Ed. 618; *Kirk v. Hamilton*, 102 U. S. 68, 79, 26 L. Ed. 79; *Paxson v. Brown*, 61 Fed. 874, 10 C. C. A. 135, 143; *Union Pac. Ry. Co. v. United States*, 67 Fed. 975, 979, 15 C. C. A. 123, 127.

In this view of these allegations, we think the third amended complaint stated a cause of action. The demurrer of the defendant to this complaint should therefore have been overruled.

The judgment of the court is reversed, with instructions to overrule the demurrer.

UNITED STATES v. DUNNE.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1909.)

No. 1,670.

1. CRIMINAL LAW (§ 1192*)—APPEAL AND ERROR—PROCEEDINGS ON MANDATE.

Where, upon the death of a defendant in a criminal case in a federal court pending proceedings in error in the Supreme Court to review a judgment of conviction, the writ of error was dismissed and the cause was remanded for such further proceedings as "according to right and justice and the laws of the United States ought to be had," on the filing of such mandate the jurisdiction of the trial court reattached, and continued until action was taken pursuant to the mandate, and the court had authority to consider and act upon a motion in abatement.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1192.*]

2. COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—APPELLATE JURISDICTION—DECISIONS REVIEWABLE.

An order of a Circuit Court of the United States declaring a judgment in a criminal action abated by reason of the death of the defendant after the entry of the judgment is in an independent proceeding of a civil na-

ture, and reviewable on writ of error by the Circuit Court of Appeals at the instance of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1103; Dec. Dig. § 405.*]

Jurisdiction of Circuit Court of Appeals in general, see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *United States Freehold Land & Emigration Co. v. Gallegos*, 32 C. C. A. 475.]

3. FINES (§ 17½*)—DEATH OF DEFENDANT AFTER JUDGMENT—ABATEMENT OF CAUSE.

A judgment entered against a defendant convicted under Rev. St. § 1782 (U. S. Comp. St. 1901, p. 1212), which provides that any person violating the same shall be deemed guilty of a misdemeanor and shall be imprisoned and fined, is wholly penal, and the death of the defendant after judgment and while the case is pending in an appellate court on writ of error operates to abate the entire cause of action, and the fine is not collectible from the defendant's estate.

[Ed. Note.—For other cases, see Fines, Cent. Dig. § 2701; Dec. Dig. § 17½.*]

In Error to the Circuit Court of the United States for the District of Oregon.

For opinion below, see 163 Fed. 1014.

In February, 1905, John H. Mitchell, then a United States Senator from the state of Oregon, was indicted by the grand jury for the district of Oregon for a violation of section 1782 of the Revised Statutes of the United States for agreeing to receive and receiving from one Frederick A. Kribs compensation for services rendered in appearing before the Commissioner of the General Land Office for the purpose of persuading the Commissioner to make special, expedite, and approve certain fraudulent applications and claims for tracts of public lands in the state of Oregon, in which the said Kribs was interested. The indictment contains seven counts, each alleging in substance that Mitchell, while a Senator of the United States, had accepted and received from Kribs various amounts set forth in the separate counts in payment for services rendered in appearing before the Commissioner of the General Land Office with relation to the applications, proceedings, claims, matters, and things in which the United States was directly interested. On this indictment Senator Mitchell was tried before a jury in the Circuit Court for the district of Oregon and found guilty. On the verdict as rendered by the jury the court, on July 25, 1905, entered a judgment that the defendant pay a fine of \$1,000, and that he be imprisoned for a term of six months. Thereupon Senator Mitchell gave a supersedeas bond, and on July 29, 1905, sued out a writ of error from the Supreme Court of the United States. While the writ of error was pending in the Supreme Court, Senator Mitchell died. This fact being suggested to the court by counsel, the writ of error was dismissed by the court, and a mandate issued to the Circuit Court "that such proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding." This mandate was filed in the Circuit Court on August 15, 1906, but no proceedings were had thereon until July 11, 1907, when David M. Dunne, the defendant in error, and the duly appointed and qualified administrator of the estate of John H. Mitchell, filed a motion, supported by his affidavit, praying for an order declaring the entire proceedings in the cause abated by reason of the death of the defendant, and for the cancellation of the fine imposed upon the defendant, together with the entry thereof in the judgment docket, and declaring the same to be no longer of any validity. The motion was granted, and a judgment entered accordingly. To this judgment the United States prosecutes the present writ of error.

John McCourt, U. S. Atty.

Bauer & Greene, for defendant in error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). In *United States v. Pomeroy* (C. C.) 152 Fed. 279, the defendant was convicted of giving rebates in violation of the interstate commerce act and its amendments, and sentenced to pay a fine. The defendant died after judgment and before the fine was paid. It was held by the Circuit Court that the judgment and entire proceedings abated on the death of the defendant, and it was not a claim enforceable against his personal representatives. An order was entered accordingly. The case was taken to the Circuit Court of Appeals for the Second Circuit upon writ of error, where the order was reversed upon the ground that when the order was entered the court had lost control of the judgment. The term in which the judgment was entered had expired before any proceedings in abatement had been taken. When, therefore, the court in a subsequent term made the order abating the judgment and all proceedings thereon, it had no power to make the order, and its action in making the same was held to be erroneous.

It is suggested on behalf of the United States that the same question arises in this case; that the judgment against Mitchell was entered on July 25, 1905, and the term in which the judgment was entered terminated on the first Monday of October, 1905, and the motion to abate the judgment was not entered until June 11, 1907. But the writ of error and supersedeas bond stayed the execution of the judgment and removed the record into the Supreme Court of the United States. Such proceeding, under section 1007 of the Revised Statutes, operated to suspend the execution of the judgment of the Circuit Court pending the writ of error in the Supreme Court and until the case was there determined or remanded. The *Slaughter-House Cases*, 77 U. S. 273, 291, 19 L. Ed. 915. Upon the death of the defendant and the suggestion of that fact to the Supreme Court by counsel, the writ of error was dismissed and the cause remanded to the Circuit Court, with direction "that such proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had." When this mandate was filed in the Circuit Court on August 15, 1906, the jurisdiction of that court reattached, and continued until action was had in accordance with the direction of the mandate. Such action was had in due course of procedure, and resulted in the judgment now before this court. The expiration of the term after the entry of the original judgment did not, under the circumstances, deprive the Circuit Court of jurisdiction to act upon the mandate; nor did the expiration of the term in which the mandate was received operate to deprive the court of jurisdiction to enter a judgment in accordance with its direction, when the proceedings thereon in due course required such action. It follows that the Circuit Court had jurisdiction to enter the judgment now under consideration.

The defendant in error moves the court to dismiss the writ of error for want of jurisdiction, on the ground that this is a criminal case, and no right has been conferred by law upon the United States to obtain a review of a judgment in such a case by writ of error from this court. In *United States v. N. Y. Cent. & H. R. R. Co.*, 164 Fed.

324, 90 C. C. A. 256, the Circuit Court of Appeals passed upon this identical question, and held that an order of the Circuit Court declaring a judgment in a criminal action abated by reason of the death of the defendant after the entry of the judgment was an independent proceeding of a civil nature, which might be reviewed in the Circuit Court of Appeals at the instance of the United States upon writ of error. In discussing the question of jurisdiction the court there said:

"At the outset the defendant contends that the government has no right to proceed in this way; that a writ of error can be sued out by the United States in a criminal case only to the Supreme Court, and to that court only in particular instances. The right of the government may be so limited in criminal cases. But this is not a criminal case. The issue in the criminal proceedings was the guilt of the accused. That issue had been terminated before these proceedings were instituted. Indeed, the very occasion for these proceedings was the closing of the criminal case by the rendition of the judgment. Instead of being criminal in their nature, these proceedings constitute, in effect, a civil suit by the representative of Mr. Pomeroy's estate to relieve it from the payment of the judgment, for a cause wholly apart from the question of his guilt or innocence. The contention that the United States has no standing to prosecute this writ is, therefore, not well founded."

We concur in that view. The words "criminal case" apply to proceedings in a court against an accused person charged with doing something forbidden, who, if found guilty, is punished. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 326, 24 Sup. Ct. 665, 48 L. Ed. 997. The present proceeding in abatement of judgment is not against an accused person charged with a crime, nor is an accused person a party to the proceeding. The judgment is against the person of John H. Mitchell; but no further proceeding can be had against him. The power of the court to enforce its judgment against him is at an end. The question of the civil liability of the estate of John H. Mitchell upon the judgment must, therefore, be a civil case, as distinguished from a criminal case. It follows that this court has jurisdiction over the writ of error.

The remaining question is whether the cause abated by the death of the defendant. In a criminal case the death of the accused after judgment, and while the case is pending in the appellate court upon writ of error, operates to abate the cause. *List v. Pennsylvania*, 131 U. S. 396, 9 Sup. Ct. 794, 33 L. Ed. 222; *Menken v. Atlanta*, 131 U. S. 405, 9 Sup. Ct. 794, 33 L. Ed. 221. In *Schreiber v. Sharpless*, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. Ed. 65, the Supreme Court said:

"The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action, on account of which the suit was brought, is one that survives by law. Rev. St. § 955 (U. S. Comp. St. 1901, p. 697). At common law actions on penal statutes do not survive (Com. Dig. tit. "Administration," B, 15), and there is no act of Congress which establishes any other rule in respect to actions on the penal statutes of the United States. The right to proceed against the representatives of a deceased person depends, not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought. If the cause of action survives, the practice, pleadings, and forms and modes of proceeding in the courts of the state may be resorted to in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties. Rev. St. § 914 (U. S. Comp. St. 1901, p. 684). But, if the cause of action dies with the person, the suit abates and cannot be revived. Whether an action survives depends on the substance of the cause of action, not

on the forms of proceeding to enforce it. As the nature of penalties and forfeitures imposed by acts of Congress cannot be changed by state laws, it follows that state statutes, allowing suits on state penal statutes to be prosecuted after the death of the offender, can have no effect on suits in the courts of the United States for the recovery of penalties imposed by an act of Congress."

The rule that a statutory penalty merged in the judgment becomes a debt, and may be recovered from the estate of the judgment debtor, does not apply in this case. The indictment was under section 1782 of the Revised Statutes (U. S. Comp. St. 1901, p. 1212), providing that every person offending against the statute should be deemed guilty of a misdemeanor, and should be imprisoned and fined. The verdict of the jury was guilty. The judgment imposed a punishment of a fine and imprisonment as provided by the statute. This judgment is before us, and is made the basis of the claim of the United States against the estate of the defendant. For the present purpose it is an indivisible judgment and wholly penal. It cannot be separated into parts, and one part kept alive as an indemnity, while the other, as a penalty, perishes with the death of the defendant. "Upon the face of the record, the action arises *ex delicto*; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender. 3 Bac. Abr. 539." *United States v. Daniel*, 47 U. S. 13, 12 L. Ed. 323. The entire cause of action abated upon the death of the defendant. *List v. Pennsylvania*, *supra*; *Menken v. Atlanta*, *supra*.

The judgment of the Circuit Court is affirmed

THE THRASHER.

(Circuit Court of Appeals, Ninth Circuit. August 2, 1909.)

No. 1,704.

1. SEAMEN (§ 30*)—DISCIPLINE AND PUNISHMENT—STATUTORY PROVISIONS.

Rev. St. § 4596, as amended by Act Dec. 21, 1898, c. 28, § 19, 30 Stat. 760 (U. S. Comp. St. 1901, p. 3113), which provides that seamen for willful disobedience to lawful commands shall be punishable at the option of the master by being placed in irons and by a forfeiture of pay, and for continued willful disobedience by being placed in irons on bread and water until such disobedience shall cease, and also by a forfeiture of pay, does not deprive the master of authority in his discretion to impose a milder punishment.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 195-211; Dec. Dig. § 30.*]

2. SEAMEN (§ 30*)—DISCIPLINE AND PUNISHMENT—CONSTRUCTION OF STATUTE—"PUNISHABLE."

In Rev. St. § 4596, as amended by Act Dec. 21, 1898, c. 28, § 19, 30 Stat. 760 (U. S. Comp. St. 1901, p. 3113), providing that offenses by seamen shall be punishable as therein prescribed, the word "punishable" does not mean "must be punished," but "may be punished" as therein provided.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 195-211; Dec. Dig. § 30.*]

For other definitions, see *Words and Phrases*, vol. 7, p. 5849.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. SEAMEN (§ 30*)—DISCIPLINE AND PUNISHMENT—LAWFULNESS OF PUNISHMENT.

An order of the master of a vessel requiring a seaman to go aloft and scrape the masts as a punishment for fighting in violation of orders, *held* within the master's discretion, and the placing of the seaman in irons with a stick under his knees and over his arms for his refusal to obey the first order, until he would consent to do so, not to entitle him to recover damages against the ship; the evidence being that it caused him no appreciable suffering.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 195-211; Dec. Dig. § 30.*]

Appeal from the District Court of the United States for the Northern District of California.

Edward C. Dean, appellant, brought a libel in rem against the whaling vessel Thrasher to recover \$600 damages on account of alleged breach of the contract of good treatment. Appellant's allegations are, in effect, that he was a mariner, and, after signing shipping papers, went aboard the Thrasher in the month of February, 1908, to go as a seaman for a whaling voyage in the North Pacific and Arctic Oceans; that in April, 1908, while the vessel was in Bering Sea, fast in ice, with the temperature below freezing, the master of the ship, without justification, caused libelant to be sent aloft, and there to be kept for about an hour and a half scraping the main royal and top-gallant masts; that while scraping the masts libelant's hands became so numb that he could not continue scraping; that thereupon said libelant was ordered down from aloft, and that the master caused handcuffs to be put on libelant's wrists, and his wrists, when handcuffed, to be placed below his knees with a pole placed over each of his arms at the elbows, and under each of his knees, the pole being lashed with stout ropes; that while so tied libelant was confined in the runway of the vessel for about 45 minutes; that after he was released the master again sent him aloft to scrape the masts, and kept him aloft for about an hour, when he was permitted to come down and to have one hardtack and a cup of water, and was then again sent aloft to continue scraping, and was kept aloft about an hour and a half.

Claimant denies the allegations of cruelty and breach of the contract of good treatment, and alleges, in substance, that during good weather the libelant was sent aloft to scrape the top-gallant mast as a punishment for assaulting other members of the crew; that libelant persistently disobeyed the orders of the master, and was thereupon ordered to be put in irons. Claimant sets up willful disobedience of orders, and denies that a stick was put under libelant's knees so as to cause him any suffering unless his position would continue for a long period of time. It says that the master told libelant that he could be released the moment he would declare himself ready to obey orders and submit to the master's reasonable discipline; but that libelant willfully refused to obey orders, and therefore voluntarily remained in irons and confinement, but was released as soon as he agreed to submit to the master's lawful orders. Claimant denies that the master caused libelant to be sent aloft a second time without justification, denies that the master kept him aloft for about an hour, and says that the master kept him aloft a much shorter time, and only long enough to ascertain that libelant obeyed lawful orders and submitted to lawful discipline, denies that libelant was sent aloft a third time, and denies all allegations of pain, suffering, and distress.

The issues were tried before the District Court, where it was decided that the evidence sustained the allegations of the answer, and that the facts affirmatively stated in the answer constituted a sufficient defense to claim of libelant for substantial damages. Decree was entered dismissing the libel with costs. Libelant appeals.

F. R. Wall, for appellant.
Andros & Hengstler, for appellee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

HUNT, District Judge (after stating the facts as above). We will assume that appellant is correct in his position that sections 4596 and 4597 of the Revised Statutes of the United States of 1878, as amended by Act Dec. 21, 1898, c. 28, §§ 19, 20, 30 Stat. 760, 761 (U. S. Comp. St. 1901, pp. 3113, 3115), relating to offenses of seamen and punishment therefor, are applicable to whalers as seamen, and that by section 26 of the act whaling vessels are brought within its provisions, and upon this assumption we will inquire whether the decision of the District Court should be overruled or not.

There was ample evidence to show that the libelant seaman had frequently made assaults upon his shipmates, that he was a quarrelsome man of bullying nature, and that he had been reprimanded for "slugging" shipmates on several occasions shortly before the incidents which gave rise to this action. It appears that upon April 11, 1908, he assaulted a shipmate, thus disobeying the captain's express order that there should be no fighting. While the captain was reprimanding him for this last assault, several of the crew told the mate that, unless the captain stopped libelant from fighting the men in the forecabin, they would kill him. The mate at once told the captain what the men said, and, to punish libelant for the assault, the captain ordered him to go to the masthead and scrape it. The temperature was probably just below freezing, so libelant took his mitts and coat. Claimant's evidence is to the effect that libelant sat at the masthead for about 20 minutes, but did not scrape; that thereupon he was called down, and asked if he was going to scrape the mast; that he said "No," and refused duty; that the captain then asked him if he knew what would become of him if he refused to do duty; that he replied that he would go in irons first, and would stay there; that thereupon, by the captain's orders, the mate put libelant in irons with his wrists below the knees, and a stick placed under his knees, so tied with twine as to prevent him from shoving his feet out; that libelant was told that he would be released whenever he would "sing out" and "be a man," and do his duty. Libelant was put in the runway, where he remained in irons about 45 minutes, when he asked to be and was released. It is in evidence that he was then again sent to the masthead for about half an hour, finished scraping, and came down, and was given a meal of hardtack and water for dinner. Whether he was sent back to the masthead a third time, is not clear. The story of libelant conflicted in part with that of the master and mate, libelant saying, among other things, that he scraped the mast until his hands became numb, and that he did not refuse to scrape any longer. He also said that by his treatment and the position he was in he was made to suffer, while claimant's evidence is to the effect that his position would not produce suffering unless he remained in it for some period of time.

From all these facts, it is plain that libelant was guilty of willful disobedience of the order of the master not to fight, and that he was liable to severe punishment therefor. The act of December 21, 1898 (Rev. St. § 4596) provides that, whenever any seaman who has been

lawfully engaged commits any of the offenses enumerated in the act, "he shall be punishable as follows":

"Fourth. For willful disobedience to any lawful command at sea, by being, at the option of the master, placed in irons until such disobedience shall cease, and upon arrival in port, if of the United States, by forfeiture from his wages of not more than four days' pay, or upon arrival in a foreign port by forfeiture from his wages of not more than four days' pay, or, at the discretion of the court, by imprisonment for not more than one month.

"Fifth. For continued willful disobedience to lawful command or continued willful neglect of duty at sea by being, at the option of the master, placed in irons, on bread and water, with full rations every fifth day, until such disobedience shall cease, and upon arrival in port, if of the United States, by forfeiture, for every twenty-four hours' continuance of such disobedience or neglect, of either a sum of not more than twelve days' pay or sufficient to defray any expenses which have been properly incurred in hiring a substitute, or upon arrival in a foreign port, in addition to the above penalty, by imprisonment for not more than three months, at the discretion of the court."

As we understand appellant's argument, it is that inasmuch as the statute quoted provides that one doing an act is punishable in a certain way, and inasmuch as there is no expressed liability to punishment in any other way, the master of a ship has no right to impose any punishment upon a seaman committing an offense enumerated in the statute by means other than those expressly specified in the statute. As applied to the facts, it is contended that, when this libellant willfully disobeyed the command of the master against fighting, the only right of punishment which the master had was to put him in irons, to enforce forfeiture of wages or otherwise to punish more severely, as the disobedience may have warranted, and as the statute has specified. Involved, too, in this argument, is the proposition that the master exceeded his authority in the first order to libellant to scrape the masts. The necessary deduction from this reasoning is that the master of a ship has no right or power to impose less punishment for disobedience of a lawful order than the full measure written in the law, and that no matter how slight may be the disobedience to a command, or how trivial may be the continued neglect of duty, if it has been willful, the offending seaman must either go unpunished altogether or be put into irons with possible loss of pay, and on bread and water until the disobedience shall cease. If this is correct, the master has no power to punish by way of change of duty. Carried farther forward, it leads to the conclusion that there can be no administration of correctional discipline by way of confinement unless in irons; and that irons alone may not fulfill the exactions of the law in instances of continued willful disobedience, for the language specifies irons and bread and water, and it may be forfeiture of pay besides. We cannot accept the conclusions made inevitable by the argument. They would lead to the establishment of rules practically taking from the master a right to punish mildly if the exigencies warranted his doing so. A result would be the denial of the master's discretion to exercise humane consideration for seamen, which pervades the spirit of maritime law, notwithstanding the absolute authority necessarily possessed by a master on board his ship.

The common as well as the marine law makes it lawful for the master to correct mariners in a reasonable and moderate manner as the

particular circumstances of each case may call for; and in providing that a seaman guilty of willful disobedience "shall be punishable" by irons and forfeiture of pay, or irons, bread and water, and forfeiture of pay, as the circumstances of the disobedience may warrant, Congress could not have meant to circumscribe the right of the master by taking from him authority to impose a less severe punishment, where the master in his discretion chooses to impose it, or to deprive him of the power to apply punishment by way of correction to preserve the good order and discipline of the ship. The word "punishable" does not mean "must be punished" but "liable to be punished" as specified. In *re Mills*, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. Ed. 107; *People v. Keating*, 61 Hun, 260, 16 N. Y. Supp. 748; *U. S. v. Watkinds* (C. C.) 6 Fed. 152; *People ex rel. v. Murphy*, 185 Ill. 623, 57 N. E. 820. Surely it does not lie in the mouth of a seaman who has been guilty of willful disobedience of a lawful order to complain that the punishment imposed was not as severe as the offense made him liable for. In discussing the rights and duties of masters of ships in relation to the crew during the voyage *Judge Story, in United States v. Freeman*, Fed. Cas. No. 15,162, said:

"It is doubtless true that the master has a right to require of them a prompt and ready performance of duty, and an habitual obedience to reasonable commands at all times. The safety of the ship and the success of the voyage essentially depend upon the due enforcement of this right. And in proportion as the urgency of the occasion, and the necessities of the sea service, require instant compliance with such commands, the duty of the seamen to obey become more pressing and obligatory. If obedience does not follow, the master may compel it by punishment, and the nature and extent of the punishment must be decided by the exigency of the case. The master may also apply punishment by way of correction for past as well as present offenses to preserve the good order and discipline of the ship. But, after all, however summary or strict may be his power, it is not unlimited, nor is it to be exercised in an arbitrary, cruel, or revengeful manner. The authority of the master on board the ship is nearly allied to that of a parent, and is to be used with reasonable tenderness and humanity. No punishment can be inflicted unless for reasonable provocation or cause; and it must be moderate and just and proportionate to the nature and aggravation of the offense. The law does not permit the master to gratify a brutal and low revenge, or to inflict cruel and unnecessary punishments. It allows no excess, either in the mode or the nature, or the object of the punishment. It upholds the exercise of the authority only when it is for salutary purposes, not when it arises from personal prejudice, caprice, or dislike, or from gross and vindictive passions."

The order to scrape the masts was in itself to do a seaman's duty, and the District Court evidently did not believe libellant's story that he suffered seriously from cold. We cannot find that the order was unreasonable or unjustifiable, although the motive for the order was to punish. It was very much less severe a penalty than might have been given if the full authority of the master had been used. Libellant ought to have obeyed; and his willful disobedience brought upon him the consequences. Having refused to obey such lawful order, to enforce obedience, the imposition of the punishment specified in the statute became the absolute right of the master. Hence libellant cannot complain because he was afterwards put in irons and given bread and water. If, after his release, he was again sent to the mast, it is not a just cause for complaint. The putting of the stick under libellant's

knees was an act on the part of the master that cannot be approved of, but the weight of the evidence is that it caused no appreciable suffering for the time libellant remained in irons.

The learned judge of the court below must have so found, and, as his conclusion was supported by evidence, this court will not set it aside. Libellant's case is without substantial merit.

Decree affirmed.

FREEDING et al. v. ALLEN et al.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1909.)

No. 1,667.

LICENSES (§ 33*) — ALASKA — CONSTRUCTION OF STATUTES—APPORTIONMENT OF LICENSE MONEYS IN TOWNS.

The power given to the District Court in Alaska by Act March 2, 1903, c. 978, 32 Stat. 944, to apportion the license moneys collected from persons for doing business within an incorporated town, and thereby required to be paid over by the clerk of the court to the treasurer of the municipality, and to designate by order the proportion that should be used for school and for municipal purposes, respectively, was taken away by Act April 28, 1904, c. 1778, 33 Stat. 529, which for the first time authorized the common council of incorporated towns to levy a general tax for school purposes, and required it to establish and maintain schools and provide the necessary funds therefor, and which also provided that the license moneys should be paid over to the municipal treasurer without qualification, "to be used for school and municipal purposes," and repealed all inconsistent acts. Since such act the apportionment of such fund rests with the common council of the town.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. § 67; Dec. Dig. § 33.*]

In Error to the District Court of the United States for the Second Division of the District of Alaska.

John Rustgard and Campbell, Metson, Drew, Oatman & MacKenzie, for plaintiffs in error.

C. S. Hannum, Albert H. Elliot, and John T. Reid, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

ROSS, Circuit Judge. The plaintiffs in error constitute the common council of the town of Nome, in the district of Alaska, and the defendants in error the school board of the Nome school district. The school board having presented a petition in writing to the court below, asking its order apportioning the federal license moneys collected by it in pursuance of law, so that the petitioner should receive 50 per cent. thereof, or such other percentage as the court should deem proper, up to the amount of \$20,500, with which to pay the indebtedness already incurred and to be incurred during the school year then ensuing, and directing the treasurer of the town of Nome to pay directly to the petitioners such percentage of the license moneys as should be apportioned by the court for the purposes stated, and an order to show cause

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

why the petition should not be granted having been served upon the plaintiffs in error by the direction of the court, objections were filed by them, to which the petitioners replied. The hearing resulted in these findings:

"(1) That the sum of \$20,500 is the proper amount to be apportioned for the use of the school board for the purpose of enabling the board to pay the indebtedness against the school district, and for the due maintenance of the Nome public schools for the ensuing school year.

"(2) That on the 26th day of August, 1908, the finance committee of the common council of the town of Nome recommended that the request of the Nome school board that the \$20,500 be made available for school purposes for the ensuing school year be granted, and that said sum be made available for such purposes, with the following exception: That \$3,000 thereof be deducted from the amount so to be made available for school purposes for the current year, until such time as the school board has exhausted its resources at law to recover the sum of \$3,000 claimed by said common council to have been illegally withdrawn from the funds of the school district by members of former school boards.

"(3) That on the 29th day of August, 1908, the recommendation of the finance committee of the common council of the town of Nome was regularly approved by the members of said common council in regular meeting assembled, and that by reason of the action of said common council only \$17,500 was made available for school purposes, and that \$3,000 of said sum of \$20,500 is not available for school purposes; the same being made dependent upon action of said petitioners to recover the said sum of \$3,000 claimed by said common council to have been illegally expended by former members of the school board.

"(4) That said sum of \$3,000, in addition to said sum of \$17,500, should be made available for school purposes for the ensuing school year, without regard to any liability of former members of the Nome school board to the Nome school district."

Upon these findings the court adjudged that the council—

"set apart, apportion, and pay over to the treasurer of the Nome school board, for school purposes for the ensuing school year, the additional sum of \$3,000 from the federal license moneys now in the hands of the clerk of this court, or hereafter to come into his hands as such clerk, and by him paid over to the common council of the town of Nome."

The power of the court below to make the order is questioned by this writ of error, which question depends upon the proper construction of various statutes enacted by Congress in respect to the district of Alaska.

The act of March 3, 1899 (30 Stat. 1253, 1336, c. 429), provided, among other things, that any person or persons, corporation, or company prosecuting or attempting to prosecute any of certain enumerated lines of business within the district of Alaska should first apply for and obtain license so to do from a District Court or a subdivision thereof in said district, and pay for such license for the respective lines of business and trade as therein specified. That act was amended by one of June 6, 1900, entitled "An act making further provision for a civil government for Alaska, and for other purposes" (31 Stat. 321, 330, 521, c. 786), which, among other things, provided for the incorporation of any community having 300 permanent inhabitants, with certain enumerated officers, including "a school board of three directors, who shall have the exclusive supervision, management and control of the public schools and school property within said corporation, and shall be elected in the same manner and for the same term as the council,"

therein also provided for, and further providing that the treasurer of the corporation shall be ex officio treasurer of the school board, and—

“that fifty per cent. of all license moneys provided for by act of Congress approved March third, eighteen hundred and ninety-nine, entitled ‘An act to define and punish crimes in the district of Alaska, and to provide a Code of Criminal Procedure for said district,’ and any amendments made thereto, required to be paid by any resident, person, or corporation, for business carried on within said corporation, shall be paid over by the clerk of the United States District Court receiving the same to the treasurer of said corporation, upon taking his receipt therefor in duplicate, one of which duplicate receipts shall be forwarded to the Secretary of the Treasury of the United States by the clerk as a voucher in lieu of cash, and the other receipt shall be retained by the clerk. The money received by the treasurer of the corporation shall be used under the direction of the council for school purposes.”

Prior to the act just mentioned, to wit, that of June 6, 1900, there was no provision for the organization of any municipal corporation within the district of Alaska, and while the council of such corporations as should be organized thereunder was thereby given the power to levy and collect taxes for certain specified local purposes, no power was given such council to levy any tax for school purposes; the schools being provided for, as above shown, by the payment by the clerk of the District Court to the treasurer of the municipal corporation of one-half of the license moneys coming into his hands.

The subsequent act of March 3, 1901 (31 Stat. 1438, c. 859), so amended the act of June 6, 1900, as to provide:

“That where it is made to appear to the satisfaction of the District Court that the whole amount heretofore or hereafter received by the treasurer of the corporation from the clerk of the court is not required for school purposes, the court may from time to time, by orders duly made and entered, with a statement of the facts upon which they are based, authorize the expenditure of the accumulated surplus, or any part thereof, for any of the municipal purposes enumerated in this chapter. Fifty per centum of all license moneys provided for by said act approved March third, eighteen hundred and ninety-nine, and any amendments made thereto, that may hereafter be paid for business carried on outside incorporated towns in the district of Alaska and covered into the Treasury of the United States shall be set aside to be expended so far as may be deemed necessary by the Secretary of the Interior, within his discretion and under his direction, for school purposes outside incorporated towns in said district of Alaska.”

On the 2d of March, 1903, Congress passed an act, entitled “An act amending the Civil Code of Alaska, providing for the organization of private corporations, and for other purposes” (32 Stat. 944, c. 978), so amending the act of March 3, 1901, in regard to license moneys as to provide as follows:

“That all license moneys provided for by act of Congress approved March third, eighteen hundred and ninety-nine, entitled ‘An act to define and punish crimes in the district of Alaska, and to provide a Code of Criminal Procedure for said district,’ and any amendments thereto, required to be paid by any resident, person, or corporation for business carried on within the limits of any incorporated town, and collected by the clerk of the District Court, shall be paid over, by said clerk to the treasurer of such corporation, to be used for municipal and school purposes in such proportions as the court may order, but not more than fifty per centum, nor less than twenty-five per centum thereof shall be used for school purposes, the remainder thereof to be paid to the treasurer of the corporation for the support of the municipality, and the clerk of said court shall take said treasurer's receipt therefor in triplicate, one of

which receipts shall be forwarded to the Secretary of the Treasury, another to the Attorney General, and the other shall be retained by the clerk; provided, that fifty per centum of all license moneys provided for by said act of Congress approved March third, eighteen hundred and ninety-nine, and any amendments made thereto, that may hereafter be paid for business carried on outside incorporated towns in the district of Alaska, shall be covered into the treasury of the United States and set aside to be expended, so far as may be deemed necessary by the Secretary of the Interior, within his discretion and under his direction, for school purposes outside incorporated towns in said district of Alaska."

On the 28th day of April, 1904, Congress passed an act, entitled "An act to amend and codify the laws relating to municipal corporations in the district of Alaska" (33 Stat. 529, c. 1778), sections 7 and 8 of which are as follows:

"Sec. 7. That all license moneys collected by the clerk of the District Court from any person for any business, trade, or occupation carried on within the limits of any incorporated town in the district of Alaska pursuant to the provisions of an act entitled 'An act to define and punish crimes in the district of Alaska, and to provide a Code of Criminal Procedure for said district,' approved March third, eighteen hundred and ninety-nine, and all acts or parts of acts amendatory thereof, shall by said clerk be paid over to the treasurer of the town to be used for school and municipal purposes within the town. The clerk shall take a receipt for such money in triplicate, one of which receipts shall be filed with the Secretary of the Treasury, one with the Attorney General of the United States, and one shall be retained by the clerk.

"Sec. 8. That all acts and parts of acts inconsistent with this act are, to the extent of such inconsistency, hereby repealed, and the provisions of this act shall apply to and govern all municipal corporations heretofore created in the district of Alaska."

This act of April 28, 1904, in its fourth section, prescribed the powers the common council of incorporated towns therein provided for, as well as all municipal corporations theretofore created in Alaska (see section 8 of the act), shall have and exercise, including the power "to assess, levy and collect a general tax for school and municipal purposes, not to exceed two per centum of the assessed valuation upon all real and personal property, and to declare the same a lien upon such property, and to enforce the collection of such lien by foreclosure, levy, distress and sale," with certain exceptions not necessary to be mentioned; and including the power—

"to establish one or more school districts, to provide the same with suitable school houses, and to provide the necessary funds for the maintenance of schools, but such school districts and schools when established shall be under the supervision and control of a school board of three members, consisting of a director, a treasurer and a clerk, to be elected annually by the vote of all adults who are citizens of the United States, or who have declared their intention to become such, and who are residents of the school district."

On the 27th day of January, 1905, Congress passed the last act which bears upon the question now before us, which act was entitled "An act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the district of Alaska, and for other purposes" (33 Stat. 616, c. 277), the fourth section of which, omitting those portions thereof having no pertinency here, is as follows:

"That the common council of the incorporated towns in such district shall have the power, and it shall be their duty in their respective towns, to estab-

lish school districts, to provide the same with suitable school houses, and to maintain public schools therein, and to provide the necessary funds for the schools; but such schools when established shall be under the supervision and control of a school board of three members, consisting of a director, a treasurer, and a clerk, to be elected annually by the votes of all adults who are citizens of the United States, or who have declared their intention to become such, and who are residents of the school district. * * * All money available for school purposes, except for the construction and equipment of school houses and the acquisition of sites for the same, shall be expended under the direction of said board, and the treasurer of said board shall be the custodian of said money, and he shall, before entering upon the duties of his office, give his bond with sufficient sureties to the school district in such sum as the common council may direct, and subject to its approval, but not less than twice the amount that may come into his hands as treasurer, conditioned that he will honestly and faithfully disburse and account for all money that may come into his hands as such treasurer. The said board shall have the power to hire and employ the necessary teachers, to provide for heating and lighting the school houses, and in general to do and perform everything necessary for the due maintenance of a proper school."

By the fifth section of the act of January 27, 1905, provision was made for the establishment of school districts outside of incorporated towns and for the maintenance thereof.

It will be readily seen from the foregoing provisions of the various acts of Congress upon the subject that by that of March 3, 1899, certain license taxes upon certain lines of business carried on in Alaska were authorized to be collected by the clerk of the District Court, who was required to pay them into the treasury of the United States; that the next act upon the subject, that of June 6, 1900, first provided for the organization of municipal corporations in Alaska, and for schools therein, and a school board therefor of three directors, with "exclusive supervision, management and control of the public schools and school property within said corporation," and a common council and treasurer of the municipality, with the further provision that the treasurer of the municipality should be ex officio treasurer of the school board, and that 50 per cent. of the license moneys provided for by the act of March 3, 1899, should be paid by the clerk of the District Court to the treasurer of the municipality, who should use it under the direction of the council for school purposes; that by its next act of March 3, 1901, Congress provided that, where it was shown to the satisfaction of the District Court that the whole amount received by the treasurer of the municipality from the clerk of the court is not required for school purposes, "the court may from time to time, by orders duly made and entered, with a statement of the facts upon which they are based, authorize the expenditure of the accumulated surplus, or any part thereof, for any of the municipal purposes enumerated" therein; that by its next act upon the subject, that of March 2, 1903, Congress provided that all of the license moneys collected by the clerk of the District Court should be paid over by him to the treasurer of the municipality, "to be used for municipal and school purposes in such proportions as the court may order, but not more than fifty per centum, nor less than twenty-five per centum thereof shall be used for school purposes, the remainder thereof to be paid to the treasurer of the corporation for the support of the municipality." But by its act of April 28, 1904, entitled "An act to amend and codify the laws relating to

municipal corporations in the district of Alaska," Congress so amended its previous provisions upon the subject as to declare that all license moneys collected by the clerk of the District Court from any other person for any business, trade, or occupation carried on within the limits of any incorporated town within the district of Alaska, pursuant to its previous acts, "shall by said clerk be paid over to the treasurer of the town, to be used for school and municipal purposes within the town," and by section 8 of its act of April 28, 1904, provided:

"That all acts and parts of acts inconsistent with this act are, to the extent of such inconsistency, hereby repealed, and the provisions of this act shall apply to and govern all municipal corporations heretofore created in the district of Alaska."

Congress thus took away from the District Court the power theretofore vested in it to apportion the license moneys, collected by its clerk and by him paid over to the treasurer of the town, to municipal and school purposes, and also eliminated the provision in the act of March 2, 1903, to the effect that not more than 50 per centum nor less than 25 per centum of such license moneys should be used for school purposes, requiring, without qualification, all of such moneys to be paid over by the clerk of the District Court to the treasurer of the municipality "to be used for school and municipal purposes"—obviously, we think, to be used for such purposes under the direction and control of the municipal authorities, and not under that of the court. And that such was the intent of Congress by its act of April 28, 1904, is further shown by the fact that, for the first time in its legislation in respect to Alaska, Congress, in the fourth section of its act of April 28, 1904, in prescribing the powers of the common council of incorporated towns therein provided for, as well as all other municipal corporations theretofore created in Alaska, gave such corporations the power to assess, levy, and collect a general tax for school as well as other municipal purposes, with certain exceptions, and with power "to establish one or more school districts, to provide the same with suitable school houses, and to provide the necessary funds for the maintenance of schools."

Under this power to levy a tax for school purposes, Congress manifestly conferred upon the common council of incorporated towns the right to supplement, if need be, the license moneys it required to be paid by the clerk of the District Court to the treasurer of the municipality "to be used for school and municipal purposes," by a general tax for school purposes. It results that it was not for the court below to determine "the proper amount to be apportioned for the use of the school board for the purpose of enabling the board to pay the indebtedness against the school district, and for the due maintenance of the Nome public schools for the ensuing school year," for all its previous authority in the premises was taken away by the provisions of the act of April 28, 1904, and that it erred in adjudging, as it did, that the council—

"set apart, apportion, and pay over to the treasurer of the Nome school board, for school purposes for the ensuing school year, the additional sum of \$3,000

from the federal license moneys now in the hands of the clerk of this court, or hereafter to come into his hands as such clerk, and by him paid over to the common council of the town of Nome."

The judgment is accordingly reversed.

METROPOLITAN SECURITIES CO. v. LADD.

(Circuit Court of Appeals, Second Circuit. July 13, 1909.)

No. 290.

CONTRACTS (§ 164*)—CONSTRUCTION—CONTEMPORANEOUS CONTRACTS CONSTRUED TOGETHER.

A street railway company leased its entire system and property for a long term. A contract was subsequently made between them by which the lessee agreed to furnish to the lessor \$8,000,000 in cash to make certain extensions and pay indebtedness, and the lessor agreed to issue its improvement notes for the same amount to defendant, a security company, with collateral security. By a contemporaneous agreement between the lessee and defendant the latter agreed that it would when required, on reasonable notice, and in any event before January 1, 1909, furnish to the lessee such sums as might be required by it to carry out its agreement with the lessor. A third agreement was made between defendant and a fourth corporation by which defendant was to deliver the notes and security received from the lessor to the other party, which was to supply the \$8,000,000, to be raised by a sale of its own obligations, secured by collateral deposited with a trust company, in accordance with a fourth contract between them. The several contracts were fully performed, except that defendant paid over to the lessee only a part of the money, refusing on the lessee's insolvency to pay more. The several corporations, except the trust company, were practically controlled by the same persons, the fourth corporation, which in fact furnished the money owning 96 per cent. of the stock of defendant, and defendant the entire stock of the lessee. *Held*, that all the contracts must be construed together as one, and, so construed, the transaction was not a loan by defendant, but it simply acted as a conduit for the transfer of the securities and payment of the money to the lessee, and that, having received it for the purpose, and the contracts having been fully executed by all other parties, it had no concern with the solvency or insolvency of the lessee, whose receivers were entitled to recover the unpaid part of the money.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 746-748; Dec. Dig. § 164.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by William W. Ladd, as receiver of the New York City Railway Company, against the Metropolitan Securities Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On writ of error to review a judgment entered February 11, 1909, in the Circuit Court for the Southern District of New York in favor of the plaintiff for \$5,271,582.54. The action was tried by the court, a jury trial being waived by written stipulation. The court made numerous findings of fact, those numbered 13, 15, 16, 17, 23, 25, 26, and 32 being duly excepted to by the defendant. The defendant also presented numerous proposed special findings which the court declined to adopt, the defendant reserving an exception to the refusal of the court to find those numbered 11, 15, 16, 17, 21, 24, 25, 28, 29, 30, and 33 to 41 inclusive. The defendant also presented 22 proposed con-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

clusions of law which the court declined to affirm, except the one numbered 22, and the defendant reserved an exception to each refusal.

The action was originally brought by Messrs. Joline and Robinson, as receivers of the New York City Railway Company. The present plaintiff was appointed receiver in place of said Joline and Robinson on the 27th day of July, 1908, and was duly substituted as plaintiff by an order of the Circuit Court entered February 10, 1909.

The complaint, after reciting the appointment of the receivers of the New York City Railway Company and the authority to bring this suit, alleges that all the times therein mentioned the defendant, the New York City Railway Company, and the Metropolitan Street Railway Company were New York corporations, and that the latter on the 14th day of February, 1902, was operating as owner, lessee, and by means of subsidiary companies, practically the entire surface street railway system of the city of New York. That on the said 14th day of February, 1902, the Metropolitan Company leased its systems and lines to the New York City Company for the term of 999 years, and the City Company took possession and operated the same under the lease, and continued to do so until the appointment of the receivers by order made September 24, 1907.

The complaint alleges further that on the 22d day of May, 1907, the City Company entered into an agreement with the Metropolitan Company whereby the City Company promised that it would when required, on reasonable notice, and in any event before January 1, 1909, furnish the Metropolitan Company \$8,000,000 in cash. The agreement further provided that the Metropolitan Company would forthwith issue and deliver to the Metropolitan Securities Company, the defendant herein, its three-year 5 per cent. improvement notes to the face value of \$8,000,000, and for security would assign to the Securities Company all claims, notes, and accounts of every description which the Metropolitan Street Railway Company had at the date of said agreement or thereafter might have against any of its subsidiary companies. That the securities were assigned as provided in said agreement.

It is alleged further that on the same day (May 22d) the City Company entered into an agreement with the Securities Company whereby it agreed that the Securities Company would when required on reasonable notice, and in any event before January 1, 1909, furnish to the City Railway Company such sums as might be required by it to carry out said agreement between the Metropolitan Street Railway Company and the City Company. That this covenant upon the part of the Securities Company formed the consideration for the said agreement on the part of the City Company to make said payments to the Metropolitan Street Railway Company, and induced the making of the agreements to do so. Both of these contracts are in writing, and are set out in full in the opinion of the Circuit Judge, and are known as schedules A and B. They need not be repeated.

The complaint alleges further that the City Company and its receivers fully performed its agreement with the Metropolitan Company, and \$8,000,000 has been paid and incurred pursuant to its terms, for which no consideration has been received except the promise of the defendant to repay said sum. That the Metropolitan Company has performed the agreement on its part with the City Company, and has delivered to the defendant prior to September, 1907, the full consideration for the defendant's said agreement to repay the sums paid by the City Company, to wit, the \$8,000,000 of improvement notes of the Metropolitan Company, and as collateral thereto the notes of the Third Avenue Railroad Company, Twenty-Eighth and Twenty-Ninth Streets Crosstown Railroad Company, Twenty-Third Street Railroad Company, and Second Avenue Railroad Company, aggregating \$8,148,209.91. That the defendant accepted the said notes, and has continued to hold the same for its own use. That the said payments to the Metropolitan Company were made at the instance of the Securities Company, and in reliance upon its agreement to repay the New York City Railway Company for such advances, no other consideration having been received by said City Company. That the Securities Company has paid only the sum of \$3,036,000 to the City Company, and there is due a balance of \$4,964,000. That the agreements heretofore mentioned were made to enable the Metropolitan Company to discharge a floating indebtedness and

make necessary improvements and changes of motive power necessitating the expenditure of \$8,000,000.

Judgment is demanded for \$4,964,000.

The answer admits the appointment of receivers of the New York City Railway Company, and that on the 14th of February, 1902, and for some time prior thereto, the Metropolitan Street Railway Company operated a large portion of the street surface railroads in the borough of Manhattan. It admits the execution of schedules A and B, the reception by it of certain papers purporting to be improvement notes of the Metropolitan Street Railway Company for the face amount of \$8,000,000, and, as collateral thereto, paper writings purporting to be promissory notes of the companies as alleged in paragraph 7 of the complaint, and it admits the payment of \$3,036,000 as therein alleged.

The answer puts in issue the other allegations of the complaint, and as an affirmative defense alleges the insolvency of the New York City Railway Company and of the Metropolitan Street Railway Company.

The opinions of the court below are reported sub nom. *Joline v. Metropolitan Securities Co.* (C. C.) 164 Fed. 144, 650.

Cravath, Henderson & De Gersdorff (De Lancey Nicoll and Richard Reid Rogers, of counsel), for plaintiff in error.

Joseph H. Choate, Arthur H. Masten, and Robert C. Beatty, for defendant in error.

Before COXE, Circuit Judge, and HOLT and HOUGH, District Judges.

PER CURIAM. It will be observed from an examination of the pleadings that few of the salient facts are disputed. These facts appear in the opinion of the Circuit Judge, and need not be restated. The question before us is one of law, depending largely upon the construction which is placed upon the second paragraph of schedule B. It will, therefore, be unnecessary to consider the defendant's exceptions in detail.

On the 22d day of May, 1907, the day on which schedule B was signed, an agreement between the Metropolitan Company and the City Railway Company was also executed, known as "Schedule A," by which, after reciting that the account between the parties had been stated and approved, it was agreed that "the City Company shall as and when required, on reasonable notice, and in any event before January 1, 1909, furnish the Metropolitan Company eight million dollars in cash."

Schedule A further provided that the Metropolitan Railway Company should forthwith issue to the Metropolitan Securities Company its improvement notes to the face amount of \$8,000,000, and for the security of said notes the Railway Company should assign all claims, notes, and accounts "which it now has and in the future may have against any of its subsidiary companies."

So far, then, we have an admitted obligation of the City Company to furnish \$8,000,000 to the Metropolitan Company, and an agreement by the latter to issue its improvement notes to that amount with collateral. Schedule B recites the making of schedule A, a copy of which is attached thereto. By the second paragraph of schedule B, the Securities Company agreed, on reasonable notice, to furnish to the City Company such sums as were required to carry out the agreement with the Metropolitan Company, viz., to "furnish the Metropolitan

Company eight million dollars in cash." The Securities Company also agreed to advance to the City Company such other sums as may be required by the City Company before January 1, 1909, against the issue of demand notes of the City Company therefor. This sentence, the second of paragraph 2, relates to an entirely separate and distinct obligation in no way connected with the first. No demand notes were issued for "such other sums," and therefore this provision of the agreement was never called into action.

The City Company assigned to the Securities Company all the shares of stock and securities set out in schedule A. On the same day, May 22, 1907, the Securities Company entered into an agreement with the Interborough-Metropolitan Company which recites by way of preamble that the Interborough Company is the owner of more than 96 per cent. of the capital stock of the Securities Company, which latter company is in need of certain moneys for corporate purposes. The agreement provides that the Interborough Company shall advance to the Securities Company prior to July 1, 1909, \$15,000,000 in such amounts as the Securities Company may require; the latter agreeing to deliver to the former its demand notes for the said sum and certain other notes and stock as security therefor. On May 23, 1907, the Interborough-Metropolitan Company entered into an agreement with the Mercantile Trust Company whereby the latter agreed to certify as trustee the former's notes to the amount of \$15,000,000.

In the endeavor to find a way through this maze of corporations, contracts, and obligations, it is well to remember that the Securities Company owned the entire capital stock of the City Company, that 96 per cent. of the stock of the Metropolitan Securities Company was held by the Interborough-Metropolitan Company, and that all of the railway companies connected with this controversy were controlled, practically, by the same individuals. There may have been a reason for involving the street railway system of New York in such an impenetrable snarl, but it has not been disclosed in the record. The project of operating and financing the street railway systems of New York during all the times in question, though protean in the facility with which it appeared in different forms and under different names, was the same familiar enterprise, and managed, with the exception of the Mercantile Trust Company, by the same group of men. In our opinion, the true view of the obligation between these parties can only be obtained by considering all the traction companies as being merely parts or administrative divisions of one complex concern, and all the separate contracts executed, in relation to obtaining \$8,000,000 for the New York City Company, as being one contract, to be construed together. The Metropolitan Street Railway Company had leased all its properties to the New York City Company. The Interborough-Metropolitan Company, through its stock ownership, actually controlled the traction business, and, although the other companies still maintained a distinct corporate existence, and could make obligatory contracts with each other, they were, in fact, merely departments or branches of the business controlled by the Interborough Company. It was clearly the intent of the parties to the May, 1907, agreements to provide a fund for paying the debts of

the Metropolitan Railway Company and for necessary future construction, aggregating about \$8,000,000, which sum the Securities Company undertook to furnish to the City Company absolutely and without condition. The language of schedule B in this regard is unambiguous. It provides that "the Securities Company shall * * * furnish to the City Company such sums as may be required by it to carry out" its agreement with the Metropolitan Company to pay \$8,000,000.

When the various contracts of May 22 and May 23, 1907, were made, the situation was this: By the provisions of the lease between the Metropolitan Street Railway Company and the New York City Railway Company, whatever money was then needed for expenditures for permanent betterments upon the roads controlled by the Metropolitan Street Railway Company was to be raised by the Metropolitan Street Railway Company, by the issue of its own securities, and was to be furnished to the New York City Railway Company, and expended by it in making the necessary permanent betterments upon the property. The New York City Company had at that time expended over \$2,000,000 of its own money for such betterments, for which it was entitled to reimbursement by the Metropolitan Street Railway Company, and it was proposed to make further similar expenditures for permanent betterments, amounting in the aggregate to \$8,000,000. That being the situation, an arrangement was made for obtaining the \$8,000,000 by the negotiation or sale of notes to be issued by the Interborough Company, certified by the Mercantile Trust Company, and secured by collateral deposited with the Trust Company. The arrangement made provided for the issue of \$15,000,000 of such notes, if desired by the Interborough Company, \$8,000,000 of which should be used to provide the \$8,000,000 required for betterments by the Street Railway Company. To effect that arrangement four contracts were executed, one between the Metropolitan Street Railway Company and the New York City Company, one between the New York City Company and the Metropolitan Securities Company, one between the Metropolitan Securities Company and the Interborough-Metropolitan Company, and one between the Interborough-Metropolitan Company and the Mercantile Trust Company. These four contracts were made at the same time, were in pari materia, and are to be construed together as constituting, in fact, one contract. The substantial provisions of that contract which bear upon the questions in controversy in this case were that the Metropolitan Street Railway Company agreed to execute its notes for \$8,000,000 payable to the Mercantile Trust Company, and to deliver them to the Metropolitan Securities Company, together with securities or obligations for more than \$8,000,000 of various street railway companies whose properties were controlled by the Metropolitan Street Railway Company. Such notes and collateral were then to be delivered by the Metropolitan Securities Company to the Interborough-Metropolitan Company, and then by the Interborough-Metropolitan Company to the Mercantile Trust Company. The Metropolitan Securities Company was to issue its notes to the Interborough Company for \$15,000,000, and the Interborough Company was to issue its own notes for \$15,000,000, accompanied by the certificates of the Mercantile

Trust Company that such notes were adequately secured by collateral delivered to the Trust Company, by means of which issue of notes of the Interborough Company, secured by the collateral held by the Mercantile Trust Company as trustee, the actual funds were to be raised. Then it was agreed that the \$8,000,000 so obtained should be paid by the Interborough Company to the Securities Company, and that the Securities Company should hold such sum, and pay it to the New York City Company whenever it was called upon for the money, and in any event before January 1, 1909. All this, except the payment of the money to the New York City Company, was done. The Metropolitan Street Railway Company issued its notes for \$8,000,000, payable to the Mercantile Trust Company, and delivered them, together with the stipulated collateral security, to the Metropolitan Securities Company. That company immediately transferred them to the Interborough Company. That company immediately transferred them to the Mercantile Trust Company. The Interborough Company immediately paid to the Metropolitan Securities Company \$8,000,000, and the Metropolitan Securities Company afterwards paid to the New York City Company, as called on from time to time, over \$3,000,000; but after the appointment of the receivers the Securities Company refused to pay over the balance to the New York City Company, on the ground, which is its defense in this case, that the real existing arrangement was that the Metropolitan Securities Company had contracted to loan \$8,000,000 to the New York City Company, and that the insolvency of the New York City Company released the Metropolitan Securities Company from the obligation to make further advances upon the loan. We do not think it strictly correct to say that the delivery of the notes and securities by the Metropolitan Street Railway Company to the Metropolitan Securities Company was a sale, although the transaction had many of the features of a sale. The Metropolitan Securities Company was nothing but an agent or conduit for the delivery of the notes and securities from the Metropolitan Street Railway Company to the Interborough Company, and for the transmission of the money received from the Interborough Company to the New York City Company. The Metropolitan Securities Company had no real interest in the notes or the collateral when it received them from the Metropolitan Street Railway Company. It had no right to retain them, or to use them for any purpose, and, in fact, there was no reason that we can see for going through the roundabout form of delivering them to the Metropolitan Securities Company at all. It would have been more to the point to have delivered them directly to the Interborough Company, or, still more directly, to the Mercantile Trust Company. So when the money was provided by the Interborough Company, there was no reason for going through the form of turning it over to the Metropolitan Securities Company. It might just as well have been paid directly to the New York City Company.

The obligation of the Metropolitan Securities Company, after it received the \$8,000,000 from the Interborough Company, to pay it to the New York City Company, may, of course, be considered as a simple obligation under the contract between them. We think it may more properly be described as a contract obligation, fully executed

by one party, and upon which nothing remained to be done by the other but to pay over the money; or it may be regarded as the obligation of a mere depositary, or bailee, to turn over money which is held upon an express agreement to pay it to another, a proper action to recover which would be an action for money had and received.

But whatever would be an accurate description of the strict legal nature of the obligation between the Metropolitan Securities Company and the New York City Company, one thing seems absolutely clear, and that is that it was not a contract of loan. Nothing in the case indicates that the Metropolitan Securities Company was loaning the money to the New York City Company. No promise to repay was executed, no evidence of the loan was delivered, no time of repayment was fixed, no rate of interest was agreed upon, and none of the ordinary indicia of a loan, particularly a loan of such magnitude as \$8,000,000, exists. But much weightier than the fact that all the ordinary evidences of a loan are wanting is the fact, shown by all the evidence and all the circumstances of the case, that nobody imagined at the time that the transaction was a loan, or had any analogy to a loan. The Metropolitan Street Railway Company had furnished the securities upon which the money was to be raised. They were in the shape of negotiable securities. They had been transferred for value, before maturity, to innocent purchasers in good faith, and no defense could be interposed to them. The money had been raised and deposited with the Metropolitan Securities Company, subject to the call of the New York City Company. It was just as though that amount had been deposited in a bank, subject to the checks of the New York City Company. It was intended to be expended in permanent betterments of the property of the street railway company, to provide for which the street railway company had parted with its securities for a like amount. The suggestion made now that this was a loan, that the New York City Company supposed, or that any of the parties concerned imagined, that the New York City Company, after it expended that \$8,000,000, was at some future time to repay it in cash to the Metropolitan Securities Company, seems to us absolutely untenable.

There is no element of a loan about such a transaction; it was a simple promise to furnish the City Company \$8,000,000. Suppose there had been a tripartite agreement between the Metropolitan, City, and Securities Companies providing that the City Company should pay the Metropolitan Company \$8,000,000 and that the Securities Company should furnish the money to enable the City Company to make the payment—all upon sufficient consideration; in such circumstances, can there be a doubt as to the liability of the Securities Company? The balance which it is asked to pay over does not come out of its treasury; it had already received the amount, or security therefor. As before stated, the transaction by which the Metropolitan Company was to be supplied with \$8,000,000 by the City Company was pursuant to a general plan as evidenced by agreements of May 22 and 23, 1907.

In consideration of the issue and delivery to the Securities Company by the Metropolitan Company of its improvement notes for the face amount of \$8,000,000, the City Company agreed to furnish the Metropolitan Company \$8,000,000 in cash, which the Securities Com-

pany promised to furnish to the City Company by a contemporaneous agreement.

Great weight is placed by the counsel for the Securities Company on what is called the "hypothecation clause" in the contract between the Metropolitan Street Railway Company and the New York City Railway Company. That contract provides for the delivery of the notes for \$8,000,000 and of the collateral by the Metropolitan Street Railway Company to the Metropolitan Securities Company, and the hypothecation clause provides that the Securities Company shall have the right to pledge and hypothecate the notes and the collateral, and it is argued that this showed that the agreement between the New York City Company and the Metropolitan Securities Company was a contract for a loan, and not for a sale. But, in our opinion, the explanation of the insertion of this hypothecation clause in the contract is very simple. Strictly, it was unnecessary. The Metropolitan Securities Company, of course, had the right to transfer the notes and collateral to the Interborough Company, and the latter company, of course, had the right to hypothecate them as security with the Mercantile Trust Company. That was what they were made for, as fully appears in the recitals in the contracts. But so complicated had become the relations of these various traction companies, and their rights and liabilities as between each other, and so involved were the rights created by the four contracts executed between the various companies, forming the chain of this transaction, that ordinary business men, like the officers of the Mercantile Trust Company, or, indeed, their counsel, if the matter had been referred to counsel, would have had to make the same laborious examination of all the details of these contracts, and of the relations between the parties, which it has been necessary for the court to make in order to understand the comparatively simple question involved in this case. Under those circumstances, it was not improbable that the question might arise whether the Metropolitan Securities Company, or the Interborough Company, or both, had, in fact, the power to hypothecate the notes of the Metropolitan Street Railway Company, and the securities accompanying them. That being so, it was a matter of practical common sense to put a specific clause in the contract showing unmistakably that such a right existed, and accordingly there was inserted in the contract between the Metropolitan Street Railway Company and the Metropolitan Securities Company, and in the contract between the Metropolitan Securities Company and the International Company, a specific provision to the effect that each of those companies had that right of hypothecation. Such a provision did not create the right, but it afforded clear evidence that the right existed, and prevented the necessity of an elaborate investigation to discover whether there were any possible grounds on the part of anybody to deny that such a right existed. Such provisions are often put into contracts, and the fact that a contract contains such a provision is not necessarily of much weight in construing the meaning of the contract.

It is not necessary, in order to sustain the judgment, to hold that the notes were actually sold to the Securities Company, in view of the fact that the company received them for the express purpose of rais-

ing money on them pursuant to a general scheme which contemplated a definite agreement on the part of the Securities Company to supply the City Company with funds wherewith to fulfill its absolute obligation to the Metropolitan Company. The Metropolitan Company issued and delivered the notes, not in consideration of a promise from any one to hypothecate or sell them, but in consideration of a valid agreement to pay it \$8,000,000 if delivery were made to the Securities Company. Although there may be a difference of opinion as to the technical name applicable to the transaction, we are unanimous in thinking that the liability of the defendant is fully established and that the question of nomenclature is negligible.

We concur with the Circuit Judge in his reasoning and conclusions as to the other questions discussed by him. If we are correct in our construction of the agreements, it is, of course, no defense that the party entitled to receive the money subsequently became insolvent.

The judgment is affirmed, with costs.

SAVELJICH et al. v. LYTLE LOGGING & MERCANTILE CO.

(Circuit Court of Appeals, Ninth Circuit. September 7, 1909.)

No. 1,676.

DEATH (§ 31*)—ACTION FOR WRONGFUL DEATH—CONSTRUCTION OF STATUTE—ACTION BY ALIENS.

Ballinger's Ann. Codes & St. Wash. § 4828 (Pierce's Code, § 256), which provides that, when the death of a person is caused by the wrongful act or neglect of another, an action for damages may be maintained for the benefit of his widow and children, as construed by the Supreme Court of the state, gives such right of action, although the widow and children are nonresident aliens.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 37; Dec. Dig. § 31.*

Nonresident aliens as beneficiaries under death acts, see note to Mahoning Ore & Steel Co. v. Blomfelt, 91 C. C. A. 396.]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

This is an action at law, brought by the plaintiffs, Staka Radova Saveljich and her several minor children, subjects of the Prince of Montenegro, by their guardian ad litem, Vido Batrichevich, against the defendant, Lytle Logging & Mercantile Company, to recover damages for the death of her husband, Rade Saveljich, who was killed while employed as a laborer by the defendant and engaged in the work of grading, near Porter, Wash., with a scraper operated by means of an engine and cable. A guy rope attached to the scraper and running through a pulley or block gave way, causing the block to be thrown upon Saveljich, killing him instantly. An amended complaint, filed May 5, 1908 alleged, in substance, that defendant, Lytle Logging & Mercantile Company, was and is now a corporation duly organized and existing under and by virtue of the laws of the state of Washington; that Vido Batrichevich was the duly appointed, qualified, and acting guardian ad litem of Mise Saveljich, aged 13 years, Milena Saveljich, aged 3 years, Savo Saveljich, aged 11 years, and Janko Saveljich, aged 5 years, all of whom and their mother were subjects of the Prince of Montenegro; that Rade Saveljich was an able-bodied man, 32 years of age, capable of earning and actually earning \$2.50 per day working in the employ of defendant as a common laborer; that on Feb-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ruary 3, 1907, Saveljich was engaged in grading near Porter, Wash., with a scraper operated by means of an engine and cable running through a pulley or block, the block being held in place by two guy ropes, one end of which was fastened to a hook on the pulley or block with an eye in the end of the guy rope, while the other end was fastened to a stump; that Saveljich was working within 10 feet of said cable, where he had been placed by the foreman of defendant, and while said apparatus was in a defective and dangerous condition and insufficient; that the foreman, knowing the dangerous position of Saveljich, and without giving him any warning whatsoever, caused said engine to start in order to move the scraper filled with dirt; that on account of the insufficient and dangerous condition of the apparatus one of the guy ropes gave way, throwing the pulley block upon Saveljich, killing him instantly; that at the time of the accident the apparatus was in a defective and dangerous condition, and was insufficient, in that the hook on said block or pulley to which said guy ropes were fastened was too small and was insufficiently fastened to said stump, all of which defendant knew, or had reason of knowing. Judgment was asked in the sum of \$30,000. The defendant demurred to the amended complaint, on the ground, among others, that the plaintiff had no legal capacity to sue. The court sustained the demurrer, on the ground that the plaintiffs were nonresident aliens; and, the plaintiffs refusing to further amend their complaint, the court, on May 25, 1908, entered a judgment of dismissal. From this judgment the plaintiffs prosecute the present writ of error.

John C. Higgins, Calvin S. Hall, and Dallas V. Halverstadt, for plaintiffs in error.

F. S. Blattner, Bamford A. Robb, L. B. Da Ponte, and Blattner & Chester, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). Section 4828 of Ballinger's Annotated Codes & Statutes of the State of Washington (Pierce's Code, § 256) contains the following provision:

"When the death of a person is caused by the wrongful act or neglect of another his heirs or personal representatives may maintain an action for damages against the person causing the death. * * * In every such action the jury may give such damages, pecuniary or exemplary, as under all circumstances of the case may to them seem just."

In 1904 Judge Hanford, in the Circuit Court of the United States for the District of Washington, in the case of *Roberts v. Great Northern Ry. Co.*, 161 Fed. 239, held that the statute of Washington above quoted could not be made the basis of an action where the widow and children are aliens and not within the state nor inhabitants thereof. The court followed the decision of the Supreme Court of Wisconsin in the case of *McMillan v. Spider Lake S. & L. Co.*, 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947, and stated that the attention of the court had not been directed to any decision by the Supreme Court of the state of Washington upon the subject. When judgment was entered in this case on May 25, 1908, no decision of the question had then been rendered by the Supreme Court of the state, and the Circuit Court followed its decision in *Roberts v. Great Northern Ry. Co.*, supra. On November 18, 1908, the Supreme Court of Washington decided the case of *Anustasakas v. International Contract Co.*, 51 Wash. 119, 98 Pac. 93, holding that nonresident aliens may maintain an action for wrongful death under the statute of that state for the benefit of the widow and children. The court refers to the

decisions of several states upon the subject and finds the weight of authority supports such an action under similar statutes. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. *Leffingwell v. Warren*, 67 U. S. 599, 603, 17 L. Ed. 261; *Oakes v. Mase*, 165 U. S. 363, 364, 17 Sup. Ct. 345, 41 L. Ed. 746; *Pacific Rolling Mills Co. v. James Street Const. Co.*, 68 Fed. 966, 969, 16 C. C. A. 68; *Mahoning Ore & Steel Co. v. Blomfelt* (C. C. A.) 163 Fed. 827, 833; *Fulco v. Schuylkill Stone Co.* (C. C. A.) 169 Fed. 98, 100.

Judgment reversed, with instructions to overrule the demurrer.

NOTE BY THE COURT.—In Great Britain the question whether the representatives of a nonresident alien could maintain an action under the statute known as "Lord Campbell's Act" (St. 9 & 10 Vict. c. 93) was first answered in the negative by *Darling, J.*, in *Adam v. British & Foreign S. S. Co.*, [1898] 2 Q. B. 430, 67 L. J. Q. B. 844, 79 L. T. 31, the court holding that the statute was not for the benefit of aliens abroad; but subsequently the question was answered in the affirmative in *Davidsson v. Hill*, [1901] 2 K. B. 606, 70 L. J. K. B. 788, 85 L. T. 118, 49 W. R. 630, 9 Asp. M. C. 223, by *Kennedy and Phillimore, JJ.*, the court holding that the act applied as well for the benefit of the representatives of a deceased foreigner as for that of a British subject. In *Beven on Negligence in Law*, vol. 1, p. 209, the author says:

"A reference to the preamble and first section of Lord Campbell's act would possibly have averted the decision in *Adam v. British & Foreign Steamship Co.* The object of that act is there stated to be, not to confer a right, but to impose a liability on 'the wrongdoer' 'in every case'—that is, within the words of the enactment."

In this country whether a nonresident alien can maintain an action under statutes similar to the Lord Campbell act has been answered in the negative in two states: Pennsylvania: *Deni v. Pennsylvania R. Co.*, 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676; *Maiorano v. Baltimore & Ohio R. Co.*, 216 Pa. 402, 65 Atl. 1077, 116 Am. St. Rep. 778; *Zeiger v. Pennsylvania R. Co.* (C. C.) 151 Fed. 348; *Id.*, 158 Fed. 809, 86 C. C. A. 69; *Fulco v. Schuylkill Stone Co.* (C. C. A.) 169 Fed. 98. Wisconsin: *McMillan v. Spider Lake S. & L. Co.*, 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947. But the question has been answered in the affirmative in sixteen states and one territory, as follows: Colorado: *Patek v. American Smelting & Refining Co.*, 154 Fed. 190, 83 C. C. A. 284; *Ferrara v. Auric Mining Co.*, 43 Colo. 496, 95 Pac. 952, 17 L. R. A. (N. S.) 964. Delaware: *Szymanski v. Blumenthal*, 3 Pennewill, 558, 52 Atl. 347. Georgia: *Augusta Railway Co. v. Glover*, 92 Ga. 132, 18 S. E. 406. Illinois: *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 191. Indiana: *Cleveland, etc., Ry. Co. v. Osgood*, 36 Ind. App. 34, 73 N. E. 285. Iowa: *Romano v. Capital Brick & Pipe Co.*, 125 Iowa, 591, 101 N. W. 437, 68 L. R. A. 132, 106 Am. St. Rep. 323. Kansas: *Atchison, etc., Co. v. Fajardo*, 74 Kan. 314, 86 Pac. 301, 6 L. R. A. (N. S.) 681. Kentucky: *Trotta's Adm'r v. Johnson*, 28 Ky. Law Rep. 851, 121 Ky. 827, 90 S. W. 540.

Massachusetts: *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309. Minnesota: *Renlund v. Commodore Mining Co.*, 89 Minn. 41, 93 N. W. 1057, 99 Am. St. Rep. 534; *Mahoning Ore & Steel Co. v. Blomfelt (C. C. A.)* 163 Fed. 827. Missouri: *Philpott v. Mo. Pac. Ry. Co.*, 85 Mo. 164. New York: *Alfson v. Bush Co.*, 182 N. Y. 393, 75 N. E. 230, 108 Am. St. Rep. 815. Ohio: *Pittsburgh, etc., Co. v. Naylor*, 73 Ohio St. 115, 76 N. E. 505, 3 L. R. A. (N. S.) 473, 112 Am. St. Rep. 701. Tennessee: *Chesapeake, etc., R. Co. v. Higgins*, 85 Tenn. 620, 4 S. W. 47. Virginia: *Pocahontas Collieries Co. v. Ruskas' Adm'r*, 104 Va. 278, 51 S. E. 449. Washington: *Anustasakas v. International Contract Co.*, 51 Wash. 119, 98 Pac. 93. Arizona: *Bonthron v. Phoenix, etc., Co.*, 8 Ariz. 129, 71 Pac. 941, 61 L. R. A. 563.

LOS ALAMITOS SUGAR CO. et al. v. CARROLL†

(Circuit Court of Appeals, Ninth Circuit. October 4, 1909.)

No. 1,701.

1. PATENTS (§ 72*)—ANTICIPATION—PRIOR DEVICES.

A device which does not operate on the same principle as that of a patent cannot be an anticipation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 90; Dec. Dig. § 72.*]

2. PATENTS (§ 72*)—"ANTICIPATION"—PRIOR DEVICES.

It is not sufficient to constitute anticipation that the devices relied upon might, by a process of modification, reorganization, or combination, be made to accomplish the function performed by the device of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 90, 91; Dec. Dig. § 72.*]

For other definitions, see Words and Phrases, vol. 1, p. 411.]

3. PATENTS (§ 174*)—IMPROVEMENT PATENTS—OPERATIONS OF DEVICE.

A patent expressly for an improvement on the device of a prior patent to the same inventor should be read in connection with the first, and will not be declared void because, standing alone, it does not describe an operative apparatus.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 174.*]

4. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—LOAD-DUMPING APPARATUS.

The Carroll patent No. 561,485, for a load-dumping apparatus, claims 1 and 2, which cover a combination of elements in an apparatus especially designed to dump wagon loads of beets, and which is highly successful in accomplishing such purpose in much less time than required by any previously known means, were not anticipated, although the elements of the combination were separately old, and disclose invention. Patent No. 595,236 to the same inventor for an improvement on the apparatus of the prior patent also *held* valid, and both *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

5. PATENTS (§ 312*)—SUIT FOR INFRINGEMENT—LACHES.

The defense of laches to a suit for infringement of patents *held* not sustained by the evidence.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 312.*]

Laches as defense in suits for infringement, see notes to *Taylor v. Sawyer Spindle Co.*, 22 C. C. A. 211; *Richardson v. D. M. Osborne & Co.*, 36 C. C. A. 613.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied.

Appeal from the Circuit Court of the United States for the Southern District of California.

Suit in equity by Timothy Carroll against the Los Alamitos Sugar Company and another. Decree for complainant, and defendants appeal. Affirmed.

Miller & White and Lawler, Allen, Van Dyke & Jutten, for appellants.

Frederick S. Lyon, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

ROSS, Circuit Judge. This suit was brought by the appellee in the court below for the alleged infringement of certain letters patent issued to him, the first of which was for a load-dumping apparatus, numbered 561,485, and dated June 2, 1896, and the second of which was for alleged improvements therein, numbered 595,236, and dated December 7, 1897.

The complainant, who is the appellee here, alleged infringement of claims 1 and 2 of the first patent, and of claims 1, 6, and 7 of the second. The defendants denied any infringement, and also set up in defense anticipation and lack of invention, laches, and also that the second patent was void on the ground that it does not disclose an operative apparatus.

In this court the appellants moved, and the appellee consented to, the dismissal of the cause as to the appellant Clark, and an order to that effect was entered.

In the specification of the first patent Carroll said:

"In Southern California the raising and shipping of beets for manufacturing sugar requires the rapid unloading of large numbers of wagon loads of beets, for the reason that the beets must be weighed and sampled by the sugar manufacturers, and it is impracticable to unload except at the place where the sampling is done, because the samples must be taken at the time of unloading each load in order to get a fair average of the load. In order to handle these beets it has heretofore been customary to place a net in the wagonbed and to then load the beets upon the net, and at the place of unloading the net was lifted by a derrick and the load drawn out of the wagon and brought over the car, and one side of the net then released; but this system was not sufficiently rapid, and great inconvenience and delay resulted, it frequently occurring that 30 teamsters would have to leave their wagons loaded all night and wait their turn next morning to unload. One object of my invention is to avoid all this inconvenience and loss of time, and to provide means whereby a farm wagon loaded with beets can be dumped in a very short period of time. With my invention as high as 27 wagon loads of beets, weighing in the aggregate nearly 40 tons, have been dumped from one dump into railroad cars, thus loading 2 cars, in 30 minutes. The actual work of dumping a 4-horse wagon load of 5 tons can be done easily in half a minute. In practice I have found 30 seconds to be sufficient for dumping the load after the wagon has stopped in place on the dump platform. My invention relates more particularly to the appliances and combinations of parts by which I am enabled to so rapidly unload heavy and light wagons loaded with beets. It is very important that the apparatus shall work rapidly, that the team remain hitched to the wagon during the dumping, that the apparatus be so constructed and arranged that the wagon can be jolted, if required, to jar loose any beets that do not readily slide out of the wagon bed, and that the parts be so arranged that the wagon can be easily and quickly put into shape to be driven away as soon as the load is

dumped. A further and very important consideration is to so construct and arrange the apparatus as to avoid any injurious strain on the wagon, and a peculiar and valuable feature of my invention is that I dump the load sidewise and fasten the vehicle to the tilting support by a chain or other suitable tie extending between and fastened to the tilting support and the bed of the vehicle. By this feature I make it possible to rapidly dump the load and not rack the wagon. In fact, by reason of this arrangement, the operation of dumping a load from a wagon does not rack or strain the vehicle in any part, except that strain comes upon that part of the bed to which the chain is fastened, and that part of the bed can easily be made strong enough to withstand the strain. No severe strain comes on the running gear, and this is of great importance. So far as I am aware, in all other appliances proposed for dumping wagons the vehicle is to be held by the running gear, and such appliances are not adapted for the work which my apparatus does. It is an object of my invention to accomplish the desired work of unloading wagon loads of beets as above stated, and to do it without straining or racking the wagon. This I have fully accomplished by my new invention. My invention is also applicable for dumping car loads of beets, and is also adapted for dumping from cars, wagons, and other vehicles bulk loads, such as coal, corn, etc., in loading vessels and for other purposes. My invention comprises the combination of a tilting vehicle support for the loaded vehicle, pivoted longitudinally to tilt sidewise, a longitudinal axis upon which the vehicle support is pivoted, means fastened to the tilting support and to the bed of the vehicle for holding the vehicle on the vehicle support, a lever for tilting the vehicle support sidewise and returning it to its horizontal position, a team support at the front of the vehicle support, on which the team can stand hitched to the vehicle while it is dumping, and a stop arranged to stop the tilting support on a slant and prevent it from tilting far enough to materially interfere with the team hitched to the vehicle. It also includes the vehicle support and various parts and combinations of parts hereinafter more fully specified. My invention also comprises the combination of a vehicle support arranged to tilt sidewise, a vehicle having a bed provided with a hinged side, and adapted and arranged to allow its load to be dumped off sidewise, and means extending between and fastened to the tilting support and the vehicle bed for holding the vehicle on the vehicle support when it is tilted, a lever fastened to and projecting from the side of the tilting support opposite that toward which the support tilts, and the stop arranged to stop the support when it has tipped sufficiently to cause the load to slide off sidewise. This is applicable either for railway cars, wagons, sleds, or any vehicle having a bed from which a load can slide sidewise when the vehicle is tipped. A distinctive feature of my invention as applied to wagons is the hinged side of the bed arranged wholly above the wheels and the dumping of the vehicle sidewise and stopping the tilting support on an incline, and thus dumping a large load without the necessity of unhitching the team, for by this means I avoid all the necessity of backing and of all other slow or complicated ways or means for dumping the load, which are necessary and which consume time in the case of wagons that dump endwise. By tilting the wagon sidewise I have made it much easier, quicker, and less expensive to unload the loads than is possible by any other means heretofore known. The driver of the team can drive across the tilting support and stop with his team upon the team support, and the dumpman can then dump the load while the team is hitched thereto, and the teamster can then drive on at once, so that there is but little stoppage of the team to dump the load. In carrying out my invention for dumping a wagon load of beets I raise the wagon bed above the wheels or arch the floor over the hind wheels, and I provide the wagon bed with a drop side, and provide such drop side wholly above the wheels with supports to hold it extended from the bed when dropped, so that the drop side serves as an apron to shoot the load onto the stationary apron which is provided at the side of the dump to shoot the load into the car."

The applicant then set out drawings illustrating the alleged invention, with specific descriptions thereof, and made five claims, the first and second of which are as follows:

"(1) The combination of a vehicle support arranged to tilt sidewise; means for tilting the support and returning it to a level position; a stop arranged to stop the support on a slant; a vehicle having a bed provided with a drop side wholly above the wheels and adapted to allow its load to be dumped off sidewise; means extending between and fastened to the tilting support and the vehicle bed for holding the vehicle on the vehicle support when it is tilted; a latch for holding the drop side in place and adapted to be released when the wagon is tilted; and means for supporting the drop side when it is dropped.

"(2) The combination of a vehicle support arranged to tilt sidewise; means for tilting the support and returning it to a level position; a stop arranged to stop the support on a slant; a vehicle having its bed adapted to allow its load to be dumped off sidewise; means extending between and fastened to the tilting support and the vehicle bed for holding the vehicle on the vehicle support when it is tilted; and a team holding support arranged at the front end of the tilting vehicle support and independent thereof, and adapted to allow the team to stand thereon hitched to the vehicle while the vehicle is being dumped."

It is manifest, we think, that these claims are limited to the dumping of wagons; and it is so conceded by the counsel for the appellee. The great usefulness of the appellee's apparatus cannot be doubted, for the importance and magnitude of the sugar-beet industry is not only a matter of common knowledge, but is also shown by the evidence, which further shows that prior to it the beets were unloaded from wagons either by means of forks and shovels, or by nets first placed in the wagons upon which the beets were loaded, and then unloaded at the desired place by means of hooks, ropes, chains, and whips operated by horses, all of which processes were more or less slow and expensive. Carroll's conception included the novel idea not only of dumping the wagons without unhitching the horses, thereby materially saving time and labor, but also the use of a part of the wagon as a part of the dumping apparatus. The conception was decidedly novel and valuable. While none of the elements employed by him were new, and while there was nothing new in the mere idea of dumping loads from cars, wagons, and other vehicles by tilting the vehicle sidewise and thereby causing its load to slide out by gravity, there is nothing in the record tending to show that anybody else had ever before thought of so unloading a wagon while the horses remained hitched to it, nor of the novel, expeditious, and highly successful manner employed by Carroll. The evidence is abundant, and without contradiction, to the effect that with Carroll's apparatus loads are readily dumped in 30 seconds, as against from 10 to 20 minutes by even the net and whim process, to say nothing of unloading with shovels or forks. In sustaining a patent for improvement in looms for weaving pile fabrics, consisting of such a new combination of known devices as to give a loom the capacity of weaving 50 yards of carpet a day when before it could only weave 40, the Supreme Court said, in the course of its opinion in *Loom Company v. Higgins*, 105 U. S. 580, 591 (26 L. Ed. 1177):

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce 50 yards a day when it never before had produced more than 40; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent."

Beet wagons are necessarily heavy and stout, although of variable capacity, usually carrying, according to the evidence, from 4 to 7 tons at a load. The great desideratum was to shorten the time required for the unloading of the wagons, and thereby, incidentally, to save cost. The successful carrying out of the idea necessarily involved the safety of the vehicle as well as of the team attached thereto. Carroll's conception was to dump the loads from the wagons without unhitching the horses, so that the teams might at once go for another load; and to accomplish this without the use of power. He seems to have so combined old elements as to produce the desired result without the use of other power than the coacting of the various parts. He provided a raised platform of a height sufficient for the dumping of the beets from the wagon into the car or bin below, with an upward approach for the driving of the team with the loaded wagon onto the platform, and a descending roadway for the departure of the team with the empty wagon after the discharge of the load. That portion of the platform on which the wagon rests while the load is being dumped was so arranged as to tilt, while the portion upon which the horses stand during the tilting process remains fixed. That portion of the platform on which the wagon rests while the load is being dumped was so arranged as not only to tilt, but to stop tilting at such an angle as to discharge its loads without interfering with the position of the wagon itself or of the horses, and so that the wagon might be brought back into position to be driven away, and the apparatus brought into position for the receipt and discharge of the next succeeding loaded wagon—one of the functions of the stop being to give the load a jolt so as to insure its complete dumping. The tilting platform was so counterbalanced that the weight of the load would automatically carry the platform and load down, and when the load was discharged the counterbalance would automatically bring the platform back to its horizontal position. The wagon bed was so arranged as to permit all the beets to slide out of it when the proper angle in the tilting process was reached, and in order to prevent any of the beets during that process from rolling onto the surface of the tilting platform or underneath the dump instead of into the car or bin, as the case might be, the wagon bed was provided with a drop side wholly above the wheels to serve as an apron to shoot the load sidewise into the car or bin. Chains were provided extending from the tilting platform to the wagon body for holding it on the platform when tilted; a latch for holding the drop side of the wagon up during the loading of the beets and their hauling to the dumping apparatus and adapted to be released when the wagon load is on the platform and the dumping operation is to take place. The record shows that the various parts of Carroll's device were so interrelated and so coacted as to bring about the desired result in an eminently successful and satisfactory manner, and we see nothing in the record to show that any other device or apparatus ever before operated upon the same principle in accomplishing the same or a similar result. A device which does not operate on the same principle cannot be an anticipation. *Western Electric Company v. Home Telephone Company* (C. C.) 85 Fed. 649; *Dederick v. Cassell* (C. C.) 9 Fed. 506; *Pattee v. Moline Plow Company* (C. C.) 9 Fed. 821; *Fuller v. Yentzer*,

94 U. S. 288, 24 L. Ed. 103; *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; *Robinson on Patents*, vol. 1, § 282; *Walker on Patents* (4th Ed.) § 62.

We do not think it necessary to refer specifically to the large number of patents set up as anticipatory. The one apparently most relied upon is that issued to Chisholm, which was for "certain new and useful improvements in the mode of dumping railroad cars." There the cars to be dumped were placed on a railroad track pivoted longitudinally to a platform arranged to tilt sidewise in either direction, with a supplemental rail so provided as that, when the platform is tilted, the inside of the flange of the upper wheel will press against it and release the strain from the flange of the lower wheel, the means for which tilting consisting of a windlass and a chain attached to the sides of the platform—the car having hinged sides arranged to be lifted upward. The sides of the car were also connected by chains with the sides of the tilting platform, so as to prevent the car from falling off the tracks when it was tilted sidewise, and posts were placed at the side of the track against which the car strikes when tilted, and which stop it. Expert witnesses for the respective parties—Boyd and Bates—seem to agree in their opinion that the principle of operation of the Chisholm device is different from that of Carroll, and, without going into details, we think it sufficient to say that the Chisholm patent does not anticipate all of the elements found in the claims of the Carroll patent hereinbefore set out, and that it is not capable of being operated or used in the manner in which Carroll's device was intended to be operated and used. Nor do any of the other patents relied upon provide a complete dumping apparatus which will operate upon the principle of Carroll's. It is not sufficient to constitute anticipation that the devices relied upon might, by a process of modification, reorganization, or combination with each other, be made to accomplish the function performed by the device of the patent sued on. Authorities *supra*.

The second patent issued to Carroll was for improvements to the apparatus patented to him by his first patent, consisting of a wheel-holding device for preventing the slipping of the vehicle on the tilting platform while being tilted, and consequent injury to the wagon. It was thus described in the specification:

"My invention includes in a dumping apparatus for dumping a vehicle sidewise a holder carried by the tilting vehicle-supporting platform at a height to engage the hubs or ends of the axles of the vehicle, and means for moving the holder to and from the hubs or axle ends, so that when the vehicle is moved onto the tilting platform the holder can be moved against the hubs or axle ends on the side toward which the platform tilts, and then when the platform is tilted the sidewise strain is borne by the axles, and lateral movement of the vehicle is prevented. Then, when the vehicle has been emptied and returned to upright position, the holder can be moved away from the hubs or axles ready for another vehicle. I have found by practical tests that this holder, carried by the tilting vehicle-supporting platform and brought against the ends of the axle or against the hubs of the wheel, is perfectly effective for holding the vehicle during the dumping process, and this application of the holder is far superior to holders which apply against the bed of the vehicle to support the bed, for the reason that the movement of the holder into its supporting position and out of the path of the vehicle is much less with wagons than is necessary where the holder is made to engage the vehicle bed, and the holder

is brought closer to the tilting platform and therefore can easily be given the required strength without being made cumbersome, and is nowise in the way of the dumping load, but is entirely below the vehicle bed and the path of the load as it passes out of the vehicle."

The inventor further said in the specification:

"I have set forth the best form in which I propose to carry out my invention, but I do not limit myself to the exact form shown, as it is obvious various modifications can be made without departing from the spirit of my invention."

We think, as did the Patent Office, that the second patent should be read in connection with the first, and that, as so read, it is not, as contended by the appellant, void on the ground that it does not describe an operative apparatus.

The court below found infringement upon the part of the appellant, and we think the evidence in the cause sustains that conclusion. The testimony of the witnesses Francis M. Townsend, Howard E. Powell, William N. Olmsted, and L. G. Bodine strongly supports it, and it also finds support in the fact that the evidence shows that the manager and the constructor of the appellant's factory knew of the Carroll apparatus, discussed it, and that its builder, Edward F. Dyer, before building the appellant's dumping device, several times examined that of Carroll, and made at least some notes and drawings of it. We extract from the testimony of the witness De Voe:

"Q. Who was the general superintendent for the erection of the Los Alamitos Sugar Company's plant and dump? A. Mr. E. F. Dyer. Q. Did you at any time have any talk with Mr. E. F. Dyer with regard to the Carroll dump which was erected at Anaheim? A. I did. Q. State the circumstances of such conversation. A. I was filling the foundation for the sugar house, and Mr. Dyer came over and asked me what I knew about the construction of the dump over at Anaheim. I told him I didn't know much about how it was constructed, but the man who was working for me, with me, Mr. Hiss, had assisted in building it and run it for a couple of years, and could tell him more than I could. Q. Prior to this conversation had there been any dump erected at the Los Alamitos Sugar Factory? A. There had not. Q. State whether or not you knew whether Mr. Edward F. Dyer went over to Anaheim in 1897 to examine the Carroll dump. A. He did. Q. How do you know he did? A. He hired me to take him there. Q. Do you know of your own knowledge whether Mr. Edward F. Dyer made any examination of the Carroll dump at Anaheim? A. I do. Q. What did he do? A. He went under the dump and looked at it; had a shingle, I think, with a paper on it, and made some drawings. Q. Did you have any conversation with him at that time? A. I did, a few minutes after that. Q. What was it? A. We left the dump and started up town, and I laughed at him and asked him if he was going to steal the Irishman's dump. He said he didn't know as there was anything to steal; he had ideas of his own."

The witness Hiss testified, among other things, as follows:

"Q. Are you acquainted with Edward F. Dyer? A. Yes, sir. Q. Do you know what connection he had in 1896 with the Los Alamitos Sugar Company? A. Yes, sir. Q. What was it? A. He had charge of the building of their factory, erecting the factory at Los Alamitos. Q. Did you have any conversation with him during the year 1896? A. Yes, sir. Q. State where and when and what that conversation was about. A. Why, he come there to the dump where I was at work, and there wasn't any teams there just at the time, and he asked me if I had any objection to him looking over the dump and taking some measurements, and I told him I didn't. So I went down off the dump with him and helped him to take some measurements, which he noted down in a book, or a shingle—I can't remember exactly which. He had something,

either a shingle or a book, which he made some datass on, and, before we got through with the measurements that he wanted to take there was some teams come up to the dump and I had to go up to attend to my duties, and I paid no more attention to just how long he was there. He was there 15 or 20 minutes, around the dump. Q. Did you have any conversation with him in regard to beet-dumping apparatus? A. Yes, sir. Q. What was it? A. Well, he asked me what I thought would be the most advisable plan for the factory at Los Alamitos, the net or a dump, and I told him by all means the dump. Q. What dump were you and Mr. Dyer referring to in that conversation? A. Well, the Carroll dump was the only one that was in existence that I knowed anything about at that time. Q. Did you ever have any conversation with Mr. Edward F. Dyer at Alamitos in regard to dumps? A. Yes, sir. Q. What was that? A. Well, I was helping to do some grading work there, and of course he knew that I had a great deal of experience in the dumps and helping to build the Carroll dump, and he asked me quite a number of different questions in regards to the width of the dump and the bins. He also knows I have had experience in Chino. And had several conversations in general which I cannot say exactly what the—word for word what they was, but it was generally in regards to the dump. I helped to do the grading there at the factory in the fall of 1896. Q. That was prior or after the dump was erected at the Los Alamitos Sugar Factory? A. That was before the dump was erected."

We cannot see that the court below erred in ruling against the appellant's plea of laches. No question in respect to profits or damages is involved on this appeal, the question of the appellee's right to the injunction awarded only being involved. The record shows not only that the contractor employed to build the appellant's dumping apparatus made several examinations of that of Carroll, taking some notes and drawings thereof before undertaking to construct the appellant's device, but that the manager of the appellant company had also a talk with Carroll in respect to the latter's apparatus, and that the manager, on the 12th of June, 1897, was notified in writing by Carroll of the issuance to him of his letters patent, and was expressly warned against infringing upon them. Carroll also testified that prior to the commencement of the suit he had a conversation with the manager of the appellant company on the street in Los Angeles, in which, said the witness:

"I told him that he had infringed on my patent, and he told me that he would be willing to pay me a nominal sum. I told him no, I wouldn't accept a nominal sum; that he could have it at a royalty at a cent per ton. He said if I wouldn't give it to him at a nominal sum he would take it. I told him positively, 'If you will take the dump and put it away from me, you will do it over my dead body. I will defend myself.'"

The record also shows that Carroll employed an attorney to bring suit against the appellant, for a contingent fee, that the matter was in the attorney's hands for a good while, and that the attorney finally died without bringing the suit, and that subsequently, when Carroll got sufficient money to commence action, he instituted the present suit.

Upon the record we do not think that it can be fairly said that there was any acquiescence upon the part of the appellee in the appellant's infringement, or that the circumstances are such as in equity bar the action.

The judgment is affirmed.

UNION TYPEWRITER CO. v. L. C. SMITH & BROS.

(Circuit Court, W. D. Pennsylvania. September 10, 1909.)

1. PATENTS (§ 45*)—ANTICIPATION—INVENTION—DATE OF CONCEPTION AND EXERCISE OF DUE DILIGENCE, WHEN IMMATERIAL—PRIOR PATENTS AS ANTICIPATING PUBLICATIONS—DATE OF APPLICATION THEREFOR.

Where there is a mere comparison of a patent with others, to determine the novelty of the device, it is immaterial just when the invention was conceived or reduced to practice, or whether due diligence was used; these being important only in interference proceedings, or where an issue of priority is raised. And neither are the dates of the applications of alleged anticipating patents of any account in such a case; a patent taking rank as a publication, negating novelty, only when it comes out, and a mere application having no such effect.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 51-53; Dec. Dig. § 45.*]

2. PATENTS (§ 106*)—INTERFERENCE PROCEEDINGS—ISSUES BETWEEN NARROWER AND BROADER CLAIMS—RIGHT OF SUCCESSFUL PARTY TO APPROPRIATE LATTER.

Where application is made for a specific form of invention by one inventor, and the claims embodying the same are thrown into interference proceedings with generic claims in the pending application of another inventor, upon the issue of priority being decided in favor of the former, he is not entitled to the broader conception of the other, being confined to the particular mechanical construction for which he has declared. The fact that the device of which he was found to be the original and first inventor shut out the broader conception of the other did not make the latter, or the claims by which it was expressed, his.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 146; Dec. Dig. § 106.*]

3. PATENTS (§ 106*)—INTERFERENCE PROCEEDINGS—RIGHT TO APPROPRIATE ISSUES.

Where, therefore, in an application for a typewriting machine, the invention as described in the specifications consisted substantially in mounting the type-bar series in a rocking cradle, arranged to carry both type bars and keyboard, by means of which the type bars were shifted vertically, according as one type or the other was to be brought to the printing point, a rocking frame or cradle, carrying keyboard and type bars, and shifting the latter vertically, was of the essence of the invention, and anything outside of and beyond this could not be consistently claimed. The issues in interference proceedings, taken from the application of another inventor, in which a vertical shifting of the type-bar frame, without more, was broadly claimed, could not, merely because of the interference proceedings being decided in favor of the narrower invention, be written into the application therefor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 146; Dec. Dig. § 106.*]

4. PATENTS (§ 120*)—REISSUE—ENLARGEMENT BY AMENDMENT OF LATER PATENT—IMPROVEMENTS.

A reissue is ordinarily the only remedy when a patent is found not to be expressive of an invention to its full breadth. An enlargement of it is not to be effected by the engrafting of broad claims upon a later patent, based upon an application of narrow scope, particularly where the second

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

patent is applied for as an improvement on the first; it not being the office of an improvement to enlarge or broaden, but only to better in detail.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 172; Dec. Dig. § 120.*]

5. PATENTS (§ 120*)—SUCCESSIVE PATENTS—TOO BROAD TO BE FOLLOWING NARROWER FIRST—CO-PENDING APPLICATION.

Where an application, in which an invention is expressed broadly, is pending at the same time with one upon narrower lines, the taking out of the latter does not necessarily preclude the subsequent allowance of the other in broader form. As, for instance, (a) where the application for a broad patent was made first, and is delayed by the Patent Office through no fault of the inventor; or (b) where the later generic patent and the earlier specific one bear a divisional relation, the two being in effect one; but not (c) necessarily where one is a continuance of the other, particularly where the later patent is in terms for an improvement on the other and conforms strictly to that idea.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 172; Dec. Dig. § 120.*]

6. PATENTS (§ 120*)—ATTEMPTED BROAD CONSTRUCTION OF LATER PATENT—DOUBLE PATENTING.

Where, therefore, an earlier patent, with specific narrow claims, is allowed to come out, and after it has issued, claims of alleged broad or generic scope are brought in by way of amendment to another patent, which is applied for as an improvement on the first, the claims of the second patent, if construed broadly, being conflicting with and anticipated by the first patent, are void as amounting to a second patenting of the same invention, which the law does not allow, a result which the co-pendency or overlapping of the second application is powerless to prevent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 172; Dec. Dig. § 120.*]

7. PATENTS (§ 328*)—INFRINGEMENT—TYPEWRITING MACHINE.

The Daugherty patent, No. 481,477, for a typewriter of the type in which the writing is visible when being written, claims 37 and 38, the dominating feature of the device being the vertical shifting of the type-bar frame to bring into position one or the other of the different kinds of type carried thereby, while generic in form, must be limited, in view of a prior patent to the same inventor, to the specific means disclosed for shifting such frame. While not anticipated by anything in the prior art as so construed, *held* not infringed by the defendants' device.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

(Syllabus by the Court.)

In Equity. Suit for infringement of letters patent No. 481,477, for a typewriter, issued August 23, 1892, to James D. Daugherty. On final hearing.

Clarence P. Byrnes and Henry D. Donnelly, for complainant.
James A. Watson and Livingston Gifford, for defendants.

ARCHBALD, District Judge (specially assigned). The patent in suit is for a so-called "visible" typewriter, in which the printing is at all times able to be seen by the operator, without stopping the work or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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moving any part. This is a desirable feature, and may well be taken as characteristic of the coming machine, if not, indeed, indispensable to it. Accompanying this, the machine of the patent has a single bank of keys, with type bars carrying different type—upper and lower case letters, different marks of punctuation, numerals, and the like—the segmental frame in which they are mounted being made to shift vertically in order to bring the one or the other character to the printing point. It is the vertical shifting of this frame that dominates the device; a single keyboard with two-character type bars and a front stroke, with resulting visibility, being thereby secured.

The defendants manufacture a typewriter which also has two-letter type bars, pivoted concentrically on a segmental frame, which is shifted vertically to bring the different characters to the printing point. The only distinction from the machine of the patent, taking it as it reads, consists of the "hitch up" between the key lever and type bars, which in the complainant's machine is direct, both keyboard and type bars being carried on a pivoted frame or cradle, by the rocking of which, without breaking the connection, the shifting of the type-bar frame is brought about; while in the defendants' machine the connection is by links, permitting the keyboard to remain stationary, the type-bar frame alone being moved.

The patent was issued to James D. Daugherty August 23, 1892, on an application filed March 8 of the same year; the invention going back, as it is said, to some time in 1883. There are two claims relied on, as follows:

"37. In a typewriter, the combination, with a series of individual pivoted type bars carrying two or more type, of a vertically-shifting frame for sustaining said bars and suitable means for shifting said frame to bring either of the type in proper position to make an impression.

"38. In a typewriter, the combination, with a series of type bars provided with two or more type, of a vertically-shifting frame for sustaining said type bars concentrically, a series of key levers connected with said type bars, and a series of keys for operating said levers."

The only difference between these claims is that in the last the type bars are concentrically sustained. Taking them broadly as they read, they cover every machine in which, with the other elements involved, there is a vertical shifting of the type-bar frame; and according to this, without more, the defendants infringe. It is only as they are restricted to the particular character of structure specified in the patent in which this idea is utilized that they do not. It is on the construction, therefore, to be given to them, the patent being valid, that the case turns.

There is nothing to anticipate the patent, whatever its construction, in the prior art. With all the variety which there appears, there is no device to in any way correspond. The idea of visibility, no doubt, was not new. There was a crude attempt at it in the Horton, which was applied for as early as March, 1882, as well as in the Brooks of the same year, to say nothing of the Fitch (1886), the Prouty and Hynes (1887—

1888),¹ the Grundy (1887-1889), the Sholes (1889-1891), and the Copeland (1887-1892), which followed on. Neither was it new to shift the type-bar frame, to bring the upper or lower character to the printing point. The usual shifting was of the platen or roller, against which the type bars strike, as in the Brooks (1875-1878), the Jenne (1879-1897), and the Sholes (1889-1891). But the shifting of the type segment as an alternative is suggested in the Brooks, which is the original two-letter type-bar machine, only it is so undeveloped as to be of little account. It definitely appears in the Wagner (1885), the Fitch (1886), the Unz (1887-1896), the Scudder (1886-1891), the Copeland (1887-1892), and the second Wagner (1888-1889). But in each of these the shifting is horizontal, and not vertical, an important distinction, as upon it the visibility of the writing, as well as the other advantages residing in the present invention, are worked out.

Nor can it be successfully maintained that it involved nothing patentable to transfer the shifting from the platen to the type-bar segment, or to change the direction to up and down. Invention has often been predicated upon less; and the highly beneficial results thereby secured fully justify its recognition here. It may not be entitled to any extended scope. *Union Writing Machine Company v. Domestic Sewing Machine Company*, 109 Fed. 85, 48 C. C. A. 244. It is not as though Daugherty originated the visible idea. That, by suggestion at least, was already in the art, although it must be conceded that he was the first to give it practical shape. And so, possibly, was the shifting of the type-bar segment, although that depends on how far the invention is able to be carried back. It is tied up also, to a certain extent, to the concrete expression of it which we have. And it may be doubtful whether the inventor had any conception of it outside of the rocking cradle, carrying keyboard and type bars, which he devised, except as in one of his patents he shifts the platen vertically instead. But, allowing all that is so said, there can be no question as to the novelty and inventive character of that for which the device, all things considered, is entitled to stand.

It is immaterial, in view of this, to inquire just when the invention was conceived, or at what date there was a reduction to practice, or whether due diligence was used, of which considerable evidence has been given, and which has been extensively discussed. These are important in interference proceedings, or where an issue as to priority between different inventors for the same invention is raised, but not where there is a mere comparison with other patents to determine the novelty of the device. Nor are the dates of the applications of alleged anticipating references of any account in such a case. A patent takes rank as a publication, negating novelty, only when it comes out. *Bates v. Coe*, 98 U. S. 31, 25 L. Ed. 68; *Diamond Drill Co. v. Kelly* (C. C.) 120 Fed. 282; *Eck v. Kutz* (C. C.) 132 Fed. 758, 764. A mere

¹ In each of these references the first date is the year when the patent was applied for, and the second, when it was granted, although, as we shall presently see, the last only, is of any account. Where but one is given, the application and the issue were the same year.

application has no such effect. The case of *Automatic Weighing Machine Co. v. Pneumatic Scale Co.* (C. C. A.) 166 Fed. 288, was one of priority of invention, and is not in point. It does not matter, therefore, how far in complete form the invention here is carried back. There is no question that it was in the mind of the inventor, in its essential features, as early as 1885, which, except the Brooks, the Horton, and the Wagner, which are of no consequence in this connection, is earlier than anything to which reference has been made. Indeed, so far as appears, it would be new and unanticipated at whatever time it came in. The validity of the patent, having regard to its general features, must therefore be sustained. The construction of the particular claims in controversy is the only question; and that depends upon considerations to be now discussed.

The first appearance of the invention in the Patent Office was by application filed November 15, 1889, which may thus be regarded as expressive of the original conception of it, of which those coming after are merely variant forms. This was held by the examiner to have been anticipated by certain references, and not to be mechanically operative; and, acquiescing in this view, on June 13, 1890, it was formally withdrawn. Having meantime perfected his ideas, and remedied what was wanting, the inventor, on May 2, 1890, filed a new application, which, after sundry rejections and amendments, was finally made the subject of interference proceedings, June 22, 1891, with the application of Arthur W. Street, as to two claims, which were held to be included in two of Street's. Before this, however, on June 9, 1891, certain other claims which had been allowed were canceled and made the subject of a divisional application, on which a patent, No. 457,258, was granted August 4, 1891. There is no particular significance in this patent, except as it is a part of the history of the proceedings of the Patent Office, and except, also, as it disclaims the pivoted shifting frame carrying the type bars shown in the others. Neither is there, to the patent for an improvement on both of these, which was applied for September 1, 1891, and granted July 12, 1892, as No. 478,925, save only that it provides for a vertical shifting of the platen, in place of the type bars. Meanwhile, in the interference proceedings, Daugherty, in his preliminary statement, having declared that he conceived the idea of shifting the type bars, instead of the carriage, as early as 1880, and his invention as a completed whole in the first part of 1885, while Street was only able to carry back his inventive conception to the spring of 1889, Street dropped out; and Daugherty, having gone on to a hearing and proved his contentions, was duly adjudged priority of invention January 21, 1892, and on March 15, 1892, patent No. 470,990 was issued to him accordingly. A week before this, on March 8, 1892, the patent in suit was applied for; and into this, by way of amendment, on June 23 following, claims 37 and 38, which are the subject of controversy were brought in; the patent issuing on August 23, two months afterwards. The question is as to the effect upon them, if any, of what had preceded.

These two claims were taken from the interference proceedings, being the first two—with a slight modification—of the Street claims.

They are more extensive than those of the Daugherty patent, No. 470,990, with which they were put in issue; it being because of this inclusiveness that the interference was declared. For convenience of comparison they are inserted here:

Street Claims.

1. In a typewriter, the combination with a series of individual pivoted type bars, carrying two or more type, of a vertically shifting frame for sustaining said bars, and suitable means for shifting said frame to bring either of the type bars in proper position to make an impression.

2. In a typewriter, the combination with a series of type bars, provided with two or more type, of a vertically shifting frame for sustaining said type bars, and upon which said type bars are pivoted concentrically, of a series of key levers connected with said type bars, and a series of keys for operating said levers.

Daugherty Claims.

2. In a typewriter, the combination of a frame and a carriage supported horizontally thereon in an elevated position, of a horizontal frame pivoted between its ends below the said carriage, and a series of type bars pivoted in the inner end of the said frame, having each two letters, whereby the tilting of the frame will move the type bars vertically and bring either letter in position to print, substantially as shown.

1. In a typewriter, the combination with a carriage of a vertically shifting frame carrying key levers and type bars, the latter having each two or more characters, whereby, when the frame is shifted, the type bars and keys are moved therewith, substantially as shown.

That the interference was rightly declared there can be no doubt. The broad claims of the one comprehending and conflicting as they did with the narrow claims of the other, both could not be separately maintained. And it is this conflict in transposed relation that continues here. The inventor, as it is said, having allowed the invention to be patented in the restricted form found in claims 1 and 2 of No. 470,990, cut himself off from any broad and comprehensive construction of it, such as is now set up. There can be no question that this ordinarily would be the result. It is contended, however, that, as the outcome of the interference proceedings, Daugherty became entitled to the claims there in controversy in all their breadth, and could have made them a part of his pending application, and, being entitled to write them into that, it is immaterial that he chose to write them upon the one he did; his right to do so being preserved by its having been put in before the other went out. That is to say, the claims having a place by right in either application, it was of no consequence as to which one it was exercised, a dedication or abandonment not being chargeable against him, because of his choosing the later one to come out. But that does not altogether state the case. There are other considerations which obtain. The question is not alone one of dedication or abandonment, but of having two patents for the same thing, as well, which, except under extraordinary circumstances, which are not found here, is not allowed.

It is a question, in the first place, whether these claims had rightly a place in either application, let alone both. The priority awarded to Daugherty in the interference proceedings did not necessarily so decide. The narrow claims found in the application for No. 470,990, of which, as against Street, he was found to be the original and first

inventor, while shutting out those of Street, did not entitle him as of course to the broader conception which there appears. He had the right to maintain his own invention, in which the vertical shifting of the type bars was made use of, whatever it was, which so conflicted with that of Street that both could not stand. But that is all. It did not make either Street's invention, or his claims, his. In judging of what Daugherty was entitled to in this respect, regard had necessarily to be given to that for which he had declared. His invention was expressed in the particular mechanical construction, or its equivalent, described in the specifications, where it was set forth in detail, and to this, not being a pioneer, he was confined. Admittedly he could not patent a mere idea; such, for instance, as the shifting of the type-bar segment instead of the platen, without regard to direction, as the complainant's brief concedes. But the vertical shifting of it, without more, is little less.

Nor, looking into the specifications, is anything broad advanced. The inventor manifestly had a definite mechanical structure in mind, and that, and no more, is what he claimed to have devised. "The objects of my invention," as he there declares, "are to connect the key levers and the type bars directly at their inner ends without the intervention of any other parts, so as to simplify and cheapen the construction and lessen the friction in the operation of the machine; to separate the type bars and the key levers by means of division bars or plates, which prevent the parts from interfering with each other; to provide each type bar with a type or types having capital and small letters or other characters upon them, and to change from one letter or character to the other by raising the inner end of the frame, which carries the type bars and the key levers, while the roller or platen carrying the paper remains stationary; to pivot at its rear end the guiding frame for the type bars, and which also holds or carries the ribbon, and to give to this guiding frame a vertical movement at its free front end, so that, while it serves as a guide to the type bars, it also raises the ribbon, so that each type bar prints its character in alignment, and then, as the type bar drops back to its normal position, the guiding frame carrying the ribbon also drops, so as to leave each letter or character, as well as the whole line of writing, unobstructedly exposed to the operator without the movement of any other part; to operate the carriage by means of two pivoted, spring-actuated dogs, which allow the carriage to move forward one space each time that one of the type bars is operated, and which permit the carriage to slide freely back to its starting position." The scope of the invention is thus made clear, and the means taken to accomplish it is amplified in the following text.

It is demonstrated, from what there appears, that, as already stated, the invention, so far as we are concerned with it, consisted substantially in mounting the type-bar series in a rocking cradle, arranged to carry both type bars and keyboard, by means of which the type bars were shifted vertically, according as one type or the other was to be brought to the printing point. And to this the inventor was tied. Not but that he was entitled to reasonable equivalents, but not to the extent of an entirely different structure. A rocking frame or cradle, carrying keyboard and type bars, and shifting the latter vertically, was of its es-

sence, and anything in which this was not found fell outside of it, and could not be consistently claimed. The vital thing, no doubt, was the vertical shifting of the type bars. But that was only a feature on which the general structure, producing visibility, was worked out. It was not, and could not be made, the whole invention. If the inventor had a larger conception, it does not appear. In other words, his only idea of how the vertical shifting of the type-bar segment could be utilized to secure visibility, so far as given to the world, was in the way that he had done; every expression of it, in the various patents taken out by him, except the one in which the platen was shifted vertically, instead of the type bars, being patterned on the same plan. And in conformity with this all the claims of the patent are drawn. Nor is there anything in the history of the invention or the course of its development to sustain a broader view. The issues in the Street interference could not, therefore, with any propriety, have been written into patent No. 470,990, as claimed.

Neither was there anything to justify their being brought into the patent in suit. As is expressly declared in the specifications, this patent was applied for as an improvement on the two which had gone before, No. 457,258 and No. 470,990; the object being "to improve, simplify, and cheapen the construction of the mechanism there described, in the manner and for the purposes set forth." The particular improvements thereby introduced consisted largely in the special form of type-bar frame employed, which was composed of a block of metal, pivoted on the working frame or cradle by which it was shifted, and having vertical slots in which the type bars were set, to assist in guiding them to the printing point. "By the use of this block," says the inventor, "I am enabled to mill slots therein for guiding the type bars accurately, so that they will at all times be guided to the printing point, * * * which makes these blocks interchangeable, so that a new one can be placed therein for an old worn one. This is a great improvement," as he adds, "over the construction shown in the said patents, as the inner ends of the division plates, when depended upon to guide the type bars, are liable to become misplaced slightly, thus causing the type to stick in the guide, 22. So, also, owing to this rigidity of the inner end of the frame, 12, and the accurate guiding of the type bars thereby, the key levers may be supported independent of the shifting frame—that is, upon a rod, b', not connected with the shifting frame, 12, but supported by vertical ears, a', projecting from the base, A'—in which instance the said levers will simply turn slightly upon their pivoted point, b', when the frame is shifted." The other improvements specified are of a like character, all going to minor features of the same general device to be found in previous patents, on which it is not necessary to enlarge.

Considerable stress is laid upon the fact that the key levers are not pivoted to the rocking frame or cradle by which the vertical shifting of the type bars is brought about. The distinction is even said to be radical, but is really of little account, not differing in substantive effect from the alternative mechanism, which it supplants, as the inventor, upon cross-examination, is forced to admit. The key levers are mounted on the cradle and rock with it, under the action of the shift-

ing lever by which the type-bar segment is raised. The shifting lever and rocking frame are simply not interlocked. That is all. The patent in suit, therefore, attempted no radical departure from what had gone before. Accepting the same general construction, it merely sought to improve upon and perfect it, as the fact that it was an improvement implies. There was no suggestion in the application of any enlarging or broadening out, which is not the office of an improvement, but only the making better of details. And there was nothing in it, therefore, to warrant the formulating of generic claims. Even in bringing in the interference issues, there was apparently no intention of getting away from the specific structure declared for; attention being called by counsel, as a reason for their allowance, to the different character of shifting frame from that to be found in No. 470,990, which shows the idea of it at the time, and from which, if such representations are to amount to anything, it should not be permitted to depart. Neither in this application, therefore, any more than the other, if any broad construction is to be given to them, did the claims in question have any place, which effectually disposes of the contention that, being entitled to be brought into either, the inventor had the right to elect which.

Assuming, however, that this is not correct, and does not do justice to the inventor, it is nevertheless conclusive against any broad construction of the present patent that an earlier patent with equivalent narrow claims was allowed to come out, which result the co-pendency of the application for the second was powerless to avert. Not but that this may not sometimes be the case, but only that, under the circumstances, it was not so here. That the claims of the patent in controversy, upon any such reading of them as is contended for, are inclusive of claims 1 and 2 of No. 470,990, there can be no doubt. The only difference between the two sets is their breadth; the one being specific, where the other is not. It was on the strength of this idea that the interference was declared. The later patent thus became a second patenting of the first, which the law does not ordinarily allow. It is not enough that there was a difference in breadth of scope. *Miller v. Eagle Manufacturing Company*, 151 U. S. 186, 14 Sup. Ct. 310, 38 L. Ed. 121. An inventor may improve or narrow, but not extend. It is contended against this result that both applications were in the Patent Office together, by which the rights of the inventor were saved. It is no doubt true that, where an application in which an invention is expressed broadly is pending at the same time with one upon narrower lines, the taking out of the latter does not preclude the subsequent allowance of the other in broader form. But that, unfortunately, is not this case. Both applications, of course, were pending together; but the one into which the broad claims were eventually brought was the specific and not the generic form, coming in apparently as an after-thought, when the other was already three months out. The interference proceedings having been disposed of on January 21, 1892, there was nothing to prevent the Street claims being made a part of the earlier patent, and, if the inventor was entitled to them, that was the place where it should have been done.

A reissue is ordinarily the only remedy where a patent is found not to be expressive of an invention to its full breadth. An enlargement

of it is not to be effected by the ingrafting of broad claims upon a later patent based upon an application of narrow scope. The authorities relied on by the complainant do not so decide. Undoubtedly there is no double patenting where the broad expression of the invention, although the last to be patented, was granted on an application filed before that for the narrower or specific form. As was well said by Judge Townsend, in *Thomson-Houston Co. v. Winchester* (C. C.) 71 Fed. 192, the inventor is not to be deprived of his broad patent where the application for it was made first and was delayed in the Patent Office through no fault of his. And *Electric Storage Co. v. Buffalo Electric Carriage Co.* (C. C.) 117 Fed. 314; *Id.*, 120 Fed. 672, 57 C. C. A. 183, is to the same effect. Nor is there a double patenting, where the later generic patent and the earlier specific one bear a divisional relation, as in *Benjamin Electric Manufacturing Co. v. Dale*, 158 Fed. 617, 85 C. C. A. 439; the two by virtue of this being in effect one. But not so, necessarily, where one is a continuance of the other, if that, indeed, can be said of what we have here, particularly where the later patent is in terms for an improvement on the other, and conforms strictly to that idea. In the *Victor Talking Machine Case* (C. C.) 140 Fed. 860, and 145 Fed. 350, 76 C. C. A. 180, the generic patent, although last applied for, was the first to issue, and all that is there said must be taken with this in view. Of course, there was no abandonment by the earlier narrow application in that instance; this not affording any disclosure or surrender of the invention, even though pending for nearly five years. Had the inventor, however, got his specific patent, and later his generic one, it would have presented a very different case.

The question, on the other hand, is squarely decided by the Commissioner of Patents in *Jones v. Larter*, 92 O. G. 383, where it was held that broad claims inserted in a later application, after a patent had issued on a co-pending earlier one, could not be allowed. "The presumption of dedication to the public by disclosure in a patent," as it is said by the learned Commissioner, "may, it is true, under certain circumstances, be overcome by having a concurrently pending application claiming it; but I know of no authority for holding that it is overcome by an application which does not and was not intended to claim it, merely because the claims are inserted therein long after the patent on the other case issues. In the present case Larter could have made the claims of the issue at any time in his original case, and his failure to do so was, according to his own statement, due merely to a mistake as to his right to such claims. This was clearly a case where the claims could only be properly made by reissue, if at all, and this was the view that Larter took of the matter. He apparently did not think of inserting them in this case until six months after his patent issued, and inserted them then only upon the suggestion of the examiner. It was an error on the part of the examiner to make the suggestion, since to grant the claims in this case would be in effect to grant a reissue of Larter's previous patent with broader claims, and at the same time extend its term."

The present case is not to be distinguished from *Morse Chain Co. v. Link Belt Machine Co.*, 164 Fed. 331, 90 C. C. A. 650. In that case there were two applications co-pending in the Patent Office for over two

years, each being for a specific expression of the same general inventive idea. A patent was granted on the earlier application, and some eight months afterwards a second patent was issued on the other, on which, as here, if construed broadly, as generic, the defendants infringed. This construction, however, the court declined to give. "This is not a case," says Judge Grosscup, "in which a patentee, having first made application for a patent for a generic invention, has subsequently applied for patents for specific improvements. This is a case in which a patentee, possessed of an alleged generic idea, elected to first apply for a patent for a specific embodiment embracing the essential feature of the generic idea, * * * and later, specifying such essential feature in another specific embodiment, claims that the generic idea growing out of such essential feature belongs to the later, and not to the earlier, patent. To allow this, it seems to us, would be to make the second patent overlap the first, a result that involves the patentee in this dilemma, either that his second patent is not generic in the respect named, or that it is a double patenting."

To the same effect, also, is *Otis Elevator Co. v. Portland Co.*, 127 Fed. 557, 62 C. C. A. 339, where a similar attempt to have the claims of a later patent read broadly, as being generic, in the face of the restricted claims of an earlier patent, the applications for the second being co-pending, was refused, upon substantially the same grounds. The truth is that there is no particular saving grace in co-pendency, independent and apart from other things. Otherwise, the filing of an application for a mere improvement, as here, before the earlier patent comes out, would allow anything to be brought into such application, by way of new and enlarged claims, that experience in the practice of the invention might suggest, which surely is not the law. Without enlarging upon the subject further, therefore, I am constrained to hold that, if the claims relied on in the patent in suit are to be so construed as to embrace the defendants' machine, they conflict with and are anticipated by patent No. 470,990, previously taken out by the same inventor, and are void. It is only by confining them to the particular character of structure described in the specifications, constituting an improvement, and not an enlargement, upon the earlier patent, that they can be saved. And upon this the defendants do not infringe.

It is also urged that the invention was covered by a British patent to the same inventor taken out in 1891, which ran out by the expiration of its term August 4, 1905, and that this, by Rev. St. § 4887 (U. S. Comp. St. 1901, p. 3382), having become the term of the patent in suit, it had thus expired before the bill was filed. The claims of the British patent were made up from those of No. 457,258 and No. 470,990, mentioned above, some being taken from each, from which the substantial identity of the invention as so patented with that of the two claims of the patent in suit, if construed broadly, would seem to ensue; the greater including the less. But I am on record as holding, in *Hennebique Construction Company v. Myers* (C. C. A.) 172 Fed. 869, that there was a complete doing away with the interdependence of foreign and domestic patents by the industrial treaty of Brussels of 1900, which treaty was self-executing, and applied to existing patents, and would therefore be effective here. While my opinion was not the opin-

ion of the court, and no point is made of the treaty by counsel at this time, I prefer—the case being otherwise disposed of—to say nothing to in any wise conflict with the views so expressed.

Limiting, then, the construction of the claims relied on, for the reasons given, to a shifting of the type-bar frame by the mechanical means specified in the patent, the defendants' machine does not infringe; or enlarging them beyond this, so that it does, the claims are void for double patenting. Either conclusion is fatal to the right to recover, and the bill must therefore be dismissed, with costs.

CONROY v. PENN ELECTRICAL & MFG. CO.

(Circuit Court, W. D. Pennsylvania. September 30, 1909.)

No. 50.

1. PATENTS (§ 138*)—REISSUE—TIME OF MAKING APPLICATION.

Where a suit on a patent was commenced within 15 months after its issue, and within 10 days after it was adjudged invalid by the Circuit Court of Appeals a reissue was applied for which narrowed the scope of the original patent, and it appeared that a decision as to the validity of the original patent was reasonably necessary to establish the necessity for a reissue, the application therefor was made within a reasonable time.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 138.*]

Time for application for reissue, see note to United Blue-Flame Oil Stove Co. v. Glazier, 55 O. C. A. 560.]

2. PATENTS (§ 141*)—REISSUE—IDENTITY OF INVENTION.

Where an original patent was for a method and held invalid because broader than the invention, a reissue covering a machine by which such method, and only that, can be practiced, is not invalid as not for the same invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 206-213; Dec. Dig. § 141.*]

3. PATENTS (§ 328*)—REISSUE—VALIDITY—MACHINE FOR CLIPPING GLASS.

The Conroy reissue patent No. 12,789 (original No. 723,139) for a machine for clipping the edge of glass articles is valid.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by John M. Conroy against the Penn Electrical & Manufacturing Company for infringement of patent. On demurrer to bill. Demurrer overruled.

Christy & Christy and Paul Synnestvedt, for complainant.

J. M. Nesbitt and Edward Rector, for defendant.

ORR, District Judge. This is a suit for the infringement of a reissued patent, the subject of which is, "Improvements for Ornamenting Glass." The bill is in the usual form and prays for the customary relief. The case comes before the court upon demurrer, which (among other matters) attacks the validity of the reissue. The demurrer must be overruled.

Ordinarily no expression of opinion is advisable in explanation or support of such ruling. In this case, however, the counsel in their

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

arguments have intimated a desire that the court should decide whether or not the patent in suit has been reissued properly. The answer to this must be in the affirmative, if all the express and implied conditions have existed, and have been performed, upon which a reissue may be granted.

The express conditions as found in the statute relating to a reissue of patents (Rev. St. 4916 [U. S. Comp. St. 1901, p. 3393]), necessary to be considered in deciding the present case, are: (1) That the original patent was invalid by reason of the patentee claiming as his own invention more than he had a right to claim as new; (2) that the error in the original patent arose by inadvertence, accident, or mistake, and without fraudulent or deceptive intention; and (3) that the reissued patent is for the same invention as the original.

The implied condition necessary to be considered is that the application for the reissue was made within a reasonable time.

The second express condition and the implied condition may be briefly considered in the light of *Topliff v. Topliff*, 145 U. S. 156, 171, 12 Sup. Ct. 825, 36 L. Ed. 658. That case pronounces the settled rule of the Supreme Court to be that it will not review the decision of the commissioner upon the question of inadvertence, accident, or mistake, unless the matter is manifest from the record. Such matter is not manifest from the record in this case. It must necessarily follow that there was not fraudulent or deceptive intention on the part of the patentee. That case also holds that the question whether the application for reissue was made within a reasonable time is in most, if not all, such cases a question of law. In the present case the application for reissue was made within 10 days after the Circuit Court of Appeals had finally decided that the original patent was invalid. That litigation, which is hereinafter referred to, was begun within 15 months after the original issue, and indicates that a decision was reasonably necessary to declare that the original patent was invalid. As will be seen, this is a case of diminished, and not enlarged, reissue. The rights of the public were not narrowed. Therefore the two-year rule mentioned in *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783, and *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. 174, 6 Sup. Ct. 451, 28 L. Ed. 665, should not apply. In no view of the case should the patentee be deemed guilty of laches.

The first express condition—reason why the original patent was invalid. The original patent, No. 723,139, was the subject of litigation between the same parties in this court, as reported in *Conroy v. Penn Company* (C. C.) 155 Fed. 421, and *Id.* 425, and in the Court of Appeals for the Third Circuit, as reported in *Penn Company v. Conroy*, 159 Fed. 943, 87 C. C. A. 149. The result of this litigation was that said original patent, No. 723,139, was declared to be invalid, not because there was no invention, but because the inventor's claim was broader than it should have been. This will be seen by an examination of the opinions of the courts in said litigation, in so far as said opinions are specially applicable to said patent No. 723,139 (there being two other patents also considered in the same case). The following is from the opinion of the lower court, 155 Fed. 421, at page 422, in which I have italicized the last sentence:

"The patents refer to the chipping and scalloping the edges of plate glass for small mirrors. Previous to these patents this was done by hand. A piece of plate glass of the desired size, diamond scored on the upper side about an eighth of an inch from the edge, was firmly held by the operator with one hand to overlap the edge of a table. In the other hand the operator held a chipping tool. This consisted of a handle provided with a bifurcated prong somewhat wider than the plate glass. The longer arm of the prong was on the lower side of the plate. A sharp, quick downward stroke of the tool forced the inner end of the lower prong against the lower side of the plate, and the upper prong against the upper edge of the plate. This chipped or cut-out scallops back to the scored line. The tool was then moved along the plate, and the operation rapidly repeated. It resulted in a uniform succession of scallops along the plate. The advance in hand chipping now dispenses with scoring. *The invention in this case consisted in supplanting hand chipping by machine chipping.*"

Again the lower court (155 Fed. 423) uses the following language, which I have italicized:

"It is very clear that, in view of the prior existence of chipped glass, and that the advance Conroy made was to devise a machine to make it, it is clear that, while such machine is patentable, the function of that machine, namely, making machine chipped glass, is not."

The lower court, therefore, held said patent void, "as simply being for the function of a machine devised to manufacture an old product." The Court of Appeals (159 Fed. 944, 949, 87 C. C. A. 155) considered and described the old hand method, and stated:

"The claims of the method patent include the hand operation as well as the machine operation. * * * The complainant did not discover a new method of chipping glass. * * * We think the court below was right in holding this patent invalid."

There seems to be in said opinions a fair recognition that Conroy had made an invention of broad character, and that only because his claim could be construed to include the old hand method was said patent invalid. It is also a reasonable conclusion from the study of those cases that an adjudication of the court upon the original patent was reasonably required to ascertain the need for reissue.

The third express condition is the same invention. The original patent was a broad method patent, covering both the hand method and the machine method; the reissued patent covers the machine method only. The boundaries of the new claim lie within the boundaries of the old, as may be seen by comparison:

Original.

R. 20, Line 101.

As an improvement in the art of shaping the edges of glass articles, the method herein described which consists in removing by blows at successive points closely adjacent to the edge the edge and a portion of the opposite side of the article in pieces approximately uniform in quantity, substantially as set forth.

Reissue.

R. 30, Line 108.

A machine for chipping the edges of glass articles, comprising in combination a rest or support for said article and a carrier movable relative to said support and provided with projecting means arranged to strike the said glass an angular glancing blow at a point adjacent its edge and in a direction away from the edge, substantially as described.

It is apparent that the method of the original claim can be performed by any other conceivable apparatus as well as by the apparatus

of the new claim, and that the apparatus of the new claim must perform the method of the original claim and no other method. The original and the reissue have the same drawings. The description of preferred forms of apparatus is the same in each. And each shows that the inventor made no claims therein to such specific or preferred forms, which were the subjects of other applications or patents. There is nothing in defendant's contention that new matter has been introduced into the specification of the reissue.

The object of the patent law is to secure to inventors a monopoly of what they have actually invented or discovered, and it ought not to be defeated by a too strict and technical adherence to the letter of the statute, or by the application of artificial rules of interpretation. *Topliff v. Topliff*, 145 U. S. 156, 171, 12 Sup. Ct. 825, 36 L. Ed. 658.

It is urged by defendant that the reissued patent in suit is invalid because it is a second patent to the same inventor for the same invention as that covered by an earlier patent, to wit, the Conroy patent No. 735,949, of August 11, 1903, heretofore referred to. But it does not so appear. The original patent, No. 723,139, was the generic method patent, while patent No. 735,949 was a specific apparatus patent, both in pursuance of the same invention and same original application. The revised patent No. 12,789 is a generic machine or apparatus patent covering every machine for chipping the edges of glass articles, which comprises in combination a rest or support for said articles and a carrier movable relative to said support, and provided with projecting means arranged to strike the glass an angular glancing blow at a point adjacent to its edge and in a direction away from the edge. Patent No. 735,949 is a specific machine or apparatus patent. The same is true of patent No. 731,667, which is mentioned in defendant's brief although not in the bill. Both are subsequent in date to the original patent and within the broad claims of the generic patent No. 12,789, the reissued patent. Both are for machines which comprise the combination of parts mentioned in the reissued patent. Yet other machines may be conceived which comprise such combination of parts, and which may be as different from the machines claimed in patents No. 735,949 and No. 731,667 as they are from each other. So far there does not appear to have been double patenting. Defendant further contends that the method patent No. 723,139 could not be reissued as machine or apparatus patent No. 12,789, because as inventions method and apparatus are distinct and independent. To support this contention many cases have been cited to show that a machine patent cannot be reissued as a method patent. In almost all of them the reissued patents were held invalid because they were improper attempts "to make the less include the greater," to enlarge the claims of the inventor and to diminish the rights of the public. In the present case the method and the machine were not distinct and independent inventions, but "were simultaneously evolved." Both were correlative units of the single fact of invention. The facts of the present case as shown by the pleadings emphasize the intent of Congress, in the passage of the act relating to reissues, to thereby further encourage inventors.

We are clearly of opinion that reissued letters patent No. 12,789,

for ornamenting glass, issued to John M. Conroy, the complainant, are valid, and that there are no sufficient causes of demurrer in this case. The demurrer is overruled.

GAINES et al. v. ALABAMA CONSOL. COAL & IRON CO. et al.

(Circuit Court, N. D. Alabama, S. D. October 6, 1909.)

No. 182.

1. PATENTS (§ 310*)—VALIDITY—DETERMINATION ON DEMURRER.

To authorize a court to declare a patent void on demurrer, it must appear from its face and from common and general knowledge of the prior art that the want of novelty and invention is so palpable that it is impossible that evidence of any kind could show the fact to be otherwise.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 535-540; Dec. Dig. § 310.*]

Pleading in infringement suits, demurrer for want of novelty and invention, see note to *Caldwell v. Powell*, 19 C. C. A. 595.]

2. PATENTS (§ 26*)—INVENTION—COMBINATION OF OLD ELEMENTS.

To constitute a patentable combination of old elements, they must by their joint action produce a new and useful result, or an old result in a cheaper or otherwise more advantageous way.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

3. PATENTS (§ 328*)—VALIDITY.

The Gaines and Cox patent No. 760,189, for plant for feeding metallurgical furnaces, *held* not void on its face.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by Ambrose P. Gaines and Edwin R. Cox, Jr., against the Alabama Consolidated Coal & Iron Company and others as its officers for infringement of letters patent No. 760,189 for plant for feeding metallurgical furnaces, dated May 17, 1904, granted to Ambrose P. Gaines and Edwin R. Cox, Jr. On demurrer to bill. Demurrer overruled.

Smith & Frazier, for complainants.

R. D. Johnston, Jr., for defendants.

GRUBB, District Judge. The equity of the bill of complaint is attacked by the general demurrer of the defendant upon the ground that the patent, which it is charged that defendant infringed, was invalid for want of invention and patentable novelty.

The invalidity must appear upon the face of the patent, and from facts of which the court takes judicial knowledge, and must so appear as to be clear and free from doubt. The rule, in hearings of this nature upon general demurrer, is well settled that:

"In considering the question of the validity of a patent on its face, the court may take judicial knowledge of facts of common and general knowledge, tending to show that the device or process patented is old, or lacking in invention, and that the court may refresh and strengthen its recollection and impression of what facts were of common and general knowledge at the time of the application for the patent by reference to any printed source of general information which is known to the court to be reliable, and to have been published prior to the application for the patent. *Brown v. Piper*, 91 U. S. 38,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

23 L. Ed. 200. The presumption from the issuance of the patent is that it involves both novelty and invention. The effect of dismissing the bill upon demurrer is to deny to the complainant the right to adduce evidence to support that presumption. Therefore, the court must be able, from the statements on the face of the patent, and from the common and general knowledge already referred to, to say that the want of novelty and invention is so palpable that it is impossible that evidence of any kind could show the fact to be otherwise. Hence it must follow that, if the court has any doubt whatever with reference to the novelty or invention of that which is patented, it must overrule the demurrer, and give the complainant an opportunity, by proof, to support and justify the action of the patent office." *American Fiber-Chamois Co. v. Buckskin-Fibre Co.*, 72 Fed. 508, 18 C. C. A. 662.

In this case, the patent covered an apparatus, the purpose of which was to convey stock (coke, ore, and limestone) from the stockyard or bins to the furnace, handling and unloading it automatically. The original method of filling the furnace with stock was by means of "buggies" loaded on the stockyard by hand, wheeled by laborers onto the cage of a vertical elevator, by which they were hoisted to the top of the furnace and rolled off the cage to the mouth of the furnace, and unloaded by hand into the furnace. The method covered by the patent adopted the vertical hoist or elevator and cage. Instead of loading and rolling buggies onto the cage at the bottom of the furnace, and rolling them off the cage when it had reached the top of the furnace, and unloading them into the furnace, all by hand, complainant's method adopted the use of a car operating on a track on the floor of the cage, which was loaded direct from bins containing the stock, and while standing on the cage and hoisted to the top loaded, where it was mechanically released from the cage running down a track connecting with the track on the cage to the mouth of the furnace, where it was dumped mechanically and returned mechanically to the cage, empty. The improvement consisted in the economical handling of the stock, due to the saving in labor.

It becomes important, in determining the question of invention or patentable novelty, to arrive at the stage of the art at the time of complainant's application for the patent under consideration, which was in January, 1904. From the recitals of the patent itself, it appears that, at the time it was applied for, there had been generally introduced among furnacemen a device for handling stock from the yard into the furnace known as the incline or skip hoist. Beginning with line 22, p. 1, the recital is:

"Nearly all furnace plants using vertical hoists were built prior to the general introduction of the skip or incline hoist, and it entails a very large expense to reconstruct such furnaces for the incline hoist, often necessitating a new furnace, because the old shells are generally too thin to support the weight of such incline or skip hoist. Our invention, which secures all the advantages of the modern skip hoist, can be applied to all such furnaces at a cost so small as may well be considered nominal."

It thus appears from the recitals of the patent itself that the skip or incline hoist was in general use when complainant's patent was applied for, and that the advantages claimed for complainant's invention were those realized by the skip or incline hoist. The exhibits, offered by defendants to refresh the recollection of the court, consisting of trade and scientific journals, published prior to the com-

plainant's application, show the same fact, and illustrate the nature of the apparatus, known as the skip or incline hoist, and its method of accomplishing the advantages which complainant contends are also the resultant of his invention.

The court has arrived at the conclusion that the fact that the skip hoist was in general use prior to the application of complainant for his patent, and the general character of skip hoists are matters of common knowledge in this district, of which the court will take judicial notice, and are shown as well by the recitals of complainant's patent. The skip hoist was an inclined instead of vertical elevator, running from the foot to the top of the furnace, on which its weight rested, and on which cars, loaded at the foot, were lifted to the top and automatically dumped into the mouth of the furnace, being returned automatically for reloading. The skip car was loaded indifferently at different plants, either direct from bins, while standing at the bottom of the incline, or from larries, which were loaded from the bins, and which conveyed the stock to the foot of the incline, and, standing over the incline car, dumped its load into it, while it was stationary at the bottom of the incline; and possibly there existed types where the incline car was moved by an electric motor away from the foot of the incline to the bins, to be loaded, and was then by it returned to the incline foot for hoisting to the furnace. In this stage of the art, the complainant applied for his patent, and the controlling inquiry is whether his apparatus shows invention or patentable novelty, in view of the fact that the incline or skip hoist was in general use at and before the date of his application. It appears from the claims of the patent that there was no new element in the combination or aggregation described and claimed in it. The only suggestion of novelty in any one of the separate elements is that the car is loaded on the cage while stationary on it. Conceding that this method had never been used prior to complainant's application, it is not the result of an original conception in the sense of an invention, but, at most, mere mechanical adaptation, and not patentable. But the method of loading the incline car while standing on the incline track in the incline pit, both from larries and from bins direct, was in general use before the complainant's application, and is the equivalent of loading the cage car while stationary on it. Numerous other instances of the same method at mines have long been in general use in all mining districts. Unless, therefore, the combination was patentable, as such, the patent cannot be sustained.

The rule as to when a combination of all old elements may be patented is expressed in the case of *Richards v. Chase Elevator Co.*, 158 U. S. 302, 15 Sup. Ct. 833, 39 L. Ed. 991, as follows:

"Unless the combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements."

And in *Stephenson v. Brooklyn R. R. Co.*, 114 U. S. 149, 5 Sup. Ct. 777, 29 L. Ed. 58, as follows:

"A combination is patentable only when the several elements of which it is composed produce, by their joint action, a new and useful result, or an old result in a cheaper or otherwise more advantageous way."

In the case of *Burt v. Evory*, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647, it is thus stated:

"Neither is it invention to combine old devices into a new article without producing any new mode of operation."

In the case of *Loom Co. v. Higgins*, 105 U. S. 591, 26 L. Ed. 1177, it is thus stated:

"At this point we are constrained to say that we cannot yield our assent to the argument that the combination of the different parts or elements for attaining the objects in view was so obvious as to merit no title to invention. Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce 50 yards a day when it never before had produced more than 40; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent."

If the state of the art, at the time of complainant's application, was represented by the vertical hoist and its buggies, as hereinbefore described, it might well be contended that complainant's device for automatic loading and handling created a new result, though by a combination of old elements, and was patentable. This result, at the time of complainant's application, had, however, been anticipated by the general use of the skip or incline hoist, which produced the same results as complainant's device was designed to do, viz., the automatic loading and handling of stock into the furnace. Both the incline hoist and complainant's device were combinations of old elements, patentable, if at all, only by reason of producing a new result, or an old result with greater economy. Complainant's device having been patented after the incline hoist had come into general use, and producing the same result only in operation and economy as it did, cannot be said to produce a new result, or an old result in a cheaper or more advantageous way than was in general use when the patent was applied for.

The only advantage claimed for complainant's system over the incline hoist is that it can be applied to a class of furnaces to which the incline hoist is not adaptable. The patent recites that many existing furnaces are constructed with a vertical hoist, and that to introduce the incline hoist it is necessary to reconstruct such furnaces at great cost, for the reason that the original construction was not of sufficient strength to support the incline, as it leans against the furnace tower. Complainant's apparatus, it is claimed, furnishes an automatic system of loading and handling the stock into these furnaces, without reconstruction and with small cost. Applying to the class of furnaces with vertical hoists, it may be said that this result, accomplished by complainant's system, is new, since the incline hoist is claimed to be inapplicable to furnaces not constructed with special reference to its installation, and with the old-style vertical hoists. To devise a method by which a large class of existing furnace plants could be furnished with an automatic loading and handling apparatus, without reconstruction, might, in itself, constitute invention.

In the case of *Western Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294, the Supreme Court held that the application of a torsional spring, theretofore used in connection only with clocks, doors, and other articles of domestic furniture, to a telegraph key, was such a new use as would make the combination patentable, and said (page 605 of 139 U. S., page 671 of 11 Sup. Ct. [35 L. Ed. 294]):

"Indeed, there is nothing in any of these exhibits which shows the use of a torsional spring in a telegraphic instrument, and, while this invention does not seem to be one of great importance, we think the adaption of this somewhat unfamiliar spring to this new use, and its consequent simplification of mechanism, justly entitles the patentee to the right of an inventor."

In the case of *Vinton v. Hamilton*, 104 U. S. 485, 26 L. Ed. 807, the court intimates that it was only the prior use of an ordinary foundry cupola furnace by others than the applicant for resmelting the iron contained in furnace slag that prevented this nonanalogous use of an old device from being patentable.

In the case of *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 198, 39 L. Ed. 275 the court said:

"But where the alleged novelty consists in transferring a device from one branch of industry to another, the answer depends upon a variety of considerations. In such cases we are bound to inquire into the remoteness of relationship of the two industries; what alterations were necessary to adapt the device to its new use, and what the value of such adaptation has been to the new industry. If the new use be analogous to the former one, the court will undoubtedly be disposed to construe the patent more strictly, and to require clearer proof of the exercise of the inventive faculty in adapting it to the new use—particularly if the device be one of minor importance in its new field of usefulness. On the other hand, if the transfer be to a branch of industry but remotely allied to the other, and the effect of such transfer has been to supersede other methods of doing the same work, the court will look with a less critical eye upon the means employed in making the transfer. Doubtless a patentee is entitled to every use of which his invention is susceptible, whether such use be known or unknown to him; but the person who has taken his device, and, by improvements thereon, has adapted it to a different industry, may also draw to himself the quality of inventor."

And again:

"As a result of the authorities upon this subject, it may be said that, if the new use be so nearly analogous to the former one that the applicability of the device to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use; but if the relations between them be remote, and especially if the use of the old device produce a new result, it may at least involve an exercise of the inventive faculty. Much, however, must still depend upon the nature of the changes required to adapt the device to its new use."

In view of these authorities, if there were no question in this case of anticipation arising out of the prior general use of the skip or incline hoist, the apparatus of complainant might show invention in applying old devices to new uses and a new industry. So far, and so far only, as the incline or skip hoist can be applied, it anticipates the use of complainant's apparatus. If there is a class of furnaces to which the skip or incline hoist cannot be applied and to which complainant's apparatus is capable of application, it may be that the patent

issued to cover it may be shown to be valid and to apply to that class of furnaces.

The demurrer will be overruled, and the defendant allowed 30 days from the date of this decree to answer the bill of complaint.

WILSON TROLLEY CATCHER CO. v. FRANK RIDLON CO. et al.

(Circuit Court, D. Massachusetts. October 14, 1909.)

No. 303.

PATENTS (§ 328*)—INFRINGEMENT—TROLLEY CONTROLLER.

The Lord patent, No. 548,074, for a trolley pole and rope controller, claim 4, which claims broadly a tension device for the rope and an automatic lock for locking the tension device when the trolley leaves the conductor, to save it from invalidity by reason of its broad terms, must be limited to substantially the arrangement of parts and the locking mechanism described in the patent. As so construed, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by the Wilson Trolley Catcher Company against Frank Ridlon Company and others. Bill dismissed.

J. S. Rusk, for complainant.

Allen Webster, for defendants.

COLT, Circuit Judge. This is a suit for infringement of letters patent No. 548,074, granted October 15, 1895, to Charles A. Lord, for "improvements in trolley pole and rope controllers." The main invention covered by the patent relates to an automatic lock for locking the tension device when the trolley pole leaves the wire. The question of infringement turns upon the merit of the Lord invention, and its scope in view of the state of the art.

The claim in issue reads as follows:

"4. In combination with a trolley pole and with a trolley rope, a tension device for the rope, and an automatic lock for locking the tension device when the trolley leaves the conductor."

This is the broad claim of the patent. The other seven claims are limited in some way to the specific form and arrangement of the devices described in the specification and shown in the drawings of the patent.

Upon its face claim 4 covers the combination of any kind of trolley pole, trolley rope, tension device, and automatic lock for locking the tension device when the trolley leaves the conductor; and the underlying question in this case is whether the merit and scope of the Lord invention are such as to entitle the patentee to a claim of this breadth.

In the operation of electric trolley cars it is important that the trolley pole, when it accidentally leaves the wire, should be prevented, as far as possible, from being thrown upwards by the action of the trolley spring, thereby rendering the pole liable to become entangled in the cross wires. It is also desirable that the trolley rope should always be kept taut while the pole is on the wire.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

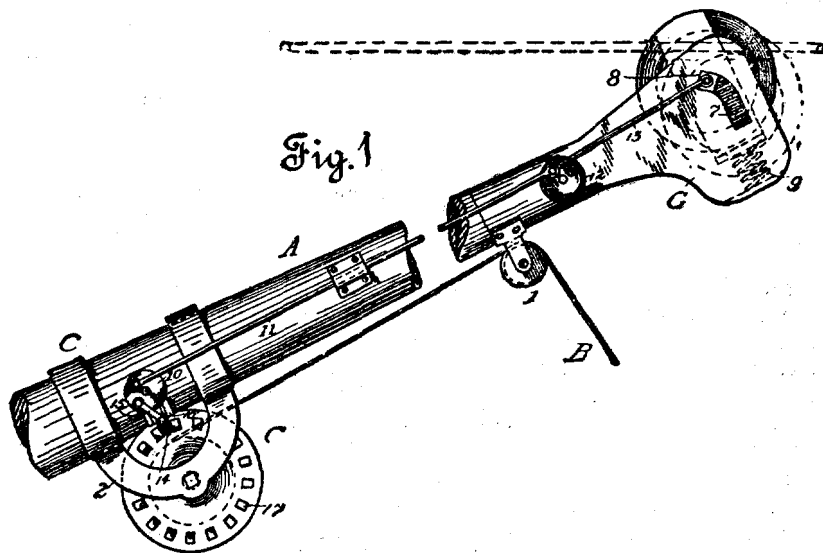
The devices for accomplishing these objects at the date of the Lord invention were a spring tension reel for keeping the rope taut while the pole was on the wire, and a supplementary locking and spring mechanism connected with the tension device, which first arrested the upward movement of the pole and then pulled it down towards the top of the car, when the pole was off the wire. In this arrangement the pole, on leaving the wire, was first thrown upward some distance above the wire and then drawn downward a considerable distance below the wire.

As distinguished from this arrangement Lord conceived the idea of a locking device which should instantaneously catch the pole the moment it left the wire and hold it, so that the pole was neither thrown upward above the wire nor pulled downward toward the top of the car.

After stating that one object of the invention is a tension device and another object of the invention is an automatic lock, and describing the purposes of these two devices, the Lord patent says:

"My invention therefore consists of two parts—first, a tension device for keeping the rope taut while the car is proceeding in the ordinary way; and, secondly, in a means for locking such device when the roller leaves the conductor, and thus preventing the end of the pole from being thrown above the level of the conductor itself."

Figure 1 of the patent is a side elevation of the trolley pole and roller, showing the tension device and the automatic locking device.



The tension device here shown is a spring tension reel. The tendency of the spring is to wind up the rope under ordinary conditions. At the same time, when the pole rises to a higher level on the wire, it permits the rope to unwind as this spring is lighter than the trolley spring (not shown in the drawing), and is therefore insufficient to

overcome the upward movement of the trolley pole produced by the trolley spring.

The locking device here shown comprises the locking bolt, 14, which engages a circular series of teeth on the tension reel. This locking bolt is connected by the link, 15, to the disk, 10, being guided by the ribs, 16. From the disk, 10, the rod, 11, extends to the disk, 12. From the disk, 12, extends a rod, 13, to the end of the transverse pin upon which the trolley roller is journaled. The sides of the trolley head, G, are provided with slots, and the ends of this pin upon which the trolley roller is journaled fits within these slots. The roller itself is mounted in a casing through the sides of which the pin passes. Between the bottom of the trolley head and the bottom of the casing is interposed a coil spring, 9. When the roller is on the wire this spring will yield to the pressure from above, and ordinarily will permit the transverse pin to remain near the middle of the slot; but if the roller leaves the wire the resistance from above is removed, and the spring forces the roller to the top of the slot, as indicated in Fig. 1. This movement of the roller actuates the locking device for the reel; in other words, it locks the reel by throwing the locking bolt into engagement with the teeth on the reel, thus preventing the unwinding of any more rope, and therefore catching and holding the trolley pole in approximately the same position as when on the wire, or at least not permitting the end of the pole to rise above the wire. When the pole is replaced on the wire, the pressure from above forces the pin carrying the roller down into the middle of the slot again, and this movement unlocks the reel, by withdrawing the locking bolt from between the projections on the reel.

With respect to this locking device the patentee says in his specification:

"I have therefore provided a locking device operated automatically at the instant the roller leaves the conductor, by means of which the reel is instantly locked, preventing any rope from being wound off, and thus absolutely preventing the trolley spring from raising the pole above the conductor."

As distinguished from the prior art, the Lord mechanism discloses three special and peculiar features: First, the tension device and the locking device are arranged on the pole instead of on the end of the car; second, the locking device is operated by the movement of the roller relatively to the pole instead of by the upward movement of the pole; and, third, the locking device operates instantaneously and so prevents any upward movement of the pole above the wire or downward movement below the wire.

While Lord's idea of an instantaneous locking device was novel and possessed merit, the principle upon which he carried out this idea was defective from a practical standpoint. It is extremely doubtful whether any useful and practical locking device can be constructed by loading the pole with the tension device and locking mechanism, and operating the lock by the movement of the trolley wheel relatively to the pole. In all the devices of this class which have proved to be practical and commercial, the tension reel and the locking mechanism have been arranged on the end of the car, and the lock operated by

the pulling movement of the rope as the pole is forced upward by the trolley spring. This is also true of the other class of devices shown in the prior Yeakley patent, No. 476,028, and the prior Lord patent, No. 498,355, in which the trolley pole is first arrested in its upward movement, and then pulled down towards the top of the car.

It is true that after acquiring title to the Lord patent October 11, 1906, and during the progress of this suit, which was begun November 7, 1906, the complainant equipped an electric car with the Lord device and operated it successfully; but this proof only goes to the extent of showing that the device is operative. It still remains the fact that the Lord patent, since its issue in 1895, has produced no impression on the art; that no device like it, or constructed on the same principles, has ever gone into general use; and that the only one ever built was for the purposes of this suit. Both the defendants' device, and the device manufactured by the complainant, are made under other patents.

For these reasons claim 4 of the Lord patent must be either held to be void by reason of its breadth, or else it must be limited to substantially the arrangement of parts and the locking mechanism described in the patent. When so limited, it is clear that the defendants' device does not infringe this claim, since it does not contain the three special and distinguishing features of the Lord structure:

In the defendants' device the reel and locking mechanism are arranged on the end of the car and not on the pole. The lock is operated by a sudden pulling movement of the rope due to the trolley spring forcing the pole upward, and not by a movement of the roller relative to the pole. The lock does not operate the instant the roller leaves the wire, thereby instantly locking the reel and "thus absolutely preventing the trolley spring from raising the pole above the conductor." On the contrary, in the defendants' device there is a centrifugal lock connected with the tension reel, and the pole is checked in its upward movement only after the upward movement and pull of the rope are sufficient to rotate the reel with force enough to throw out the locking dogs by centrifugal force.

It thus appears that the defendants' device differs from the Lord device in the arrangement of its parts, in the form and operation of its lock mechanism, and in the result accomplished, since it does not prevent the "end of the pole from being thrown above the level of the conductor," which is the very essence of the Lord invention.

The bill must be dismissed on the ground of noninfringement, and a decree may be entered accordingly.

EXCELSIOR DRUM WORKS v. SHEIP & VANDEGRIFT, Inc.

(Circuit Court, E. D. Pennsylvania. October 20, 1909.)

No. 117.

1. PATENTS (§ 167*)—CONSTRUCTION—LIMITATION OF CLAIMS BY SPECIFICATION.

A broad claim in a patent cannot be based on a description in the specification that is specifically limited to a single device and does not present it as an example or a preferred structure.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

2. PATENTS (§ 167*)—SPECIFICATIONS—HORN FOR TALKING MACHINE.

The Soistmann patent No. 873,908, for a horn for talking machines, claim 3, which claims as one element "a reinforcing band surrounding the body of the horn intermediate its two ends," must be limited as to such band to a thin and narrow strip of wood or other suitable material wound spirally from one end of the horn to the other, which is the only band described or shown by the specification or drawings. As so limited, *held* not infringed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

In Equity. Suit by Excelsior Drum Works against Sheip & Vandegrift, Incorporated, for infringement of patent. On final hearing. Bill dismissed.

John P. Croasdale, for complainant.

W. Howard Ramsay and Hector T. Fenton, for respondent.

J. B. McPHERSON, District Judge. The patent in suit, No. 873,908, which was granted to Adolph G. Soistmann in December, 1907, upon an application filed May 5, 1906, relates to improvements in horns for talking machines. The applicant's object was "to provide an improved structure combining simplicity of construction, strength, and lightness in weight, and tone qualities capable of producing a maximum resonance." The specification then goes on to describe the invention in detail:

"My improved horn comprises a series of non-metallic tapered sections, 4, preferably of hard wood or fiber. These sections, 4, are each beveled upon each longitudinal edge, 5 and 6, as clearly shown in Fig. 3, so that one bevel of each section may be termed an upper bevel, and the other an under bevel. These bevels are so disposed that the abutting edges of adjacent sections will overlap. These overlapping edges may be glued or otherwise fastened together to form a continuous horn-shaped structure. Upon this structure, I then wrap a very thin narrow strip or ribbon, 7, of wood or other suitable material, and glue the same securely to said structure. I have found, for example, that a ribbon of veneering of approximately one-quarter of an inch in width, and about one-twentieth of an inch in thickness, makes a satisfactory wrapping. This wrapping extends spirally from one end of a horn to the other. When the structure is so formed and wrapped, the flaring end thereof is secured in the annular channel, 8, of the rim or ring, 9. This ring or rim, 9, has its ends provided with long bevels, 10 and 11, adapted to overlap each other, so that, when the flaring end of the horn structure is seated in the channel, 8, the ring is slightly contracted, the beveled edges, 10 and 11, sliding slightly over each other, so that the rim, 9, will form a tight locking engagement with the flaring end of the body of the horn structure.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"By the construction above described, there is formed, at minimum expense, a structure having its component parts so intimate and secure, and locked together, so as to constitute a substantially integral whole of great strength, extremely light in weight, and having qualities of resonance which render it an extremely powerful and efficient horn for the purposes specified."

The claims are as follows:

"(1) A horn composed of longitudinally extending tapered sections forming a structure contracted at one end and flaring at the other, and a thin band spirally wound about said structure.

"(2) A horn composed of longitudinally extending tapered sections, forming a structure contracted at one end and flaring at the other, a thin band spirally wound about said structure, and a ring member provided with an annular channel to receive the flaring end of said structure.

"(3) A horn composed of longitudinally extending tapered sections, forming a structure contracted at one end and flaring at the other, and a reinforcing band surrounding the body of the horn intermediate its two ends."

I have quoted the three claims, although the third only is in controversy, because the other two seem to throw some light on the dispute. At the time when Soistmann entered the field, part of it had been already occupied. It was no longer new to make a horn of wood, having longitudinally tapered sections that formed a structure contracted at one end and flaring at the other; and it was not new to provide a ring member having an annular channel to receive the flaring end. Neither was it new to arrange the tapering sections so that their edges would come into contact radially and be glued together in that position. The two English patents to Cockman, No. 5,186 of November, 1903, and No. 14,700 of March, 1905, and the American patents to Ruggiero, No. 770,024 of September, 1904, and to Cunnius, No. 784,385 of March, 1905, confirm these statements. But Soistmann was apparently the first to suggest beveling the edges of the tapering sections and uniting these edges by bringing the bevels into overlapping contact and to provide also for overlaying the horn with a thin and narrow spirally wound ribbon of veneering. The beveled edges were rejected by the Office for lack of novelty, but the thin band of spiral veneering remains as one element in the first two claims. The third claim, however, departs from their language—"a thin band spirally wound about said structure"—and substitutes the words, "a reinforcing band surrounding the body of the horn, intermediate its two ends." By this substitution the third claim is made much broader than the others, and much broader also than the specification and the drawings. It includes not only a spiral band wound about the horn, but any reinforcing band, either spiral or circular, that surrounds the horn at any point between the two ends. The defendant's horn has a band of textile material, which is stretched and glued into a shallow groove that surrounds the horn near the large end, and to some extent this band reinforces or adds strength to the structure. It is therefore within the literal language of the third claim, and must be held to infringe unless the claim should be so limited by the specification taken as a whole and by the state of the prior art as to apply substantially only to such structure as the specification describes in detail. It is the "reinforcing band" that presents the problem here. Should that phrase be restricted to a band of veneering that substantially covers the sur-

face of the horn between the two ends? Or may it be so construed as to cover a single narrow circular band such as the defendant's, on the ground that the circular band "reinforces" in some degree? If it were a merely ornamental band, it would certainly not infringe; but the language of the claim, standing by itself, lays hold upon any band as soon as it begins to add strength to the structure, even if the addition be very slight. In my opinion, the claim cannot be permitted to depart thus far from the specification. The description is wholly confined to a thin and narrow band "wound spirally from one end of the horn to the other." The drawings show this construction and no other, and there is not a word in the specification to indicate that the inventor is merely describing a preferred construction. I think it would be quite inadmissible, therefore, to construe the claim as broadly as the exigency of the complainant's case requires; and (without attempting to decide what would be a merely immaterial variation from the patented structure so as to expose the maker to the charge of infringement, or to decide precisely at what point the variation would become material so that the new structure would not infringe) I have no hesitation in holding that the defendant's horn has passed the point that separates the two kinds of variations, and does vary materially. For this reason I hold that it does not infringe.

It is well settled that claims may be narrowed by limitations in the description (Walker, Patents [4th Ed.] p. 173, and cases cited), and, also, that specifications and drawings are usually looked at only for the purpose of better understanding the meaning of the claim (Howe Mach. Co. v. Nat. Needle Co., 134 U. S. 394, 10 Sup. Ct. 570, 33 L. Ed. 963). But whatever reciprocal effect the description and the claim may in general have upon each other, I do not understand that a broad claim can be based upon a description that is specifically limited to a single device, and does not present it as an example or a preferred structure. A possible explanation of the presence of the third claim is afforded by the file wrapper, which shows that the claim was inserted bodily after various rejections by the examiner, thus introducing the "reinforcing band" for the first time without anything in the description to support language so broad. As originally framed, the specification was drawn to sustain claims that referred only to "a thin narrow band spirally wound about said structure."

That the claim cannot be construed alone, is manifest. It must be limited in at least one other particular. It speaks broadly of "a horn," and, taken alone, this would include metallic horns, although these are unquestionably excluded, but by words of exclusion that are no more positive than the words that limit the band to a wrapping that "extends spirally from one end of the horn to the other."

Moreover, since the band of the third claim is "reinforcing," and therefore must be a band that helps to hold the structure together, the argument merits consideration that a circular reinforcing band around a trumpet is essentially a hoop around a barrel—and this is an element that can scarcely be called novel. Of course, a cooper's barrel belongs to a different art from the wooden horn of a talking machine, but they have this much in common at least: they may both be made of staves

radially arranged, and, when this is the case, a circular band adds to the strength of either structure, and it can make little difference, I think, whether it be called a hoop or a reinforcing band. By either name it is the same thing, and does the same work. It is used in either art for the same purpose, and if it is not new around a barrel it can hardly be claimed as a novel element around a horn.

The defendant's horn does not infringe, as it seems to me, and accordingly a decree may be entered dismissing the bill with costs.

YOUNGSTOWN CAR MFG. CO. v. B. K. ELLIOTT CO. et al.

(Circuit Court, W. D. Pennsylvania. October 13, 1909.)

1. PATENTS (§ 312*)—SUIT FOR INFRINGEMENT—TITLE OF COMPLAINT.

Evidence *held* sufficient to establish complainant's title by assignment to the patent in suit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 548; Dec. Dig. § 312.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BLUE-PRINT MACHINE.

The Fullman patent, No. 771,774, for an apparatus for copying drawings, was not anticipated and discloses invention; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by the Youngstown Car Manufacturing Company against the B. K. Elliott Company, Reinhold Herman, and Byron K. Elliott for infringement of patent. On final hearing. Decree for complainant.

F. W. H. Clay, for plaintiff.

Connolly Bros., for defendants.

ORR, District Judge. This is a suit for injunction and accounting for infringement of letters patent of the United States, No. 771,774, granted October 4, 1904, to J. M. G. Fullman for apparatus for copying drawings. It is now before the court upon final hearing. In the presentation of the case there are but three questions to be considered: (1) Has the plaintiff sufficiently proven title to the patent? (2) Was there invention? (3) Is there infringement?

Title. The complainant alleged a complete assignment of the patent by the patentee to it, dated January 22, 1907, and recorded in the United States Patent Office February 4, 1907, in Liber R-75, page 405. Complainant's attorney offered a copy of said assignment, giving exact date and place of record as alleged in the bill. By stipulation of the counsel for the parties the copy, "subject to correction by the original," could be used with the same force and effect as if the original had been filed of record. No complaint is made by the defendants that the copy filed is not correct. Without more, no argument could be based upon failure to prove title. But during the examination of Fullman, the patentee, it appeared that he had, prior to said assignment, granted a license to Eugene Dietzgen Company, which was originally exclusive, but which by subsequent agreement became a limited license

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or shop right, for which the said licensee was paying royalties to the complainant at the present time. The evident purpose of complainant in proving the receipt of royalties was to show the value of the invention. The production of the original agreements with said licensee was demanded by the defendants as the best evidence, and because they were not produced defendants insist that the bill must be dismissed. They might have proven an agreement to pay, but they would not have proven the receipt of royalties. They were simply collateral to the issue. Their contents, or terms, were not (so far as appears) relative to the issue, and were not attempted to be proven. In another branch of the law it is well known evidence as to the fact of tenancy may be received as a matter collateral to the issue without the production of the lease, although in writing. Complainant's title to the patent in suit was fully established.

Invention. Defendants are now heard to deny what they recently affirmed. The record of the Court of Appeals for the District of Columbia, at No. 244 in Patent Appeal Docket, shows an interference was instituted between an application by Herman, one of the defendants herein, and the application of said Fullman "for a similar invention" (quoting Herman's language), which was so proceeded with that priority of invention was awarded to Fullman. Thereupon the patent in suit was issued to him. In that proceeding the defendant Elliott, who was manager of the defendant company, appeared as a witness for Herman, and testified that the defendant company was sole selling agent for the Herman blue-print machines, and that within two years prior to the time of his examination that company had sold 11 of the machines. So far as appears, the defendants still bear the same relation to each other, and it is clear that they are still manufacturing and selling the machines described in the Herman application. It has been held that the action of the officials of the Patent Office, with the state of the prior art before them, in granting a patent, creates a presumption of patentable novelty, which must be overcome by clear proof that they were mistaken. *Fairbanks, Morse & Co. v. Stickney*, 123 Fed. at page 79, 59 C. C. A. 209. That presumption, if affected by the prior conduct of the defendants in this case, must be much strengthened. They should, perhaps, be held to some standard, if possible, of extraordinary proof. However, if there had been no interference by Herman, the evidence offered in the case at bar is not sufficient to show there was no invention by Fullman.

There are other elements tending to show invention which appear from the acts of the parties and the public: (a) The defendants are still manufacturing and selling the machines described in Herman's application; (b) the Dietzgen Company is still paying royalties to the complainant; (c) the Buckeye Engine Company negotiated with Fullman for a license; and (d) the complainant was an infringer of Fullman's patent, and paid \$4,000 to Fullman for the same to avoid litigation for infringement. As stated in Fullman's specification, his invention "relates to improvements in apparatus for reproducing or copying drawings, and particularly to that class of such devices in which the reproduction is obtained by electrically-produced light."

The first six claims of the Fullman patent, which complainant alleges to be infringed, are:

"1. In an apparatus for copying or reproducing drawings, etc., the combination of a cylinder, means to support the subject-matter to be copied or reproduced upon the exterior of said cylinder, an arc-lamp adapted to be lowered into the interior of said cylinder, and means to automatically break the circuit for the purpose of extinguishing the light.

"2. A printing frame and a lamp, movable one in relation to the other, in combination with an automatic device to cut off the light upon the completion of the printing process.

"3. In an apparatus for copying drawings, etc., the cylindrical printing frame, the suspended electric arc-lamp and means for controlling its descent within the frame, an electric switch controlling the light circuit, and means for automatically opening the switch when the lamp has completed its travel.

"4. In an apparatus for copying drawings, etc., the cylindrical support for the drawings, a suspended lamp arranged to descend axially within the frame, a governing apparatus for controlling the descent of the lamp, and the automatically operated switch controlling the light-circuit.

"5. In an apparatus for copying or reproducing drawings, etc., the combination of a cylinder adapted to be rotated, means to support the subject-matter to be copied or reproduced upon the exterior of said cylinder, an arc-lamp adapted to be lowered into said cylinder, and means to automatically break the circuit for the purpose of extinguishing the light.

"6. In an apparatus for copying drawings, etc., the cylindrical support for the drawings, a suspended lamp arranged to descend axially within the frame, the counterweight, the time mechanism controlling the descent of the lamp, and the automatically-actuated switch controlling the circuit on both sides of the lamp."

The blue-printing machines in use prior to the Fullman invention did not have any means for automatically extinguishing the light when the printing process was completed. Twenty-five machines had been made and sold by the Pittsburgh Blue-Print Company, with which Fullman was connected, without the automatic cut-off, and other companies had placed machines on the market without it.

Defendants contend that the Fullman patent was anticipated by the Hall British patent, No. 9,853 of 1897, by the United States patent to Urie, No. 478,663, of July 12, 1892, by the United States patent to Schwartz, No. 612,550, of 1898, and by the Suter British patent, No. 30,027 of 1897. Their contentions are not sustained. The Hall patent is the only one having any real bearing on the questions at issue. The record of the interference proceedings shows it was before the examiners. That patent shows and describes a cylindrical printing frame arranged so it can be rotated on its own axis and an arc light adapted to be lowered gradually within the cylindrical printing frame by means of time or clockwork mechanism to control its motion. To that extent the Hall machine has parts similar in construction and operation to the Fullman machine. But nothing is said in the Hall specification about turning on or off the current to the lamp. The Urie, Schwartz, and Suter patents each relate to photographic printing from negatives. In each there is a means of extinguishing the light when a sufficient exposure has been given to the sensitized paper within the printing frame. That is done by some motive power external to the machine itself, and is not dependent in its action upon the relative movement of the source of light in relation to the printing frame, as is the case in the Fullman machine. The claims of Fullman were not anticipated.

Infringement. It was not seriously argued, either at bar or in the briefs of counsel, that the Herman machines, as described in the Herman patent, No. 777,096, and as manufactured by the defendants, were unlike the Fullman machines. As a fact they are, notwithstanding some slight variations, the same machines.

Therefore the complainant, having shown title, invention, and infringement, is entitled to an injunction and an accounting as prayed for. Let a decree be drawn in accordance with this opinion.

DUNTLEY MFG. CO. v. KELLER MFG. CO.

(Circuit Court, E. D. Pennsylvania. October 16, 1909.)

No. 291.

PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—PLEADING.

In a suit in equity for infringement of a patent, a plea setting up the defense of prior invention will be stricken off, and such defense left to be taken by answer, at least where other defenses are not waived, but contingently reserved.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

In Equity. Suit by the Duntley Manufacturing Company against the Keller Manufacturing Company. On motion to strike off plea. Motion sustained.

Frank P. Prichard, for complainant.
Cyrus N. Anderson, for defendant.

J. B. McPHERSON, District Judge. To this bill, which is in the ordinary form and charges the infringement of a patent that was granted to J. W. Smith on May 11, 1909, the defendant has pleaded that, prior to Smith's pretended invention, two other persons—Wiedemann and Templin—invented the apparatus, and applied for a patent on May 3, 1909; that a divisional application was filed on June 9, 1909; that the claims of the patent to Smith are in interference with the claims of the divisional application; and that the interference proceeding is now pending and undetermined. The complainant's motion to strike off the plea is before the court for decision.

The motion is attacked as improper upon the ground that the legal sufficiency of a plea can only be questioned by setting it down for argument or by taking issue upon it by filing a replication. But the legal sufficiency of this plea, either in form or in substance, is not now in controversy. Its form is in effect conceded to be unexceptionable, and, of course, its substance, if true, is a complete reply to the bill. The precise question raised by the motion is not the sufficiency of the plea, but whether it ought to be considered at all—in other words, whether the defendant should not be required to set up by answer the matter now put forward as a defense. The defendant has not only declined to stipulate that its defense will be confined to the averments of the plea, but has declared that it will avail itself by answer of all the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defenses that may be available. No complaint can be made of this position; but it furnishes a sufficient reason why the court may decline to hear and determine one defense now, while the rest of the defenses are contingently reserved for a second installment. The point has been ruled several times against the contention of the defendant, and I can add nothing to the discussion that may be found in the following cases cited on the complainant's brief: *Carnrick v. McKesson* (C. C.) 8 Fed. 807; *Sharp v. Reissner* (C. C.) 9 Fed. 445; *Korn v. Wiebusch* (C. C.) 33 Fed. 50; *Union Switch Co. v. Railway Co.* (C. C.) 69 Fed. 833; *Chisholm v. Johnson* (C. C.) 84 Fed. 384; *Knox Co. v. Rairdon Co.* (C. C.) 87 Fed. 969; *Arrott v. Standard Co.* (C. C.) 113 Fed. 389; *Thresher v. General Electric Co.* (C. C.) 143 Fed. 337; *Glucose Co. v. Douglass* (C. C.) 145 Fed. 949; *American Co. v. Bayless Co.* (C. C.) 163 Fed. 843. Four of these cases are in the Third circuit, decided, respectively, by Judges Acheson, Dallas, Bradford, and Archbald.

The plea is stricken off, and the defendant is directed to answer the bill on or before November 15, 1909.

MURRAY et ux. v. PAQUIN.

(Circuit Court, W. D. North Carolina. September 16, 1909.)

1. VENDOR AND PURCHASER (§ 31*)—CONTRACT OF SALE—VALIDITY OF ASSENT—RESCISSION FOR MISTAKE.

To warrant the rescission by a court of equity of an executed contract for the sale of land on the ground of mutual mistake, the mistake must be material and so important that, if it had not been made, complainant would not have made the contract.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 35-37; Dec. Dig. § 31.*]

2. VENDOR AND PURCHASER (§ 31*)—CONTRACT OF SALE—VALIDITY OF ASSENT—RESCISSION FOR MISTAKE.

A purchaser of real estate is not entitled to a rescission of the contract in equity on the ground of a mistake of fact, where there was no misrepresentation, and the means of ascertaining the true facts were open to complainant equally with defendant, and he did not make use of them.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 35-37; Dec. Dig. § 31.*]

3. VENDOR AND PURCHASER (§ 31*)—CONTRACT OF SALE—VALIDITY OF ASSENT—RESCISSION FOR MUTUAL MISTAKE.

Complainants, who were husband and wife, purchased from defendant a residence property in Asheville, N. C., where the wife intended to reside temporarily on account of poor health. The chief consideration which led to the selection of such property was its location and the adaptability of the house to the wife's needs. Defendant delivered a deed which described the boundaries of the lot, and which complainants had examined by an attorney. A subsequent survey disclosed that the western boundary at the back end of the lot was further to the eastward than was supposed by either party, and ran through the barn which had been built by defendant. No willful misrepresentation by defendant was claimed. *Held*, that the mistake as to the line did not entitle complainants to a rescission of the contract, since they had an opportunity to ascertain the true boundary before completing the purchase, and it did not appear that if it had been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

known it was of such importance that they would have refused to take the property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 36; Dec. Dig. § 31.*]

In Equity.

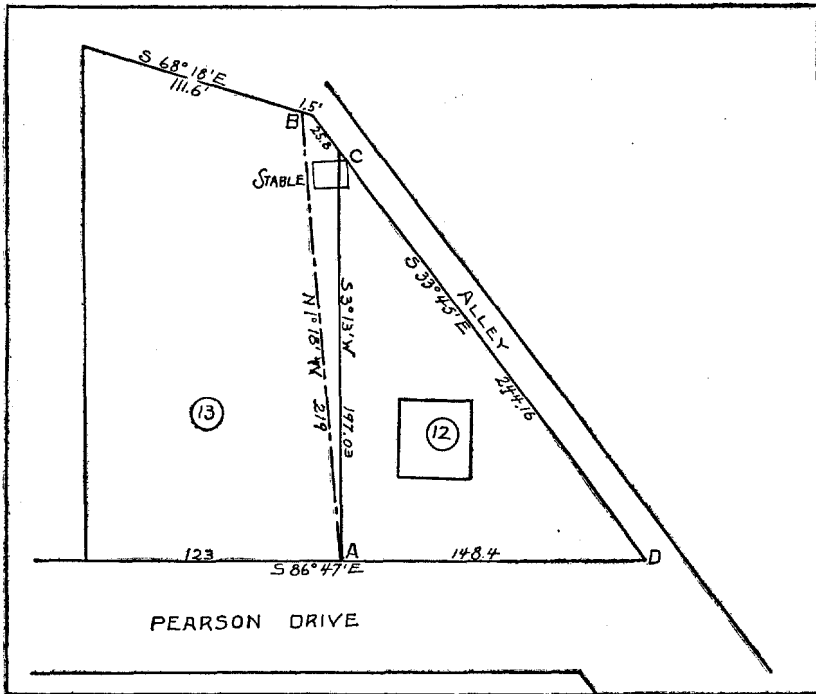
Davidson, Bourne & Parker, for complainants.

Alf. S. Barnard, for defendant.

NEWMAN, District Judge. This is a bill brought by the complainants against the defendant to rescind and cancel an executed contract for the sale of real estate in the city of Asheville. The bill alleges that the complainants are citizens of Ohio and residents of Cleveland in that state, and that the defendant is a citizen of North Carolina and an inhabitant of the Western district of North Carolina, living in Asheville. It is then alleged that, some time in the spring of 1905, the health of Mrs. Nellie Murray became so impaired that it became necessary for her to come South to secure the benefit of a milder climate; and, being so advised, she came to Asheville, secured a temporary residence in the city, and took up the matter of employing a physician who might aid her in the restoration of her health; that before coming to Asheville she heard of the defendant as a physician in St. Louis, Mo., where he had professionally treated her brother; and that, induced by these considerations, among others, she called upon him and engaged him to treat her. She became his patient, and remained so for about two years, during which time the defendant acquired not only professional, but personal, confidence and friendship of Mrs. Murray, and of her husband, George R. Murray, who frequently came to Asheville to visit her and look after her welfare and comfort as often as his business would permit, and close personal relations were established between the defendant and the complainants, which continued uninterrupted until some time after the purchase of the property in controversy. During this period Mrs. Murray returned to her home in Cleveland, but remained only a short time, it being doubtful whether she would be able to retain her health there; and it became necessary for her to return to Asheville, and with that in view she and her husband formed a determination to purchase a house in Asheville for her to occupy as long as her comfort and convenience might require, her husband to visit her as often, and remain as long, as his business would permit; that this decision was communicated to the defendant, and that he gave his most hearty approval, and expressed full confidence that by carrying it into effect the health of Mrs. Murray could be restored. He was asked by the complainants to assist in the selection of a proper place for the purpose. In response to this, defendant procured from real estate agents in Asheville a long list of properties offered for sale, and discussed them with Mrs. Murray and her husband; but to the most of them the defendant suggested objections. He then proposed to sell them the house and lot which he occupied as a home on Pearson Drive, in the western part of Asheville, representing it to be eminently suited for their purposes, and stated that it was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the only available property in Asheville which did entirely fill the requirements of her condition. The defendant at that time lived upon the lot, which had on it the dwelling (consisting of seven rooms, besides attics and closets), and a barn in the rear, capable of holding a couple of horses and a carriage. The lot fronted on Pearson Drive, which is a popular residence street in Asheville, and on the east and northeast was an alley which separated it from the adjoining property. On the west and northwest, at the time of the negotiation and purchase, the defendant represented the line to begin near a certain bush or sapling on the northern margin of Pearson Drive, and to run practically north, intersecting the alley heretofore referred to, and thus forming a triangle, the base being upon Pearson Drive and the apex at the intersection of the line last named. Diagram of the lot is attached.



The defendant claimed and represented that the true westerly line began near the bush or sapling on the north margin of Pearson Drive, and ran in a general direction north to the intersection of the alley shown on the plat from the letter "A" to the letter "B," and for a considerable portion of that line from the alley southward there was a fence separating this lot from that adjoining it on the west, and the barn aforesaid was situated wholly east of the said line. These lines were shown to complainant George R. Murray before the conclusion of the negotiations. Complainants having absolute confidence in the friendship of the defendant, relying implicitly upon his statements to

them, and there being no suggestions from any source whatever, either by the owners of the adjacent lots or any one else, that the line so claimed and represented by the defendant to be the true line was not the true line, and the said lot being bound on the south by a much-frequented and popular highway, viz., Pearson Drive, and on the east and northeast by the alley, there was no necessity, so far as they could see, and so far as they could believe that the defendant could see, for any actual survey. The defendant represented that the lot was 197 feet by 240 feet, thereby conveying the impression upon the minds of the complainants that the front on Pearson Drive was 197 feet and the back would approximately be 240 feet. Having this understanding, Murray and his wife decided to accept the property and complete the purchase, and paid the purchase price of \$5,500, and defendant executed a deed to the complainant, copy of which is attached to the bill. It is alleged that there is no intimation or suggestion from any quarter that there was any trouble about the line; and, if the line had been as supposed, it would have been practicable to divide the lot by a line beginning on Pearson Drive and running thence back to where it would intersect with the line on the western side of the alley, and thus give space for two comfortable dwellings, both fronting on Pearson Drive. Much of the negotiations were conducted by correspondence between George R. Murray and the defendant. When Murray and his wife came to Asheville about the end of 1906 to take possession of the house, for which payment had been made, the condition of the house was such that it was not desirable for Mrs. Murray to occupy it, and it was thereupon determined to subdivide the lot, move the house to the eastern portion of the lot, and build another house on the western portion; both houses fronting on Pearson Drive. Contracts were duly entered into for this work; but, when the architect came to locate the foundation for the new house to be built on the western division, it was found in the first place that the true frontage on Pearson Drive was but about 148 feet. This fact was immediately called to the attention of Paquin, and became the subject of some verbal communication between George R. Murray and Paquin; and complainants still believing that, even with the reduced frontage, if the western line was correct, they could yet utilize the lot for the purposes of two houses, they refrained from making any demand for any correction or abatement in the price from the defendant. But when they endeavored to locate the foundation for the new house on the western subdivision, the architect discovered through actual measurement, and brought the fact to the knowledge of the complainants for the first time, that the representations of the defendant as to the true location of the western line were not true; but, on the contrary, the true line began on Pearson Drive near the bush or sapling mentioned and ran in a northerly direction as shown on the diagram and the plan from "A" to "C," leaving the whole of the fence, which had been represented and believed to be upon the true line, west of that line, and leaving a greater part of the barn which the defendant had built and occupied, and which he represented to be entirely on the lot sold to the plaintiff, also on the west side of the line. This so nar-

rowed and contracted the lot, especially at the point where it was necessary to locate a new house, as to destroy its value for that purpose and greatly diminish its value for any purpose. At the time of the purchase there was in the rear of the building a large and well-arranged kitchen garden. This fact had much weight with the complainants. The contraction of the lot, by the true location of the western line, not only cut into the garden very seriously, but also made it necessary to locate the barn, which was necessary to Mrs. Murray's health, at a point which would still more cut into the garden, and also locate it so near the house as to make it undesirable. After this information came they were compelled to abandon their plans for the subdivision of the lot and the erection of a new building. They immediately called the information they had received to the attention of the defendant and demanded of him a rescission of the conveyance, offering to reconvey the property, and demanded the repayment of the \$5,500 purchase money and interest. Defendant first insisted that his representations were correct, and caused a survey to be made for himself, which confirmed the survey made under the direction of the architect. Afterwards it is alleged that the defendant for some time evaded complainants' demands for a rescission of the transaction, but finally absolutely declined to do anything in that respect. Thereupon, about the 22d day of March, 1907, the complainants, through their attorneys, made formal demand upon him for a rescission of the transaction, and tendered to him a reconveyance of the property. Copy of the deed of reconveyance so tendered is attached to the bill. Complainants removed certain household furniture from Cleveland to Ashville and placed it in the house; but after they discovered the circumstances they removed the furniture, and have never at any time since used or occupied the premises. Complainants relied upon the friendship of the defendant in this transaction, and the defendant was fully advised of the object and purpose for which they purchased this property. Further allegations are then made as to the reliance by the complainants upon the integrity of the defendant and his friendly feeling and friendship for them. Then occurs the following statement in the bill: They aver that they believe, at the time the defendant made the representations as to the said location and dimensions of said lot, he believed them to be true, and that he was innocently mistaken as to the facts, although he may have been careless in his method of ascertaining such facts and assuming them to be correct; there having been ample opportunity during his long residence and occupancy of the property to become familiar with its true boundaries. The prayers are that the sale be rescinded and canceled, and that the defendant be adjudged and decreed to repay the complainants the purchase price paid him—that is, the sum of \$5,500—with interest from the date of payment, November 20, 1906, and for a lien, enforced in such way as the court may direct, upon the property for the amount to be paid them as prayed. The foregoing are substantially the allegations of the bill.

In his answer, under oath, defendant admits that he was Mrs. Nellie Murray's physician, but denies that there existed between himself

and complainants any close personal and confidential relations, beyond professional duty inducing complainants to rely upon his representations as to the purchase of the property. He admits that he was consulted as to the advisability of Mrs. Nellie Murray taking up her residence in Asheville for the purpose of restoring her health, but denies that Asheville was the only health resort recommended by him. On the contrary, he says he advised complainants that there were a number of other suitable places in North Carolina and other states, a residence in any of which would be equally beneficial to Mrs. Murray, but specifically said that he did not wish to influence Mrs. Murray to take up residence in Asheville, merely giving the reasons why he believed the climate in Asheville would be conducive to her recovery; that it is not true, as alleged, that he offered objections to most, if not all, of the properties which Mr. and Mrs. Murray were considering as a home for Mrs. Murray. On the contrary, he gave them a long list of other homes. He admits, however, that he advised that some of the places complainants suggested were not suitable for the purpose. He did say that certain other property in Asheville would be suitable after adding out of door sleeping quarters, so that they would meet with the requirements of Mrs. Murray's condition, and were so located as to be healthful; that, before he took George E. Murray to see his own property on Pearson Drive, Murray had visited several places in Asheville and expressed dissatisfaction with all of them, and it was when Murray had seen these other properties and intimated that he did not want them that defendant took him to see his own property, which was subsequently bought; that it never was suggested to him that Mr. and Mrs. Murray would desire to use the property for any other purposes than as a home for Mrs. Murray; that defendant did say that the property on Pearson Drive, by reason of its location, its southern exposure, and the facilities it possessed for permitting Mrs. Murray to sleep out of doors, was suitable for the purpose. He denies that he ever represented to Mr. and Mrs. Murray that the west line of the lot began at a certain bush or sapling and ran practically north; that there was no sapling or bush there, and that he pointed out the footpath abutting on the northern margin of Pearson Drive as the beginning of the line between him and Mrs. Brown; that, at the time complainant and defendant went to see the property, defendant took the complainant all over the grounds, through the house and barn, but did not point out the lines as indicated by the fences, and defendant says he then and there gave an exact and correct description of the property; that it is not true, as alleged, that he claimed and represented that the true westerly line began on the northern margin of Pearson Drive; that it is true that he pointed out the fence lines around the property as being the lines which he believed to be correct, but that he stated to them that his deed for the property was the only instrument from which he could get an accurate description, and referred them to it for that purpose; that he was careful to point out that the small angle at the northeast corner of the lot between the survey stakes and the street belonged to the city. He expressly avers that complainants did not rely upon his representations and statements

in regard to the location and title of the property, but that complainants had the title fully examined and passed upon by competent attorneys, and during the time of examination had access to defendant's title papers, and also had the deed which he offered as a proper conveyance of the property, which deed contained a full and accurate description of the property by metes and bounds, and referred to the plat of the property duly recorded in the office of the register of deeds of Buncombe county, reference to which plat would have disclosed to complainants and their attorneys the exact location of the lot and the length of each of the boundary lines. It is true that defendant represented the lot as being 197 feet by 240 feet; but he did not at any time state that the property fronted 197 feet on Pearson Drive, and a reference to the deed executed by defendant and his wife to the complainants would have shown that they were mistaken in their belief that the lot fronted 197 feet on Pearson Drive. He admits that complainants did complete the purchase of the property, but denies that they completed it so far as he was concerned with any understanding that the property fronted 197 feet on Pearson Drive. Defendant does not know whether it would be practicable to subdivide the lot on account of its triangular shape, but does not believe it could be utilized for the purpose of two houses, even if the westerly line had been as indicated by the fence. He denies that it was ever suggested to him that complainants might desire to divide the lot. He says, when Mrs. Murray arrived in Asheville about the end of 1906, the property was not in such a condition as Mrs. Murray could occupy it, the condition having been brought about by the freezing and bursting of some water pipes in the house, but that defendant, at the request of Mr. Murray, had the repairs made, and the defendant paid for the same; that when Mrs. Murray saw the house in the condition it was in, although she had been in the house before, she became dissatisfied with it, and began to criticize and scold her husband for having purchased it; that Mr. Murray then stated that the defendant was not to blame for the condition of the house, and said that if Mrs. Murray was not satisfied with the property he would build another house elsewhere. He denies that the existence of the garden had much weight with complainants in inducing them to buy the property, as both Mr. and Mrs. Murray said to the defendant that the alley leading to the barn would not be used, but that they would cut a road through the garden to the barn, which would have almost totally destroyed the garden. He denies that to move the barn so as to place it entirely upon the line would have placed it so near the house as to make it objectionable. He denies that complainants, immediately after receiving the information as to the true location of the lines, made demand for a rescission and reconveyance of the property, or that he ever evaded such a demand. On the contrary, he says that complainants assumed control over the property with full knowledge of all the facts relative to its boundaries, and paid to the defendant, in accordance with their agreement to purchase, a proportionate amount which defendant had expended for taxes and insurance on the property, and thereafter listed the property with at least one real estate agent in Asheville for rent. He says their furniture was

stored in the house after they discovered their mistake with reference to the westerly line of the lot, and after they knew of the deficiency in the area of the lot. Defendant has no knowledge as to when the furniture was removed, or whether it has been removed. He has no recollection that he was ever notified that it was removed, or that the property was ready for occupancy by him, and denies that such notice was ever given. He denies again that defendants relied upon him in the purchase of the property, and alleges that they accepted the property and paid the purchase money only after they had made a full investigation through their attorneys. He alleges that they had the information at hand, and could have easily discovered the true location of the westerly line. He says that the only reliance complainants placed upon him was in so far as he advised them professionally that the property was suitable as a home for Mrs. Murray; that it was his opinion that the house was suitable for Mrs. Murray, and he still believes it to be suitable. He says that the mistake in reference to the line was on account of the complainants' own carelessness. He denies that there is as much as \$2,000 involved in the controversy, because he says the most he could be held responsible for would be the difference between the value of the property if the westerly line was where the fence now stands, and this would not be anything like \$2,000.

Evidence was taken, there has been a final hearing in the case, and, after argument, it has been submitted for determination. In order to correctly understand this case, it must first be stripped of all superfluous matter. Some evidence was offered by complainants tending to show that they were informed, after purchase, that the house had been occupied by persons afflicted with tuberculosis, rendering it unsuitable for Mrs. Murray's occupancy. There is no allegation whatever in the bill to this effect, and the testimony so offered was objected to by defendant's counsel as being inadmissible for that reason. The rule that the allegation made in the bill and the proof in support of it must correspond, and that no proof will be admitted in support of that which is not alleged, is so well settled that it hardly needs authority to support it; so that I think this matter may be entirely eliminated before coming to a consideration of the real question involved. It may also be said, as will be shown by a clear statement in the bill, that no fraud or deceit is claimed to have been practiced by the defendant in connection with the transaction. The matter of the frontage of the lot appears to have been waived, and not insisted upon now, so that the status of the case is, as was conceded on the hearing, that of a mutual mistake of the parties as to the western line of the lot.

That the defendant really believed the line to be where the fence and some shrubbery showed it to be was evidenced by the fact that he had built his barn so that the larger part of it was on the small strip or angle as to which the mistake is said to have been made. That complainants believed that to be the line is manifest, because the barn was on the line and the fence was running up along a considerable portion of the lot to a point about even with the back porch, thereby indicating to them, or to any one else not making a careful measurement, that this was the true line. It is perfectly clear from the evidence that the

only thing the defendant knew as to the purpose of the complainants with reference to the lot was that it was to be the temporary home of Mrs. Murray. There is nothing to show that he had any knowledge whatever that they had any thought or intention of dividing the property into two lots and building another house. If complainants had any such thought, they certainly did not communicate it to the defendant. If the fence had been upon what is now said to be the true line, and the barn had been within this line (the property being in other respects as it was), would this have been considered a material matter by the plaintiffs, and would it have prevented the trade; or, on the other hand, if this had been true, would Mr. and Mrs. Murray have been just as well satisfied as they were, and have purchased the property notwithstanding that fact? This is the proper way to look at the case in order to reach a correct conclusion as to what should now be done.

In *Grymes v. Sanders et al.*, 93 U. S. 55, 23 L. Ed. 798, it is said in the opinion by Mr. Justice Wayne:

"A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must be such that it animated and controlled the conduct of the party. It must go to the essence of the object in view, and not be merely incidental. The court must be satisfied that but for the mistake the complainant would not have assumed the obligation from which he seeks to be relieved. *Kerr on Mistake & Fraud*, 408; *Trigg v. Read*, 5 Humph. (Tenn.) 529 (42 Am. Dec. 447); *Jennings v. Broughton*, 17 Beav. 541; *Thompson v. Jackson*, 3 Rand. (Va.) 507 (15 Am. Dec. 721); *Harrod's Heirs v. Cowan*, Hardin (Ky.) 543; *Hill v. Bush*, 19 Ark. 522; *Juzan v. Toulmin*, 9 Ala. 662, 44 Am. Dec. 448."

In *Story's Equity Jurisprudence*, § 151, the doctrine is stated in this way:

"* * * Mistake or ignorance of facts in parties is a proper subject of relief only when it constitutes a material ingredient in the contract of the parties and disappoints their intention by a mutual error, or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference."

Section 856 of *Pomeroy's Equity Jurisprudence*, on this subject, is as follows:

"There are two requisites essential to the exercise of the equitable jurisdiction in giving any relief defensive or affirmative. The fact concerning which the mistake is made must be material to the transaction, affecting its substance, and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. If a mistake is made by one or both parties in reference to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject-matter, or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it, in any case the mistake will not be ground for any relief affirmative or defensive."

From the foregoing authorities, and others which might be cited, it seems clear that a mistake, to justify equitable relief, must be as to a matter which was controlling in bringing about the transaction. The mistake should be as to something without which the trade would not

have been made. Mr. Murray bought this property as a home for his wife. They wished a pleasant, healthy location, a good residential street, and a house, in view of Dr. Paquin's recommendation, with a sleeping porch; and these were the main things they desired, and these they obtained. It does not appear anywhere in the record that defendant had any knowledge whatever that there was a proposition to subdivide or utilize the property as a paying investment. The main object, and the one which Mr. Murray and his wife had in mind, above all things, was a pleasant home and pleasant surroundings, and such a place generally as would render Mrs. Murray comfortable, and the occupancy of which would be conducive to Mrs. Murray's improvement in health and to her recovery.

But there is an additional reason against the complainants' right to relief in this case, and it grows out of the fact that the record shows that they had the same opportunity the defendant had for getting the true facts, but failed to avail themselves of the information which was readily at hand. They were furnished defendant's deed to the property and the chain of title for their examination. They placed the examination of the title in the hands of competent attorneys, and altogether could have known, just as well as the defendant could have known, everything about the lot and its proper and true boundaries. The authorities are uniform to the effect that, this being true, they are not entitled to relief in a court of equity.

In *Crowder v. Langdon*, 38 N. C. 486, the rule on this subject is stated in this way:

"* * * The general rule unquestionably is that an act done or a contract made under a mistake or ignorance of a material fact is relievable in equity. 1 Story, Equity, 155. But where the means of information are alike open to both parties, and when each is presumed to exercise his own judgment in regard to extrinsic matters, equity will not relieve. The policy of the law is to administer relief to the vigilant, and to put all parties to the exercise of a proper diligence. In like manner, where the fact is equally known to both parties, or where each has equal and adequate means of information, or when the fact is doubtful from its own nature, in any such case, if the party has acted with entire good faith, a court of equity will not interpose. 1 Foub. Eq. bk. 1, c. 2, § 7, note "v"; 1 Pow. on Con. 200; 1 Mad. Ch. Pr. 62, 4; 1 Story, Eq. 163."

In *Anderson v. Rainey*, 100 N. C. 321, 5 S. E. 182, in the headnote it is said:

"If, in a contract for the purchase of land, a party fails to avail himself of those sources of information readily within his reach, and chooses to rely upon representations which, though not true, were not made with any false and fraudulent intent, the maxim of 'caveat emptor' applies, as it does to personal property, and courts will not aid the purchaser. *Walsh v. Hall*, 66 N. C. 233."

An extract from the opinion in *Woodbury v. Evans*, 122 N. C. 781, 30 S. E. 2, is as follows:

"This is an action to recover the balance due on a contract for the sale of land, and the court says: 'In all contracts for the sale of land it is the duty of the purchaser to guard himself against defects of title, quantity, incumbrance, and the like; and if he fail to do so it is his own folly, for the law will not afford him a remedy for the consequences of his own negligence. If, however, representations are made by the bargainor, which may be reasonably relied upon by the purchaser, and they constitute a material inducement to the contract, and are false within the knowledge of the party making them, and

cause loss and damage to the party relying upon them, and he has acted in ordinary prudence, in the matter, he is entitled to relief.' *Etheridge v. Vernoy*, 70 N. C. 713; *Foy v. Haughton*, 85 N. C. 168; *Anderson v. Rainey*, 100 N. C. 321, 5 S. E. 182."

In *Farnsworth v. Duffner*, 142 U. S. 48, 12 Sup. Ct. 165, 35 L. Ed. 931, in the opinion by Mr. Justice Brewer, the proper rule on this subject is stated in this language:

"This is a suit for the rescission of a contract of purchase, and to recover the moneys paid thereon, on the ground that it was induced by the false and fraudulent representations of the vendors. In respect to such an action it has been laid down by many authorities that, where the means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained. In *Slaughter, Administrator, v. Gerson*, 13 Wall. 379, 383, 20 L. Ed. 627, this court said: 'Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained.' See, also, *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246. In *Ludington v. Reinick*, 7 W. Va. 273, it was held that 'a party seeking the rescission of a contract, on the ground of misrepresentations, must establish the same by clear and irrefragable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied.' In the case of *Atwood v. Small*, decided by the House of Lords and reported in 6 Cl. & Finn. 232, 233, it is held that 'if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or the means of knowledge open to him or to his agents, he cannot be heard to say that he was deceived by the vendor's representations.' And in *Pomeroy's Equity Jurisprudence*, § 892, it is declared that a party is not justified in relying upon representations made to him * * * '(1) when, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement; (2) when, having the opportunity of making such examination, he is charged with the knowledge he necessarily would have obtained if he had prosecuted it with diligence; (3) when the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties.'"

In *Shappirio v. Goldberg*, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419, in the opinion by Mr. Justice Day, this is said on this subject:

"When the means of knowledge are open and at hand, or furnished to the purchaser or his agent, and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor. *Slaughter, Adm'r. v. Gerson*, 13 Wall. 379, 20 L. Ed. 627; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931."

What is now said to be the truth about this strip of land was not known to either party at the time of the sale. It could have been ascertained by the defendant by a careful examination of the deeds and

a simple measurement of the lot. The complainant, Murray, could have ascertained it in exactly the same way, and had the same opportunity for doing so. It was a mutual mistake—an honest mistake; both parties being in ignorance, and both having the same opportunity for ascertaining the truth.

What has been stated would seem to be sufficient to show that complainants are not entitled to relief in a court of equity. In addition to this it may be stated that, after Mr. and Mrs. Murray came to Asheville and saw the place, they moved their furniture into it, although it is probably true that they soon moved it out; but they did list the property for rent with a real estate agent in Asheville, but when the agent obtained a tenant Mrs. Murray declined to execute a lease. Whether this, in the absence of other controlling reasons, would be sufficient to deny relief, it is unnecessary to determine, because what has been heretofore stated must control the case against the complainants, and requires a denial to them of the relief sought by the bill.

Another matter has impressed me ever since the facts of the case were presented, and that is: Why it was that both the defendant and complainants, after they bought the property, so readily yielded this strip of land under all the circumstances. Perhaps it would be unwise and improper to express any opinion now as to the relative rights of the parties here, and others, in this respect; but, if this strip could have been legally retained by the complainants as between them and the adjoining owner, there would certainly be no ground for relief here, whatever else might be true in the case. It seems to be conceded, however, by counsel for both complainants and defendant, that this strip must be yielded to the adjoining owner.

In view of this, I am inclined to think that it would be equitable for the defendant to pay the expense of removing the barn within what they seem to be willing to recognize as the true line. What this cost would be is a matter of conjecture, and I will hear counsel as to this; the costs to be equally divided.

CENTRAL TRUST CO. OF NEW YORK v. MOBILE, J. & K. C. R. CO. et al.

(Circuit Court, S. D. Alabama. August 9, 1909.)

No. 271.

RAILROADS (§ 169*)—MORTGAGES—RIGHT OF MORTGAGEE TO INCOME.

A mortgagee of the property of a railroad company, to which its income is also pledged by the mortgage, is not entitled to such income until it takes or demands possession of the property or secures the appointment of a receiver.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 536-548; Dec. Dig. § 169.*]

In Equity. Suit by the Central Trust Company of New York against the Mobile, Jackson & Kansas City Railroad Company and others. On motion for injunction. Motion denied.

Mayes & Longstreet, for complainants.

McIntosh & Rich, for defendant railroad company.

Webb & McAlpine, for defendant Smith.

TOULMIN, District Judge. "A mortgagee out of possession has no lien upon rents. Until he elects to take possession or moves for a receiver, the rents belong to the lessor." In re Banner (D. C.) 149 Fed. 936.

"Where the income is expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon the failure of the mortgagor to perform the conditions of the mortgage, the general rule is the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken in his behalf by a receiver, or until in proper form he demands and is refused possession." *Freedman's Savings Co. v. Shepherd*, 127 U. S. 502, 8 Sup. Ct. 1250, 32 L. Ed. 163; In re Banner, *supra*.

"A pledge of income does not become effective so long as the mortgagor is permitted to remain in possession of the property and to receive and disburse the earnings." *Galveston R. R. v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199; *Atlantic Trust Co. v. Dana*, 128 Fed. 219, 62 C. C. A. 657.

"A mortgagor, so long as he remains in possession, may take the rents and profits of the land to his own use, and is not required to account to the mortgagee for them." *Gilman v. Illinois & Miss. Co. et al.*, 91 U. S. 603, 23 L. Ed. 405.

"A mortgage by a railroad company of its road and income does not transfer the income to the mortgagee until he takes possession, where it is clearly implied in the mortgage that the railroad company should hold possession and receive the income until the mortgagee should take possession, or the proper judicial authority should interpose." *Gilman v. Illinois & Miss. Co. et al.*, *supra*.

It does not appear in the case at bar that the mortgagees or trustees ever took possession of the property covered by the mortgage, or ever demanded possession of the same, or ever invoked the proper judicial authority to interpose and take possession by a receiver.

"Until then, the whole income belonged to the company and was subject to its control, and it was liable to the creditors of the company, as if the mortgage did not exist." *Gilman v. Illinois & Miss. Co. et al.*, *supra*.

The injunction or restraining order is denied.

RILEY V. VALLEJO FERRY CO.

(District Court, N. D. California. June 30, 1909.)

No. 13,736.

1. CARRIERS (§ 247*) — RELATION OF CARRIER AND PASSENGER — TIME OF COMMENCEMENT—"PASSENGER."

The relation of carrier and passenger begins as soon as one, intending in good faith to become a "passenger," enters the carrier's premises for that purpose, and the carrier's responsibility dates from that time.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984-993; Dec. Dig. § 247.*

For other definitions, see Words and Phrases, vol. 6, pp. 5218-5227; vol. 8, p. 7748.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. FERRIES (§ 32*)—INJURY TO PASSENGER—NEGLIGENCE OF EMPLOYEES.

A woman, following others and leading two small children, was going down the gangway on board a ferryboat of defendant, when the warning whistle blew, and as she attempted to step upon the boat it started, throwing her and the children into the bay, causing her death. There were deck hands on the boat at the end of the gangplank, who made no attempt to prevent people from coming on board, but assisted them. *Held*, that deceased was a passenger, to whom defendant owed the duty of care as such, and that it failed in such duty; also that deceased was acting upon at least the implied invitation of defendant's servants, and was not, under the circumstances, chargeable with contributory negligence; and that defendant was liable in damages for her death.

[Ed. Note.—For other cases, see *Ferries*, Cent. Dig. § 85; Dec. Dig. § 32.*

As carriers, see note to *Wade v. Lutzer & Moore Cypress Lumber Co.*, 20 C. C. A. 536.]

In Admiralty. Action by Stanislaus A. Riley, as administrator of the estate of Josephine C. Irelan, against the Vallejo Ferry Company. Decree for libellant.

Wm. Denman, for libellant.

Fredk. W. Hall, for respondent.

DE HAVEN, District Judge. This is an action, in personam, brought by Stanislaus A. Riley, as administrator of the estate of Josephine C. Irelan, deceased, against the defendant, to recover damages for the death of said deceased; the libel alleging that her death was caused by the negligence of the defendant in the operation of the steam ferryboat Vallejo.

1. The defendant was, on January 18, 1907, the owner and engaged in operating the Vallejo, as a common carrier of passengers, between the city of Vallejo and Mare Island, and on the afternoon of that day the deceased, in attempting to go on board that boat, for the purpose of taking passage to Mare Island, fell into the waters of San Francisco Bay, and as a result contracted pneumonia, from the effects of which she died on January 22, 1907. The accident occurred in this manner: The deceased, accompanied by three children, her mother, and a lady friend, started down the narrow passageway leading from Georgia street wharf to the ferry slip in which the Vallejo was moored, intending to take passage to Mare Island. The deceased was leading two small children, and her baby, two years old, was in a baby carriage, wheeled by its grandmother. While they were going down the gangway, the Vallejo gave a warning whistle for the purpose of indicating that she was about to start, and the apron of the slip was lifted about 12 or 18 inches above her deck. Upon reaching the boat, the lady, who was in the lead, stepped aboard, and one of the deck hands assisted the mother of the deceased in getting the baby carriage and its occupant on the boat. The deceased was just behind her mother and had with her the two other children, one on each side of her, and when she attempted to step upon the boat it started, and she and the two children with her fell into the bay. Whether the deceased succeeded in placing her foot upon the deck and was thrown into the bay by the sudden starting of the boat, or whether the boat started as she was in the act of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stepping and caused her foot to miss the deck, does not clearly appear; but I am satisfied that the accident was caused in one or the other of these ways. There was no chain or rope across the gangway leading to the Vallejo, and it does not appear whether the pilot, from his station in the pilot house, on the opposite end of the boat, could see passengers coming on the boat, or whether he depended entirely upon the deck hands to give warning to persons who might attempt to come on board, after the starting whistle was blown.

"It is not necessary, in order to create the relation of carrier and passenger, that the passenger should have actually entered the vehicle, much less that the vehicle should have started on the journey with him. The relation begins as soon as one, intending in good faith to become a passenger, enters in a lawful manner upon the carrier's premises to engage passage; and the carrier's responsibility dates from that time." *Shearman & Redfield on Negligence*, vol. 2, § 490; *Grimes v. Penn. Co. (C. C.)* 36 Fed. 72.

This being so, the defendant, upon the facts above stated, owed to the deceased, at the time of the accident which resulted in her death, the duty which a common carrier of passengers owes to the passenger, the duty of exercising the utmost care and skill which a prudent man would have used under the circumstances in order to safeguard her from injury in going upon the boat, as a passenger, and I am entirely satisfied that the defendant, in starting the boat while the deceased was in the act of going on board, failed to exercise such care.

It is claimed, however, by the defendant, that the deceased was herself guilty of contributory negligence; but this contention cannot, in my opinion, be sustained. I think it very satisfactorily appears from the evidence that the deceased, in attempting to get on the boat, was acting upon the implied, if not express, invitation of the deck hand on the Vallejo, and the danger of making the attempt was not so obvious that a person of ordinary prudence would have known that it was not safe to do so, or that the boat would start while she was in the very act of stepping from the slip to the deck. She cannot, therefore, be charged with negligence in what she did.

The deceased was of the age of 31 years, and leaves surviving a husband, between 40 and 50 years of age, and three children, aged, respectively, 2, 4, and 11 years. The libelant, as administrator of the estate, is entitled to recover, for the benefit of the heirs of deceased, such damages as, under all the circumstances of the case, shall appear to be just, and I find the amount of such damages to be the sum of \$5,000.

Let a decree be entered in favor of the libelant for that amount and costs.

HUFF et al. v. UNION NAT. BANK OF OAKLAND et al.

(Circuit Court, N. D. of California. September 24, 1909.)

No. 14,794.

1. COURTS (§ 294*)—FEDERAL COURTS—JURISDICTION—LAWS OF UNITED STATES. Rev. St. § 5200 (U. S. Comp. St. 1901, p. 3494), limits the total liabilities of any person, firm, or corporation to a national bank to not more than one-tenth of the bank's paid-in capital stock, and section 5239 (U. S. Comp.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

St. 1901, p. 3515) provides that every director participating in or assenting to a violation of the act shall be liable in his personal and individual capacity for all damages which the association and stockholders or any other person shall sustain in consequence thereof. *Held*, that a suit by a stockholder of a national bank for its benefit against the bank, its officers, and directors having charge of its assets individually, alleging that they had made excessive loans of the bank's funds to irresponsible and insolvent borrowers without adequate security in violation of the act, and that the bank after proper notice and demand had failed to bring the action, involved the construction of the national bank act, and was therefore a suit arising under the laws of the United States, of which the federal courts had jurisdiction, though there was no diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 294.*]

2. COURTS (§ 279*)—FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

The existence of a federal question sufficient to sustain federal jurisdiction must appear from complainant's statement of his own cause of action, without aid of any allegation as to what defendant claims.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 279.*]

Jurisdiction in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Mining Co.*, 35 C. C. A. 7.]

Suit by Mary J. Huff and others against the Union National Bank of Oakland and others. On demurrer to the bill for alleged lack of jurisdiction. Overruled.

Charles S. Wheeler, for complainants.

Milton S. Hamilton, for defendants.

VAN FLEET, District Judge. This is a bill in equity for an accounting to which the defendants have demurred upon the ground that the facts alleged do not state a case within the jurisdiction of this court. There is no diversity of citizenship, the parties being all citizens of the state, but the jurisdiction of the court is invoked upon the ground that the suit is one arising under the Constitution and laws of the United States within the terms and meaning of the judiciary act (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]).

The complainants sue in the capacity of stockholders of the defendant corporation, a national banking association, and for its benefit; it being alleged that the latter has, after proper notice and demand, failed and neglected to bring the action. The material features of the bill are, in substance and effect, that at the times of the commission of the acts complained of the individual defendants were officers of the defendant bank, one of them being the president and a director and the other two directors thereof, and as such officers having the control and being intrusted with the management and conduct of its business and affairs; that while acting as such officers the last-mentioned defendants were guilty of acts of malfeasance in office, in that at divers times, which are alleged with particularity and detail, they wrongfully and without right withdrew from the funds of the bank large sums of money, and employed the same to their own private use and benefit, and without adequate return to the bank, and made loans of the funds of said bank to irresponsible and insolvent borrowers, without ade-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

quate or any security, for the purposes of speculation, in which such officers were privately interested; and it is alleged that such withdrawals and loans were knowingly had and made by said officers in sums largely in excess of the limit allowed by specific provisions of the national banking law and contrary to and in violation thereof, and that said acts of the defendants have resulted in great loss to the bank, much in excess of the jurisdictional amount, for which loss it is asked that the defendants be compelled to account.

I am of opinion that these facts make a case arising under the laws of the United States and within the jurisdiction of this court. In defining the powers of national banking associations and their officers Congress has provided in section 5200 of the Revised Statutes (U. S. Comp. St. 1901, p. 3494) that:

"The total liabilities to any association, of any person, or of any company, corporation, or firm, for money borrowed, including, in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in."

This provision is very clearly a restriction upon the power of the officers of such an association in conducting its business against making loans of its funds, either to themselves or others, beyond the limit therein specified; and this provision the averments of the bill show was violated by the defendants in the instances counted upon.

Congress has also fixed the measure of liability of the officers of such associations for a violation of any of the provisions of the law governing them by providing in section 5239, Rev. St. (U. S. Comp. St. 1901, p. 3515), that in case of any such violation "every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

Thus it appears that the specific right, the alleged violation of which it is sought by the bill to redress, is one given by a law of the United States—no: remotely or indefinitely, but directly and positively—and that the measure of liability and recovery for such violation is likewise specifically furnished by the same law. Obviously it seems to me that in such a case the suit must be held to be one arising under a law of the United States, because the right to recover, if it exists, is thus directly given by an act of Congress, and the court is bound, therefore, in determining the controversy to decide whether or not the act gives the right claimed under it. Nor is this view to my mind at variance with the contention of the defendants, based upon the language of some of the cases, that it must appear from the averments of the bill that the construction of a federal statute is necessarily involved; for, in order to determine whether or not the act relied on does give the right claimed, the court is necessarily required to construe the act. That that question of construction is a matter in actual controversy sufficiently appears from a pleading which, like the present bill, merely alleges the violation of the statute, the fact of the injury resulting from such violation, and the fact that compensation has not been made for that injury. Such controversy exists because, if the

complainants' construction of the law be correct, the defendants ought to have made good the loss resulting from their wrongful acts; and their failure so to do is in itself a denial of the correctness of that construction.

These views are fully sustained by *National Bank of Commerce v. Wade* (C. C.) 84 Fed. 10, involving the same provisions of the Revised Statutes and under facts precisely similar to those presented in the present bill, where the bank was suing its derelict officers. In response to the objection now urged to the jurisdiction of the court Judge Hanford says:

"The true test of jurisdiction in this class of cases is fairly given in that part of the opinion of the Supreme Court in the case of *Cooke v. Avery*, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209, which is quoted in the defendants' brief as follows: 'Whether a suit is one that arises under the Constitution or laws of the United States is determined by the questions involved. If, from them, it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the Constitution or laws of the United States. *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Starin v. City of New York*, 115 U. S. 248-257, 6 Sup. Ct. 28, 29 L. Ed. 388. In *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992, it was ruled that it was necessary that the construction either of the Constitution or some law or treaty should be directly involved, in order to give jurisdiction.'"

And, after commenting upon the facts alleged and the contentions of the parties, it is further said:

"If, upon the trial of this case, the facts alleged in the bill should be proved, then the right of the complainant to recover will depend upon the proper construction and application of these statutes; if the facts shall not be proven as alleged, the plaintiff must fail, even though it should be made to appear that it has sustained damages by reason of negligence on the part of the defendants. For the purpose of this demurrer, the bill must be taken as true. Therefore, tested by the above rule, it is quite plain that the case is one arising under the laws of the United States, for the questions to be decided involve the construction of laws of the United States."

To the same effect is *Wyman v. Wallace*, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738. The idea that the bill should allege that the defendants actually dispute the construction of the statute claimed by the complainants is not, so far as I have been able to discover, supported by any of the cases upon the subject. To the contrary, it is now firmly settled that the existence of a federal question must appear from the complainant's statement of his own case, and cannot be aided by any allegation as to what the defendant claims or contends in that regard. *Florida, etc., R. Co. v. Bell*, 176 U. S. 321, 20 Sup. Ct. 399, 44 L. Ed. 486. On the general proposition discussed, see, also, *Walker v. Windsor National Bank*, 56 Fed. 76, 80, 5 C. C. A. 421; *In re Lennon*, 166 U. S. 548, 553, 554, 17 Sup. Ct. 658, 41 L. Ed. 1110; *St. Paul, etc., Ry. Co. v. St. Paul, etc., R. Co.*, 68 Fed. 2, 13, 15 C. C. A. 167; *Ellis v. Norton* (C. C.) 16 Fed. 4; *Stanley v. Supervisors* (C. C.) 6 Fed. 561.

The other grounds of demurrer have not been pressed and may therefore be regarded as abandoned.

The demurrers will be overruled.

CENTRAL COAL & COKE CO v. WILLIAMS.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1909.)

No. 2,992.

1. MASTER AND SERVANT (§ 217*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK FROM UNSAFE PLACE.

A servant has the right to assume that the master has performed his duty to provide and maintain a reasonably safe place in which to work, and is not required to exercise care to ascertain such fact, but assumes the risk from an unsafe place only where he knows it to be unsafe, or its dangerous condition is obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

2. EVIDENCE (§ 474*)—OPINION EVIDENCE.

In an action by an employé against a mining company to recover for a personal injury caused by the falling of a rock from the roof of an entry, where there were issues as to whether the roof was unsafe, and, if so, whether defendant should have known it in the exercise of reasonable care, it was not error to admit in evidence the opinions of practical miners familiar with the place, to aid the jury on such issues, which were presumably unfamiliar to the ordinary juror.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2200, 2204, 2214; Dec. Dig. § 474.*]

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Action by John Williams against the Central Coal & Coke Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Williams sued the coal company for damages resulting from personal injuries sustained by him while mining coal in a mine operated by the company. The complaint was that defendant failed to observe proper care to keep a roof of an entry in the mine, where the miners were required to keep their powder and fuse and make up their cartridges, in a reasonably safe condition; that as a consequence, while plaintiff was in that entry making up cartridges in the usual and proper course of business, a rock fell from the roof and injured him. Defendant denied the alleged want of care, and pleaded that plaintiff knew, or by the exercise of ordinary care could have known, of the dangerous condition of the roof, and by remaining in defendant's employ assumed the risk of its falling. It also pleaded contributory negligence by the plaintiff and negligence of his fellow servants as the proximate cause of his injury. The cause went to trial on these issues before a jury, and resulted in a verdict and judgment for plaintiff, to reverse which defendant prosecutes error.

Ira D. Oglesby, for plaintiff in error.

James Brizzolara and Henry L. Fitzhugh, for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). Much evidence was offered to sustain the issue, tendered by the answer, that plaintiff might in the exercise of ordinary care have discovered the dangerous character of the roof in question, and the court charged the jury that the duty devolved upon the master to exercise reasonable care to make the entry in question reasonably safe and secure, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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properly told the jury that the servant had a right to presume that the master had performed his duty and to proceed with his work in reliance upon that presumption; but the court qualified this correct exposition of the law by adding:

"Unless a reasonably prudent man, in the performance of his work as a miner, would have learned facts from which he would have apprehended danger to himself, in which event the law would not permit him, if he knew, or by the exercise of reasonable care might have known, that the roof of the entry was unsafe, insecure, and dangerous to proceed to work underneath the same; and, if he did so, he assumed the risk and cannot recover."

This in effect told the jury that a servant entering or continuing in the employ of a master is charged with the affirmative duty of exercising reasonable care to find out whether the place provided for him to work in is safe. We have repeatedly held that no such obligation is imposed upon the servant. He has a right to assume that the master has performed his whole duty and that the place is reasonably safe. It is only when it is known by the servant not to be safe, or when it is patent to or plainly observable by him that it is not safe, that the servant assumes the risk of danger. *Kirkpatrick v. St. Louis & S. F. R. Co.*, 159 Fed. 855, 87 C. C. A. 35; *Chicago Great Western R. Co. v. McDonough*, 161 Fed. 657, 88 C. C. A. 517; *Federal Lead Co. v. Swyers*, 161 Fed. 687, 88 C. C. A. 547; *United States Smelting Co. v. Parry*, 166 Fed. 407, 92 C. C. A. 159; *Western Inv. Co. v. McFarland*, 166 Fed. 76, 91 C. C. A. 504; *Ohio Copper Min. Co. v. Hutchings* (C. C. A.) 172 Fed. 201. The court below, therefore, declared the law more favorably to the defendant than should have been done.

One of the defendant's main contentions is that the evidence conclusively established that Williams was not in the entry where the powder and fuse were kept, and where he was required to make up his cartridges, but was out in a dangerous and abandoned cross-cut, where he was not required or expected to be, and received his injury from a rock falling while there. It is claimed he was thereby guilty of such contributory negligence as precluded recovery by him, and that the trial court erred in refusing to instruct the jury to find for the defendant as requested. After a careful reading of the record, we are satisfied that there was substantial evidence tending to show that Williams received his injury while at work in the entry as claimed by him. The learned trial judge charged the jury explicitly that if he was not injured while in the entry, but chose of his own accord to go into the cross-cut, and while there was injured, he could not recover. The verdict for plaintiff necessarily responded to this issue adversely to defendant's contention, and is conclusive upon us.

Exception was also taken to certain parts of the charge, which stated to the jury in effect that a primary duty rested upon the defendant to so inspect the roof of the entry in question as to maintain it in a reasonably safe condition, and to keep in its employ an inspector whose duty it was to look after the roofs of the entries. It is contended that these and other like expressions imposed the duty upon the master to procure and keep in its service a separate inspector, whose duty it was to look after the roof of the entries.

We do not think the charge as a whole conveys any such meaning. Its manifest purpose was to advise the jury of the undoubted law that a duty rested upon some one or more of the agents of the defendant, through whom only it could act, to perform the primary duty imposed upon the master. As so interpreted, there was no error.

Defendant also excepted to, and specifies as error, the action of the trial court in admitting over its objections the opinions of certain witnesses of large practical experience in coal mining as to whether an experienced miner could determine when a rock was loose in the roof of the entry, or when the roof was unsafe, and also as to whether the entry or roof in question was in fact in a safe condition at the time the plaintiff was injured. It is insisted that these questions substituted the opinion of witnesses for that of the jury, and encroached upon the latter's exclusive province. We think this insistence is untenable. The important issues in the case were whether the roof was actually unsafe, and, if so, whether the defendant in the exercise of ordinary care should have known it. Evidence was, of course, admissible touching the actual physical condition of the entry, and we think the opinion of experts, familiar with the physical condition and operation of the mine, concerning the subjects of inquiry, were also admissible.

This is not a new question with this court. In the very recent case of *United States Smelting Co. v. Parry*, *supra*, this court, speaking by Judge Van Devanter, said the general rule limiting the testimony of witnesses to primary facts within their knowledge is subject to certain qualifications; one of them being that a witness "possessed of special training, experience, or observation in respect of the matter under investigation may testify to his opinion, when it will tend to aid the jury in reaching a correct conclusion—the true test being, not the total dependence of the jury upon such testimony, but their inability to judge for themselves as well as is the witness." An exhaustive review of the authorities sustaining the proposition announced is then taken up. It was further remarked in that case that:

"The tendency of modern decisions is not only to give as wide a scope as is reasonably possible to the investigation of such questions, but also to accord to the trial judge a certain discretion in determining what testimony has a tendency to establish the ultimate facts, and to disturb his decision admitting testimony of that character only when it plainly appears that the testimony had no legitimate bearing upon the questions at issue and was calculated to prejudice the minds of the jurors."

The doctrine of that case received the unanimous approval of all the judges then sitting, and commends itself to our most favorable consideration. It is inconceivable that the opinions of practical mining operatives touching the questions under review would not greatly aid the jury in the performance of its only legitimate function, to reach a correct conclusion. The subject about which the testimony was elicited was underground mining operations familiar to the witnesses as a result of actual experience, and presumably not familiar to the ordinary juror. On the authority of the *Parry Case*,

we conclude that no error was committed in the reception of the evidence complained of.

This record presents a condition of things in many respects like that involved in *Western Investment Co. v. McFarland*, supra, in which we held the defendant liable. The plaintiff was set to work in a dark mine, lighted only by the dim and ineffectual light of a candle or lamp in the miners' hats. He had never worked there but a day or two before he was injured, and knew little of the inside of the mine. The recentness of his employment and the natural desire to continue in it had a tendency to make him complacent with his surroundings. He had a right, according to well-established law, to rely upon the owner doing its duty and furnishing him a reasonably safe place to work in, and did so. The testimony discloses that defendant flagrantly failed to discharge this duty; that it negligently, if not recklessly, allowed a dangerous condition of the roof of the entry to menace the safety of its employes, who were required to work under it. This constituted, not only a failure to discharge a legal duty, but a violation of the plainest dictates of humanity. As a result of it the plaintiff was hurt, and the defendant ought to be held responsible for his damages.

Finding no errors prejudicial to the defendant, the judgment is affirmed.

CENTRAL COAL & COKE CO. v. PENNY et al.

(Circuit Court of Appeals, Eighth Circuit. September 13, 1909.)

No. 3,001.

1. ADVERSE POSSESSION (§ 104*)—PRESUMPTION OF LAWFUL GRANT FROM TWENTY YEARS' EXCLUSIVE POSSESSION CONCLUSIVE, UNLESS LEGAL IMPOSSIBILITY.

A conclusive legal presumption of a grant of the character necessary to sustain title in the possessor arises from the exclusive, uninterrupted, adverse possession of real estate for 20 years, unless there is proof that such a title could not have been acquired by the possessor by any legal possibility.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. § 104.*]

2. ADVERSE POSSESSION (§ 104*)—FUTILE ATTEMPT BY ALLEGED GRANTOR TO CONVEY TO OTHERS NO EVIDENCE OF SUCH IMPOSSIBILITY.

The fact that the grantor, under whom the plaintiffs, who had been in exclusive possession for more than 20 years, claimed, had attempted in vain to convey the land to others, is no substantial proof that he could not, by any legal possibility, have conveyed the land in the possession of the plaintiffs to them.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 595-602; Dec. Dig. § 104.*]

3. ADVERSE POSSESSION (§ 31*)—NOTICE OF TITLE.

The notorious actual possession of real estate is notice to all of the title and of the rights of the possessors thereto.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 128-133; Dec. Dig. § 31.*]

4. MINES AND MINERALS (§ 51*)—CONVERSION—MEASURE OF DAMAGES.

One who, unintentionally and in the honest belief that he is lawfully exercising a right he has, enters upon the property of another and removes his ore, his coal, his timber, or any other valuable appurtenant to his land, is liable in damages for the value of the ore, timber, or other thing, in its original place, but for no more.

But one who willfully, intentionally, or with reckless disregard of the rights of another, takes his ore, timber, or other property, and appropriates it to his own use, must respond to the owner for the full value of the property at the time he converts it, without deduction for the labor bestowed or expenses incurred in removing and preparing it for market.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 141; Dec. Dig. § 51.*]

5. MINES AND MINERALS (§ 51*)—PRESUMPTION OF INTENTION TO CONVERT.

The wrongful taking of the ore or timber of another, in the absence of all other evidence, raises a presumption of fact that the trespasser took it intentionally, willfully, or in reckless disregard of the rights of the owner.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 51.*]

6. MINES AND MINERALS (§ 51*)—CONVERSION.

When the defendant bought the land around the two acres claimed by the plaintiffs, and while it was taking ore from beneath the surface of their land, they were, and had been for more than 20 years, in the notorious, uninterrupted, exclusive, adverse possession of their land, upon which they had maintained a church and a graveyard. The church and cemetery were within 200 feet of the shaft of the mine which the defendant bought. In the deed under which the defendant claimed was an exception of two acres upon which stands a church building, heretofore known as the Wollage Colored Church, and the plaintiffs' church was so known. The officers of the defendant testified that when they bought the property their attorney advised them that the exception was void, and that they had acquired good title to the plaintiffs' land and coal; that they believed that they owned the coal, when they took it from the land of the plaintiffs; that they inquired of their grantor what title the plaintiffs had, and were informed that they had none, but were there by permission; but that they did not inquire of the plaintiffs, or of any of the members of the church, concerning their claim of title.

Held, here was substantial evidence for the jury upon the question whether or not the defendant took the plaintiffs' coal willfully, or with a reckless disregard of their rights.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 51.*]

7. WITNESSES (§ 318*)—EVIDENCE OF REPUTATION OF WITNESS INADMISSIBLE WHERE NOT ASSAILED.

It is not competent for a party to an action to introduce in evidence the testimony of one of his witnesses to the effect that the reputation of another of his witnesses for integrity, veracity, ability, and standing is high, in the absence of evidence assailing his reputation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1086; Dec. Dig. § 318.*]

Evidence as to character or reputation in civil actions, see note to Morgan v. Barnhill, 55 C. C. A. 7.]

8. DEPOSITIONS (§ 95*)—PARTS OF DEPOSITION.

When a deposition has been properly taken, either party may introduce all or any competent or relevant part of it which is not clearly fragmentary and misleading, and the opposing party may put in evidence any other like part of it.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 276, 277; Dec. Dig. § 95.*]

(Syllabus by the Court.)

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Action by William Penny and Ben Hubbard, trustees of Cherokee Chapel Church, against the Central Coal & Coke Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Ira D. Oglesby, for plaintiff in error.

T. B. Pryor and F. A. Youmans, for defendants in error.

Before SANBORN, Circuit Judge, and CARLAND and POLLOCK, District Judges.

SANBORN, Circuit Judge. The trustees of the Cherokee Chapel Church have recovered a judgment against the Central Coal & Coke Company for its conversion of coal which it removed from beneath two acres of land which have been occupied by the plaintiffs as a cemetery and the site for their church for more than 20 years. At the trial the Coal Company admitted that it had removed the coal out of this land; but it challenges the judgment against it on several grounds, the chief of which are that there was no substantial evidence of title by purchase in the trustees of the church, or of an intentional or willful taking and conversion of the coal of the plaintiffs by it.

Title by purchase, as distinguished from title by descent or otherwise, is deemed material by counsel in this case, because the statute of Arkansas provides that such a title conveyed to trustees in trust for the use of any religious society within that state for a meeting house or burying ground shall descend, with the improvements thereon, in perpetual succession in trust to such trustees as shall from time to time be elected or appointed by such society. Kirby's Dig. Ark. § 6851. At a former trial of this case the trustees proved that they and their predecessors had been in the exclusive, uninterrupted, adverse possession of the two acres of land in controversy for more than 30 years; that for that length of time they had maintained a fence around about an acre and a half of the land, and had used that portion of it as a burying ground; and that during this time they had maintained and used a meeting house on the adjoining part, which was not inclosed. The former pastor testified that the church was organized in 1868 or 1869; that in 1869 or 1870 the meeting house was constructed upon the land, and a fence was built around the burying ground, and that about the time the building was constructed there came into his possession a deed purporting to have been executed by one McCullom, and to have been acknowledged before a justice of the peace named Watts; that he took this deed to the register of deeds of the county, and asked him to record it; that the register subsequently returned it to him as recorded; that it was read to the congregation; that he delivered it to one of the trustees of the church, who died about 1880; that the house of this trustee was burned; and that the deed was lost. The Circuit Court held that this evidence was insufficient to establish title; but this court was of the opinion that it constituted substantial evidence that the trustees had title by purchase to this property under the rule announced by the Supreme Court in *United States v. Chaves*, 159 U. S. 452, 464, 16 Sup. Ct. 57, 40 L. Ed. 215, that "it is the general rule

of American law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for 20 years, and that such rule will be applied as a 'præsumptio juris et de jure,' wherever, by possibility, a right may be acquired in any manner known to the law (1 Greenleaf on Evidence [12th Ed.] § 17; Ricard v. Williams, 7 Wheat. 59, 109, 5 L. Ed. 398; Coolidge v. Learned, 8 Pick. [Mass.] 504), and under its repeated quotation and approval (Ricard v. Williams, 7 Wheat. 59, 119, 5 L. Ed. 398; Fletcher v. Fuller, 120 U. S. 534, 548, 7 Sup. Ct. 667, 30 L. Ed. 759; United States v. Chavez, 175 U. S. 509, 523, 20 Sup. Ct. 159, 44 L. Ed. 255) of this declaration of the law by the Supreme Court of Tennessee in Williams v. Donell, 2 Head, 695, 697:

"It is not indispensable, in order to lay a proper foundation for the legal presumption of a grant, to establish the probability of the fact that in reality a grant ever issued. It will be a sufficient ground for the presumption to show that, by legal possibility, a grant might have issued. And, this appearing, it may be assumed, in the absence of circumstances repelling such conclusion, that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law." Penny v. Central Coal & Coke Co., 71 C. C. A. 135, 139, 138 Fed. 769, 773.

The true rule of law upon this subject is, therefore, that if a title by purchase were necessary to sustain the legal title of the trustees to this property in the case in hand, then, if by any legal possibility a title by purchase could have been acquired by them in any manner known to the law, the uninterrupted, exclusive, adverse possession of the trustees for more than 20 years raises the conclusive presumption that such a title was acquired by them.

The trustees proved the facts established at the first trial in the same way upon the second trial, which is here for review; but counsel for the Coal Company insist that those facts were insufficient to sustain a finding by the jury that the trustees had obtained a title by purchase, because the Coal Company proved that on May 26, 1869, the register of deeds, with whom the pastor left his deed to be recorded, registered a deed dated April 19, 1869, made by McCullom and acknowledged before Watts, to the free colored inhabitants of township 5 N. of range 31 W. of the fifth principal meridian, of an impossible and hence void description of land in that township, and that no other deed from McCullom appeared in the index or in the records of the county between 1863 and 1883. The plaintiffs, however, proved that the deed to the defendant and the deed to its grantor, both of which conveyed a title claimed under McCullom, contained after the descriptions therein these words, "Excepting out of the northwest quarter of the said southwest quarter (N.W. $\frac{1}{4}$ of S.W. $\frac{1}{4}$) two acres upon which stands a church building heretofore known as the Wollage Colored Church, used as a church, schoolhouse, and graveyard;" that their church was known by that name; and that, when the Coal Company obtained its title, the meeting house and the graveyard were within 200 feet of the shaft of its mine and in plain sight from it. Counsel argue that this evidence conclusively proved that the deed which the pastor of the church received and recorded was the void deed from McCullom to the colored inhabitants of section 5, and from this fact they draw the inference

that there could not have been a conveyance to the trustees of this church.

Let the fact upon which they base this inference be conceded; but the fact that an alleged grantor made a void deed to others no more repels the presumption that he made one to alleged grantees than the absence of all proof of such a deed. In the absence of all proof of that character, the exclusive, uninterrupted, adverse possession of the plaintiffs for more than 20 years, and the presumption which that possession raised that they had acquired a legal title to the premises they occupied by purchase, if there was any legal possibility that they could have so acquired it, and the indisputable possibility that McCullom might have conveyed this property to the trustees by a deed in proper form, acknowledged before Watts, conclusively established their title. Indeed, the legal possibility, which certainly exists, becomes even a probability, in view of the fact that the deeds under McCullom's title contained the exception which has been recited. In this state of the case there was no substantial evidence that the acquisition by the trustees of the title to their property by purchase was a legal impossibility, the court might have lawfully instructed the jury that the title of the plaintiffs was conclusively established by their proof of possession and the presumption of a grant to them, and a verdict to the contrary could not have been sustained. In this state of the record there was no error prejudicial to the Coal Company, either in submitting this question of title to the jury, or in the instructions of the court, or in its refusals to instruct upon this issue.

We turn to the measure of damages. This was not an action for damage to the realty, but an action for the conversion of the coal wrongfully taken from the land; for the only damages prayed were for that conversion. *Stone v. United States*, 167 U. S. 178, 182, 17 Sup. Ct. 778, 42 L. Ed. 127; *Peyton v. Desmond*, 63 C. C. A. 651, 656, 657, 129 Fed. 1, 6, 7; *United States v. Ute Coal & Coke Company*, 85 C. C. A. 302, 304, 158 Fed. 20, 22. At the close of the trial counsel for the Coal Company requested the court to instruct the jury that the trustees could not recover in any event more than the value of the coal removed as it lay in the ground before its removal. The court denied this request, and charged the jury as follows:

"The rule for the measure of damages in cases of trespass in taking the coal of another depends upon the circumstances under which the coal was taken. If you find that the coal was either recklessly, willfully or intentionally taken by the defendant company from the land owned by plaintiffs, as aforesaid, without right, then the measure of damages is the enhanced value of the coal at the mouth of the shaft, or where it was finally converted to the use of the defendant. But if you should find that the defendant took and converted the coal from the land owned by the plaintiffs through inadvertence or mistake, or in the honest belief that it was acting within its legal right, then the measure of damages is the value of the coal as it was in the ground before it was disturbed by the defendant. The wrongful taking of coal, in the absence of any explanation or other evidence, raises a presumption of fact that the trespasser took it intentionally and willfully. That presumption, however, is a disputable one, which evidence may so completely overcome as to remove the presumption that it was intentionally and willfully done."

These rulings of the court are specified as error. But the charge was a correct statement of the measure of damages and of the pre-

sumption from a wrongful taking (*Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, 64 C. C. A. 180, 191, 129 Fed. 668, 679; *United States v. Ute Coal & Coke Company*, 85 C. C. A. 302, 305, 158 Fed. 20, 23; *United States v. Homestake Mining Co.*, 54 C. C. A. 303, 304, 308, 117 Fed. 481, 482, 486), and the only question for consideration here is whether or not there was any substantial evidence that the taking was willful or in reckless disregard of the rights of the plaintiffs. While mere negligence that is synonymous with inadvertence is insufficient alone to sustain a finding of a willful trespass or taking, one may be so far negligent as to justify the inference that he acted knowingly and intentionally and to warrant a jury in finding that his act was reckless or willful. An intentional or reckless omission to ascertain the rights or the boundaries of land of his victim for the purpose of maintaining ignorance regarding them, or a reckless disregard of them, is as fatal to the claim of a trespasser to limit the recovery of damages against him to the lower measure as is an intentional or willful trespass or taking. *Golden Reward Min. Co. v. Buxton Min. Co.*, 38 C. C. A. 228, 238, 97 Fed. 413, 422; *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, 64 C. C. A. 180, 192, 129 Fed. 668, 680.

The notorious actual possession of real estate is notice to all of the title and of the rights of the possessors thereto. In 1902, when the Coal Company bought the mine under the lands adjoining the property in controversy, and during the time when it was taking the coal from this property, the trustees were in notorious possession of it, their church and graveyard were within 200 feet of the shaft of the defendant's mine, in plain sight therefrom, the company knew that it was taking coal from the property upon which this church and graveyard were located, and it knew that the deed to its grantor and its own deed contained the exception which has been recited. Under these circumstances it took the risk of the plaintiffs' claims when it appropriated their coal, for their notorious possession was notice of their title; and there was no error in the instruction of the court that it was "the duty of any person buying land who finds persons occupying the land to inquire into and ascertain the nature and the character of the occupancy." It is true that the attorney of the Coal Company and its other officers testified that when the company purchased the attorney examined the title and inquired of the grantor and of others than the trustees and the members of the church what the title and claims of the latter were, and that he was informed that they had no right or title to the land, except permission to use the surface for their church and burying ground, and that this attorney advised the other officers of the company, and they and he in good faith believed that the exception in the deeds was void, and that they conveyed to the Coal Company good title to the land and to the coal in controversy. All this was competent and material evidence for the consideration of the jury in their determination of the question whether or not the Coal Company took and converted the coal willfully or with a reckless disregard of the rights of the plaintiffs.

But the notorious occupation of the latter was notice of their exclusive, uninterrupted possession for more than 20 years, of their pre-

sumptive grant, of all these facts which the officers of the company would have learned if they had asked the trustees or the members of the church what their claims to this property were. While the attorney and the general manager of the company testified that they believed in good faith that the coal in controversy belonged to the company, they both testified that they never inquired of the plaintiffs or of any members of the church what their rights or claims were. In view of the notorious possession of the land by the plaintiffs, of the church and the graveyard thereon in plain view from the defendant's shaft, of the warning exception in the deeds under which it claims, and of the company's wary refraining from inquiring of the plaintiffs what they claimed their rights to the land and the coal in question to be, it cannot be lawfully held that there was no substantial evidence here that the Coal Company took and converted this coal with a reckless disregard of the rights of the plaintiffs. The question of the measure of damages to which the plaintiffs were entitled was rightly submitted to the jury.

It is assigned as error that the court refused to permit the defendant to prove by another witness the general reputation of one of its witnesses as a man and a lawyer for integrity, veracity, ability, and high standing; but it is only when the good reputation of a witness has been assailed by evidence that testimony in support of it is admissible, and here no such attack had been made.

The specification of error that the court permitted the plaintiffs to introduce in evidence the cross-examination of one of their witnesses contained in a deposition, after they had introduced the direct examination and the defendant had declined to put the cross-examination in evidence is baseless. When a deposition has been properly taken and filed in the court, either party may introduce all or any competent and relevant part of it which is not clearly fragmentary and misleading, and the opposing party may put in evidence any other like part. *H. Scherer & Company v. Everest* (C. C. A.) 168 Fed. 822, 827; *Crotty v. Chicago Great Western Ry. Co.* (C. C. A.) 169 Fed. 593.

There was no error in the trial of the case prejudicial to the Coal Company, and the judgment below must be affirmed.

It is so ordered.

HASTORF v. O'BRIEN et al.

(Circuit Court of Appeals, Second Circuit. July 21, 1909.)

No. 278.

SHIPPING (§ 54*)—BAILEE FOR HIRE OF SCOW—LIABILITY FOR INJURY OF VESSEL.

Bailees for hire of a scow, bound to exercise ordinary care to protect her from injury, are not liable for her injury by being pierced by a timber standing upright in the bottom under her, where she lay while being unloaded, where the place had been dredged and swept for obstructions but a month before by the city, and where their own vessel, which was larger, had safely lain in the same position only five days before.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219, 220; Dec. Dig. § 54.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Action by Albert H. Hastorf, as owner of the scow *Arcadia*, against Henry O'Brien and others, as bailees for injury to the scow. Decree for libellant, and respondents appeal. Reversed.

The libellant is the owner of the scow *Arcadia*, which in January, 1907, was chartered to the respondents and was used by them to carry stone to a contractor who was constructing new ferry slips at Thirty-Ninth street, Brooklyn. On January 3, 1907, the respondents loaded the scow with rip-rap at Manhattan, and she was thereupon towed to the Brooklyn work. When she reached there she was taken through an open space into an inclosure surrounded by piling where a crib was being sunk by putting stone in it. Some rip-rap had already been put in, and the stone which composed the scow's cargo was partially unloaded into the crib. Before she was wholly unloaded, however, the scow listed and soon sank. Subsequent examination showed that the cause of the sinking was the penetration of a timber which was imbedded in the bottom of the river in a nearly upright position. This timber had pierced the bottom of the scow and had gone through as far as her deck. It was sawed off and the scow later repaired. The ferryboats in going in and out passed close to where the scow lay, and their suction was sufficient to draw her down about a foot.

The respondents made no examination of the bottom before placing the scow alongside the crib. The place where she lay, however, had been newly dredged, and the bottom had been swept for obstructions by an engineer of the city dock department about a month before the accident. No obstructions were found at this place. A few days before the accident another scow, of the respondents, the *Whitelight*, loaded with stone for the crib, had been moored by them in substantially the same place where the *Arcadia* was when injured. This scow was larger than the *Arcadia*, remained there under substantially the same conditions as existed in her case, and suffered no injury.

The District Court held that the respondents had failed to establish their freedom from negligence and rendered a decree for the libellant.

Foley, Martin & Nelson, for appellants.

James J. Macklin (De Lagnel Berier, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The respondents were bailees for hire of the scow and were bound to use ordinary care in operating her. They were not insurers and were not obliged to adopt every known means to guard against accident. They were only required to take such precautions as, under all the circumstances, a reasonably prudent person would have taken.

Now in this case what precautions ought the respondents to have taken to guard against the accident which occurred? And this involves the further inquiry: What precautions could they have taken? Had the timber been imbedded in the bottom before the scow was towed there, its presence could have been discovered by employing divers to search the bottom. So the bottom might have been swept in the manner of the engineers of the dock department. But these were extraordinary precautions, which, under the circumstances, we think the charterers of a scow used in this class of work were not required to take. In our opinion they did their full duty when they sent the scow only to a place where their own vessel had lain in safety under similar conditions but a few days before. As men of ordinary prudence they might well have concluded that a place was safe for their chartered

boat in which their own larger vessel had been moored for the same purpose and had sustained no injury.

But it is said that they failed to guard against the possibility of the timber being imbedded in the bottom between December 29th, when the Whitelight was there, and January 3d, when the accident occurred, as well as the possibility of the timber floating under the vessel in an upright position after she was moored. We think, however, that ordinary care did not require them to apprehend these improbable happenings. Extraordinary, and not ordinary, care alone would have guarded against them. In our opinion, the respondents as bailees for hire showed that they failed in the performance of no duty which they owed the libellant.

The decree of the District Court is reversed, with costs, and the cause remanded, with instructions to dismiss the libel, with costs.

NOTE.—The following is the opinion of Adams, District Judge, in the court below:

ADAMS, District Judge. This action was brought by the owner of the scow Arcadia to recover for damages received in the forenoon of January 4, 1907, at a wharf then under construction at 39th Street, South Brooklyn.

The libel alleges that the employé of the respondent hauled the scow Arcadia into an opening made in the dock running from the foot of 39th Street, that this opening separated the said dock, making two parts of the same, the dock was undergoing repairs by the respondent, that the cargo of stone laden on said scow being for filling in the crib work; that at the time of hauling the scow into the place it was high water and that on the falling of the tide on or about the 4th day of January, in the afternoon of said day, the scow took a list to port and it was subsequently ascertained that a plank broke through the bottom of the scow, resulting in the scow taking the list, causing her to leak and settle on the bottom; that during the said times the scow was under charter of the respondent, under agreement with the libellant, and that said respondent agreed to return the boat at the expiration of the charter in the same condition as received.

And the libel also alleges that the plank or timber that broke through the bottom of the scow was a part of the old dock imbedded in the bottom and left by the respondent in the gap made by them in the said dock and opening where the scow was hauled by the employés and servants of the respondent.

The defense is; that the respondent admits that on or about the 3rd of January, 1907, at the foot of 55th Street, North River, the respondent loaded some stone on board the scow Arcadia, but they deny that they completed the loading of a cargo of stone on the scow. They admit said scow was towed to the foot of 39th Street, Brooklyn, by the tug Henry O'Brien—and it has been proved here that was one of the respondent's boats. They admit the scow was brought into the crib at the foot of 39th Street.

Respondent alleges as a separate defense, that the respondents were engaged in the building of new ferry racks and cribs at the foot of 39th Street, East River, and that at the time the crib had been sunk the respondents were engaged in filling the crib; that in the work the scow Arcadia was employed to convey a load of rip-rap from 55th Street to 39th Street, where the respondent was carrying on the said work; that on the 3rd day of January, 1907, the respondent was placing rip-rap on the scow and when a portion of the same had been loaded the captain of the scow refused to permit any more rip-rap or cargo to be placed on said scow because it was then in a leaky condition and unfit to receive any further cargo; that at the time and for some time prior thereto the said scow was rotten, old and leaky and unseaworthy; that thereupon the said scow was brought with such portion of her cargo as she had on to 39th Street, and upon reaching there efforts were made to promptly unload her; that a rain storm came up while the unloading was going on and the unloading was interrupted; that while the scow lay in the crib at 39th

Street she took in such a quantity of water that she sank; that the sinking was caused without any fault, neglect or want of care on the part of the respondent, but was caused solely through the old, rotten, leaky and unseaworthy condition of the said scow; that the place where the scow sank was a good and safe berth, free from all obstructions of every kind.

I think we ought first to dispose of the claim of unseaworthiness. It has been argued here on the part of the respondent that the unseaworthiness, even if it existed, was not contributory to the sinking. The testimony, however, satisfies me that the boat—although old and somewhat the worse for wear and perhaps incapable of carrying a full cargo—was on this occasion quite capable of carrying the cargo that was loaded on her. She did carry it safely to 39th Street, where she was placed in the crib. There does not appear to have been any undue leakage on her part on the way over. Some hours after it was discovered she was leaking. What was the cause for this leaking? It turned out from the examination of the diver—who went there a few days after the boat sank—that the bottom was filled with wreckage. Perhaps I should qualify that somewhat. He did not say it was absolutely filled, but that he found a piece of wreckage—a scantling of timber, 8x12—embedded in the bottom there and projecting upward and that the scow had set on this piece of timber and a hole had been broken through her bottom through which the timber extended up so that it rested against her deck. This scow was what is known as a deck scow, that is, she did not carry anything in her hold, but carried all her cargo on deck. The diver, when he went down had to encounter obstacles under the deck put there for the purpose of strengthening the scow and he was very persistent and managed to go to the place of injury, where he found this plank protruding through the bottom and up against the deck. I have no doubt whatever that that was the cause of the boat sinking, and the only thing that is troubling me in the case is whether the respondent was in any way negligent, thereby causing the boat to sink.

Of course as bailees for hire the respondent was under a duty to take at least ordinary care of the scow and in order to make them responsible it is necessary that some negligence appears on their part. That is the real question in this case. Were they, or were they not, negligent in sending the boat to that place?

The Circuit Court of Appeals (*Johan Swenson v. Snare & Triest Company*, 160 Fed. 459, 87 C. C. A. 443) has recently said, in a case of this kind:

"It is admitted that the pile driver was chartered by the respondent from the libellant and that while in the exclusive possession of the respondent it sank and was lost. As such an occurrence is not in the ordinary course of things, the burden was thrown on the respondent as a bailee to show how the loss took place and that it was not caused by its negligence. * * *

"The District Judge heard the witnesses. He had an opportunity to note their appearance and behavior upon the stand. He has found that the evidence showed negligence upon the part of the respondent. We need not go so far. It is sufficient for us to say that we have carefully examined the whole record and, in view of the findings of the trial court, are unable to hold that the respondent has sustained the burden of proof imposed upon it by law."

It appears here that the respondent sent its own boats there and one of the boats the same size as the *Arcadia* had lain in practically the same place without receiving any injury; that it was a boat which drew about the same water and that she remained there through all stages of the tide and she had received no injury whatever.

I have no doubt the *Arcadia* was lying in such a way that in ordinary circumstances when there was no special commotion of the water, she would not have touched this obstruction, although she would probably have been quite near it. The testimony shows that the ferryboats going into and out of their slips in that vicinity—partly at the end of the slip at this time on the south side of the wharf which was about 1,200 or 1,500 feet long up to the place of the opening where the scow was injured—created a great suction so that the water was removed from underneath the boats, I think the witnesses say, about a foot; causing the boats to settle a foot lower than they would otherwise have done. Now I think that was the cause of this accident. This other scow belonging to the respondent which had lain in the same place could not

have met these same conditions or she might not have passed through the experience without injury. The Arcadia was, apparently, in whatever suction took place there brought down so that her bottom rested upon the obstruction which I have already described and which doubtless made a hole in her so that this piece of plank ran into her bottom and created a serious opening causing her almost immediately to take in water enough to sink her.

It remains to be determined, now, whether the O'Briens should have anticipated such a state of affairs as that. They were bound to take ordinary care of this boat and bound not to take her into a place where she would be subjected to any extraordinary stress or danger. It seems to me that they should have known that the effect of the commotion caused there by the ferryboats would be to lower the scow considerably in the water, at least as much as a foot, and that they ought to have taken that into consideration, what she would meet with under such circumstances. It has been testified here that the place was dredged out and that no obstructions were found, but as I recall the testimony that was done by the City and not at the expense of the respondent. I do not think, however, even if these parties who did the dredging had been the agents of the respondent that the respondent would be relieved by that dredging, if they were otherwise liable, because the man who testified about it really did not know what was taking place there. It seems to me if there had been any such dredging as the witness for the City seemed to indicate there had been, this obstruction would have been discovered. It must have been there for some little time, it was embedded in the sand; whether that embedding was caused by the weight of the boat or something else, it is impossible to tell. Quite likely the weight of the boat resting on the obstruction did push it down into the sand—although sand is not such a material as yields to anything of that kind as readily as mud would. I believe that was the cause of this accident, that no precautions were taken by the respondent to ascertain what the scow Arcadia would meet with when she was subjected to the effect of the ferryboat swells and it seems to me that in that respect they were negligent. They should have known what the effect of those swells would be upon the scow and in failing to ascertain that, they were guilty of negligence, such negligence as ought to make them responsible for the effects of this accident.

I therefore direct that a decree be entered for libellant against the respondents with an order of reference.

PATTON et al. v. MARSHALL.

(Circuit Court of Appeals, Fourth Circuit. July 13, 1909.)

No. 871.

1. EQUITY (§ 204*)—CROSS-BILL—BRINGING IN NEW PARTIES.

New parties cannot be brought into a suit in equity by a cross-bill; but, if the interest of defendant requires their presence, he should take the objection of nonjoinder and compel complainant to amend.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 467; Dec. Dig. § 204.*]

2. EQUITY (§ 204*)—CROSS-BILL—RIGHT TO FILE.

In a suit in equity by the purchaser of coal rights in lands for a specific enforcement of the contract, the terms of which were in dispute between the parties, the defendant cannot by cross-bill bring in as parties defendant the agents who made the contract, on his behalf and with his approval, to have their right to commissions determined, a controversy which has no relevancy to the principal suit, and in which complainant has no interest.

[Ed. Note.—For other cases, see Equity, Dec. Dig. § 204.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. COURTS (§ 307*)—FEDERAL COURTS—JURISDICTION OF CROSS-BILL.

If a cross-bill in a federal court assumes the character of an original bill, it will be dismissed for want of jurisdiction, where the parties to the controversy presented thereby are citizens of the same state.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 307.*]

4. COURTS (§ 508*) — FEDERAL COURTS — INJUNCTION AGAINST PROCEEDINGS IN STATE COURT.

Under Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), which provides that a writ of injunction shall not be granted by a federal court to stay proceedings in any court of a state, a federal court has no power to enjoin the further prosecution of an action at law in a state court between citizens of the same state to permit one of the parties to litigate the same question before it by making the other party a defendant in a suit in equity pending therein.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 508.*]

Enjoining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

Suit in equity by Elwood D. Fulton against T. Marcellus Marshall and others. To a cross-bill filed by Marshall, making them parties, John Patton and Thomas L. Evans demurred. From an order overruling the demurrer and granting an injunction staying an action in a state court, they appeal. Reversed.

On the 2d of October, 1901, T. Marcellus Marshall, residing in the state of West Virginia, entered into a contract with John Patton and T. L. Evans as follows:

"I hereby authorize John Patton and T. L. Evans, of Harrison county, W. Va., to act as my agents in selling something like two or two and one-half thousand acres of land containing coal of the Pittsburg vein of coal that I own or control. I agree to make deeds of general warranty of perfect title for all lands as soon as the money shall be paid to me or deposited to my order in some bank specified by me to be held by it in escrow during the reasonable and necessary time for me to execute said deeds and for the grantees to examine them and the claim of title back of them. I retain all rights and discretion in the matter, and said Evans and Patton are merely employed by me to carry out my directions in the matter.

"Glenville, W. Va., Oct. 2, 1901.

T. Marcellus Marshall.

"I accept the above agency.

"John Patton & T. L. Evans."

The said Marshall at the time was the owner, in his own right, of a considerable quantity of coal lands, and also had control of other lands as administrator with the will annexed of Robert R. Marshall, deceased. Acting upon the authority conferred as above, Patton & Evans entered into a contract with E. D. Fulton on the 25th of October, 1901, from which, in order to show the character of the sale, the following paragraph therein is here copied:

"That the parties of the first part do hereby sell to the party of the second part all of the coal known as the Pittsburg vein upon and underlying the farm or tracts of land owned by T. M. Marshall, and also all of the coal of the vein aforesaid controlled by said T. M. Marshall, as executor of the last will of R. R. Marshall, deceased, situate in the counties of Gilmer and Braxton, in the state of West Virginia, on the waters of the Little Kanawha river, Sliding run, Long run, Joe's run, Heater's fork, Dusk Camp, Copen's run, and other tributaries of the said river, containing from two thousand to twenty-five hundred acres, more or less, of surface, at the price of thirty-five dollars per acre for coal; no allowance being made for outcrops, but saving and excepting there-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from all veins or strata of coal other than that usually called the Pittsburg vein. This sale is understood to include all the coal, subject to the exceptions hereinbefore stated which the executor (who is understood to be the said T. M. Marshall) is entitled to sell and convey under the provisions of the will of the said Robert R. Marshall, deceased, and also all of the coal owned by the said T. M. Marshall, in consideration whereof the party of the second part agrees and binds himself to pay the purchase money of thirty-five dollars per acre, as follows, to wit:"

The terms of the sale were \$2,000 in cash, which Fulton paid to Marshall, \$5,000 additional within 30 days, which Fulton also paid, and a sum sufficient to make up one-third of the whole purchase price within 90 days from the date of the sale. Marshall agreed to pay Patton & Evans \$2.50 per acre for the services they were to render in making the sale of the lands above described. Marshall at first demurred to the contract which his agents, Patton & Evans, had made with Fulton, but afterwards ratified it and accepted the cash payments, and Fulton then made a deposit in bank of the sum of \$16,500 to Marshall's credit, which was intended to cover the one-third payment required by the contract. Afterwards, as appears from the record, a disagreement arose between Marshall and Fulton as to the construction of the contract, Marshall insisting that he was to have pay for the land contracted to be sold according to the actual surface area of each of the tracts, to be computed from the horizontal measurement of the exterior boundaries, without reference to the actual coal area of the said tracts, and that, whilst Fulton had bought upon these terms, the contract was only to convey to him the actual Pittsburg vein or stratum of coal underlying the said tracts. On the other hand, Fulton contended that he was not to pay per acre for surface measurement, but only for the quantity actually underlaid by the kind of coal prescribed in the contract. Marshall refused to execute deed to Fulton upon the terms claimed by the latter, and thereupon Fulton filed his bill on the equity side of the docket in the Circuit Court of the United States for the Northern District of West Virginia to compel specific performance of the contract of sale made with him by Marshall, through his agents, Patton & Evans, on the 25th day of October, 1901.

Fulton's bill was filed on the 4th of September, 1903, and he named as defendant in his suit T. Marcellus Marshall, in his own right and as administrator with will annexed of Robert R. Marshall, deceased. By leave of the court Fulton filed in his cause on November 3, 1903, an amended bill, in which Robert M. Marshall, John S. Withers, and Robert G. Linn are named as defendants in addition to those in the original bill. In the amended bill Fulton seeks the same relief as in the original; the object of the amendment being, as appears from the record, to bring in as additional parties defendant Robert M. Marshall, John S. Withers, and Robert G. Linn. Robert M. Marshall was claiming an interest as one of the devisees under the will of Robert R. Marshall in the coal lands contracted to be sold to Fulton, and John S. Withers also claimed an interest in the said lands by reason of a conveyance from Charles E. Marshall, who was a devisee also under the said will. Robert G. Linn, the other defendant brought in, was, so it was alleged, the owner of one of the tracts of land sold to Fulton. Robert M. Marshall and John S. Withers were undertaking to assert whatever right they may have had in these coal lands by a bill of complaint which they had filed on the 13th of November, 1903, in the circuit court of Gilmer county, W. Va., after Fulton had filed his bill in the Circuit Court of the United States, as before stated. They named as defendants in their bill in the circuit court of Gilmer county T. Marcellus Marshall, in his own right and as administrator of Robert R. Marshall, deceased, Elwood D. Fulton, and Robert G. Linn.

The bill filed by Robert M. Marshall and John S. Withers in the state court sought to compel Fulton and T. Marcellus Marshall to carry out the contract which had been made through Patton and Evans for the sale of the Pittsburg vein of coal upon and underlying the tracts of land which T. Marcellus Marshall owned and controlled, as heretofore stated. The complainants in that bill claimed that they were entitled to a part of the proceeds of this sale, because of an alleged interest in some of the lands embraced in the contract. The disclosure of these facts, it is assumed, led to the filing of Fulton's

amended bill in the Circuit Court of the United States to bring in Robert M. Marshall, John S. Withers, and Robert G. Linn as parties defendant. On the same day that Fulton's bill was filed in the Circuit Court, to wit, the 4th day of September, 1903, John Patton and Thomas L. Evans, T. Marcellus Marshall's agents, who made the contract of sale with Fulton, brought a suit at law in the circuit court of Gilmer county, W. Va., against T. Marcellus Marshall, to recover of him their compensation for services rendered in effecting the sale to Fulton under the contract of October 2, 1901. Their declaration was in assumpsit, and they demanded a commission of \$2.50 per acre for the number of acres which Marshall authorized them to sell. To this declaration Marshall demurred; but, his demurrer having been overruled, he entered his plea of non assumpsit on January 11, 1904, and the issue was joined. Upon the petition of T. Marcellus Marshall, the defendant, the circuit court of Gilmer county stayed proceedings in the suit of Patton and Evans from time to time and until March term, 1907, of said court. At this term of the said court, at the instance of Marshall, the court again stayed proceedings in the suit until the next regular term of the court. Before the day arrived to which the last stay had been given, T. Marcellus Marshall on June 27, 1907, filed his cross-bill in the Fulton suit in the Circuit Court of the United States. The prayer of this cross-bill was, among other things, that John Patton and Thomas L. Evans be made parties defendant, and that their rights be litigated and determined in the Fulton suit, and that they be enjoined and restrained from proceeding further in the action which they had brought in the state court. The Circuit Court, in response to this prayer, directed a subpoena to be issued commanding the said Patton and Evans to appear, and also granted a restraining order enjoining them from proceeding with their case against T. Marcellus Marshall in the state court. Patton and Evans demurred to the cross-bill and moved to dissolve the injunction. The demurrer was overruled, and a decree entered continuing the injunction. From this decree Patton and Evans appealed to this court.

The assignments of error on this appeal present for consideration two propositions: First, that the defendant, T. Marcellus Marshall, could not by his cross-bill make Patton and Evans parties defendant to the Fulton suit in the Circuit Court of the United States; Second, that the Circuit Court was, by reason of section 720, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 581), without jurisdiction to enjoin the action at law which Patton and Evans had brought and which was pending in a court of the state of West Virginia.

John W. Davis (R. F. Kidd and Davis & Davis, on the briefs), for appellants.

W. E. R. Byrne (Linn & Byrne, on the briefs), for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge (after stating the facts as above). It is the privilege of a complainant in a bill in equity to make such parties defendant in his suit as he may elect, provided such parties come within the class of necessary parties, or proper parties, or both; but even the complainant has no right to go beyond these classes, and bring into his suit those who have no connection with the controversy disclosed in the bill, nor interest or concern in its determination. It seems that the complainant in the equity cause of Fulton against Marshall, pending in the Circuit Court of the United States, had brought before the court all the parties, so far as interests are disclosed by the record, necessary to a complete determination and adjudication of the subject-matter of his bill. In the outset he made party defendant T. Marcellus Marshall, in his own right and as administrator, with whom

the contract of sale had been made, and as against these parties the complainant sought specific performance. It was afterwards ascertained that Robert M. Marshall and John S. Withers claimed an interest in the proceeds of the sale, and it was further ascertained that the legal title to one of the tracts of land included was in Robert G. Linn. It cannot be denied that if the Marshall last named and Withers and Linn held title to portions of the land included in the contract of sale, or were entitled to participate in the distribution of the proceeds, they were at least proper, if not necessary, parties. It was the orderly course, therefore, when Fulton discovered that these persons were claiming an interest in the lands wherein he had contracted to buy coal rights which might in some way affect the title to be derived from T. Marcellus Marshall, that he should proceed by an amended bill to make them parties defendant. When Fulton had brought before the court as defendants in his action all such parties as he knew or had ground to believe were interested in the subject-matter of his action, he had the right to proceed with his cause without interruption on the part of one of the defendants by an effort to introduce into the litigation an independent disconnected controversy between such defendant and outside parties.

If the complainant had omitted to bring in parties who were necessary to a complete determination of equities between himself and one or more of the defendants, or among defendants themselves, in regard to the subject-matter of the suit, a cross-bill was not the proper proceeding by which to supply such defect. A cross-bill in equity possesses no such function.

"The purpose of a cross-bill is either to obtain a discovery in aid of a defense to the original bill, or to obtain full relief to all the parties touching the matter of the original bill." Story's Equity Pleading, § 385.

"New parties cannot be introduced into a cause by a cross-bill. If the plaintiff desires to make new parties, he amends his bill and makes them. If the interest of the defendant requires their presence, he takes the objection of non-joinder, and the complainant is forced to amend or his bill is dismissed." Shields et al. v. Barrow, 17 How. 130, 15 L. Ed. 158.

But, aside from this, Fulton's suit was for the specific performance of a contract of sale, a cause of action peculiarly cognizable in a court of equity. It was of no concern to him what Marshall had agreed to pay his agents whom he had authorized to secure a purchaser for the coal rights in the lands, nor could the compensation for services due or claimed by such agents enter into Fulton's cause of action. In equity pleading, the answer is a defense to complainant's bill, and does not set up grounds for affirmative relief. Such relief is granted upon a cross-bill. But affirmative relief in response to the prayer of a cross-bill is against either the plaintiff or a codefendant in the original bill. Street's Fed. Equity Prac. vol. 2, § 1020.

"The cross-bill must, so it is held, be germane to the original bill. It must be confined to the same matters as the original bill, and it cannot introduce a new controversy not embraced in the original bill." Street's Fed. Eq. Prac. vol. 2, § 1030.

This author lays down the further principle that a cross-bill is primarily a defense, and, being so considered, is confined to matters in

litigation in the original suit; otherwise, new matters might be introduced into a litigation by cross-suits without end; and still further says the same author, in section 1031:

"A cross-bill is bad that goes beyond the original bill, and states a cause of action foreign to the primary dispute. A cross-bill may allege new or additional facts not set forth in the original bill, and be germane to the subject-matter of the action. The introduction of new facts do not render a cross-bill objectionable, but the making of a foreign or multifarious issue."

Johnson Railroad Signal Co. v. Union Switch & Signal Co. (C. C.) 43 Fed. 331, holds as well settled the rule that a cross-bill cannot introduce any new or distinct matter not within the scope of the original bill, nor such matter as is not necessary as a defense to the original bill or is foreign to the primary controversy. A cross-bill which seeks no discovery and sets up no defense, except such as would be available by answer, is bad. *Street*, Fed. Eq. Prac. vol. 2, § 1022. See, also, *Miller v. Rickey* (C. C.) 146 Fed. 577.

In *Railway Co. v. United States*, 101 U. S. 639, 25 L. Ed. 1074, it is held that a cross-bill cannot be used to bring in new and distinct matters, and in support the court cites in that case *Ayers v. Chicago*, 101 U. S. 184, 25 L. Ed. 838. A cross-bill must grow out of the original suit. It cannot bring in new and distinct matters. *Rubber v. Good-year*, 9 Wall. 788, 19 L. Ed. 566, and *Cross v. Del Valle*, 1 Wall. 5, 17 L. Ed. 515. In this last case it is said by the court:

"That a cross-bill is a mere auxiliary suit, and a dependency of the original. It may be brought by a defendant against the plaintiff in the said suit, or against other defendants, or against both; but it must be touching the matters in question in the bill."

A cross-bill cannot introduce a new controversy, which it is not necessary to be decided in order to have a final decree on the case presented by the original bill. A cross-bill is "a proceeding to procure a complete determination of a matter already in dispute." 2 Dan. Ch. Pr. 1549, and note 2. The matter in dispute, as disclosed by *Fulton's* bill, was only specific performance of *Marshall's* contract. Suppose, for the sake of the argument, that *Marshall* had been the moving party, and had filed his bill against *Fulton* for specific performance of the contract of sale; no one would contend that *Patton* and *Evans* would have been either necessary or proper parties, for in the broadest view they had no interest which a decree against *Fulton* compelling him to carry out his contract could affect. Then how can they be necessary parties to a decree requiring *Marshall* to accept the balance of the purchase money and make title to *Fulton* in compliance with the terms of the contract which the latter's bill seeks to have specifically performed? We feel constrained in answer to this question to hold that *Patton* and *Evans* were not necessary or proper parties to *Fulton's* bill. They had no interest in the subject-matter of controversy between *Fulton* and *Marshall*, nor in any controversy which might arise between defendants themselves within the scope or the purposes of the original bill. Following, therefore, in the line which we have pursued in discussing this case, and relying upon the authorities and decisions which we have cited, it is our conclusion that *Marshall* could not

by his cross-bill make Patton and Evans parties defendant to Fulton's bill.

So far as appellant's first assignment of error is concerned, we might stop here; but there is another view presented by counsel which we must admit carries with it some force, and that is that Marshall's cross-bill, undertaking as it does to introduce into Fulton's suit new parties defendant against whom Marshall alone seeks relief, gives to his pleading the character of an original bill, and, this being so, that the essential element, to wit, diverse citizenship, as between Marshall and the new defendants, is wanting, and therefore the Circuit Court of the United States is without jurisdiction. As will be seen, Marshall and Patton and Evans are all citizens of West Virginia. If a cross-bill assumes the character of an original bill, it will be dismissed if wanting in the element of diverse citizenship which will be necessary to give jurisdiction to the Circuit Court of the United States. *Cross v. Del Valle*, supra. See, also, *Delaware, L. & W. R. Company v. Jersey City (C. C.)* 168 Fed. 128.

Appellants' second assignment of error is based upon the proposition that the Circuit Court was without jurisdiction to enjoin proceedings in the action at law which Patton and Evans had brought against T. Marcellus Marshall in the state court. It will be observed that, when Marshall filed his cross-bill in the Fulton suit, the action at law brought by Patton and Evans against him in the state court had been pending nearly three years. Marshall had entered his plea of nonassumpsit, and had thereby raised an issue which the plaintiffs were entitled to have tried by a jury. It is also a fact, as appears in the record, that in the Fulton suit in the Circuit Court, which had also been pending for the same length of time, Marshall had filed his answer, to which Fulton had on the 28th day of June, 1904, made replication. This case was, therefore, at issue, and a decree for the parties to take testimony had been entered. In this situation, Marshall, by his cross-bill, was permitted to bring in Patton and Evans as parties defendant to the Fulton bill in the Circuit Court, and by a decree of that court to enjoin them from proceeding with their action at law in the state court. The decree of the Circuit Court, therefore, had not only the effect to deprive Patton and Evans of their right to have the issue of fact raised by the pleadings in their suit against Marshall tried by jury, but at the same time the injunction issued by a court of the United States stayed a proceeding properly instituted and pending in a state court of West Virginia.

We do not deem it necessary to discuss the right of trial by jury, but will pass on to the second proposition; that is, that by the injunction issued in this case the suit of Patton and Evans against Marshall, pending in a state court, was stayed. There can be no doubt of the power of the courts of the United States in the exercise of their equity jurisdiction to issue the writ of injunction. This power is inherent in the courts themselves, and is also amply secured by statutes which authorize them to issue all writs necessary for the exercise of their respective jurisdictions. Upon this general power, however, there is one important limitation, and that is by virtue of section 720 of the Revised Statutes, which declares:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The Supreme Court of the United States has passed upon this statute in a number of cases, notably in the case of *Peck et al. v. Jerness et al.*, 48 U. S. 612, 12 L. Ed. 841. In that case the Supreme Court, speaking through Mr. Justice Grier, says:

"Act Cong. March 2, 1793, c. 66, § 5, declares that a writ of injunction shall not be granted 'to stay proceedings in any court of a state.' In the case of *Diggs v. Wolcott*, 4 Cranch, 179, 2 L. Ed. 587, the decree of the Circuit Court had enjoined the defendant from proceeding in a suit pending in a state court, and this court reversed the decree, because it had no jurisdiction to enjoin proceedings in a state court."

Following in line with this decision, the Supreme Court again, through Mr. Justice Bradley, in *Haines et al. v. Carpenter et al.*, 91 U. S. 254, 23 L. Ed. 345, says:

"In the first place, the great object of the suit is to enjoin and stop litigation in the state courts, and to bring all the litigated questions before the Circuit Court. This is one of the things which the federal courts are expressly prohibited from doing. By the act of March 2, 1793, it was declared that a writ of injunction shall not be granted to stay proceedings in a state court. This prohibition is repeated in section 720 of the Revised Statutes, and extends to all cases except where otherwise provided by the bankrupt law. This objection alone is sufficient ground for sustaining the demurrer to the bill."

There are other decisions of the Supreme Court in point upon this question, but we will not pursue the discussion further than to say that there are, it is true, some cases constituting exception to the general doctrine announced in the authorities we have cited. See *Deizsch v. Huidekoper*, 103 U. S. 494, 26 L. Ed. 497, in which *Kern v. Huidekoper*, 103 U. S. 485, 26 L. Ed. 354, is cited and approved, and *French v. Hay*, 22 Wall. 250, 22 L. Ed. 854, reaffirmed. Our case, however, is not within the exception, as a perusal of the opinions of the Supreme Court in the cases named will abundantly show.

It is our conclusion, therefore, that there was error in the decree of the Circuit Court, and that it should be reversed. The case is remanded, to the end that Marshall's cross-bill, so far as it concerns Patton and Evans, may be dismissed, and the injunction against them dissolved.

Reversed.

ST. LOUIS & S. F. R. CO. v. SUMMERS et al.

(Circuit Court of Appeals, Eighth Circuit. October 11, 1909.)

No. 2,982.

1. RAILROADS (§ 338*)—INJURY TO PERSONS AT CROSSINGS—GROUNDS OF LIABILITY.

The rule is well settled that, notwithstanding such contributory negligence of a traveler in crossing railroad tracks as will preclude recovery for any primary negligence of the railroad company in operating its trains so as to cause his injury, he may still recover if, after actually discovering that he was in imminent peril, the railroad company by the exercise of ordinary care could have prevented his injury and failed to do so; but in such case some new act of negligence must arise to create the cause of action, and must be established by proof, unaided by the former acts, which have been excused by the traveler's contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1096-1099; Dec. Dig. § 338.*]

2. RAILROADS (§ 320*)—ACCIDENTS AT CROSSINGS—NEGLIGENCE.

The fact alone that those in charge of a railroad train observe a person driving with a team toward a crossing ahead of the train is not sufficient to apprise them that he is in danger, or to charge them with negligence for not stopping the train; but they have the right to presume that the traveler will stop before reaching the crossing, as the law requires.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1016; Dec. Dig. § 320.*]

In Error to the Circuit Court of the United States for the Eastern District of Oklahoma.

Action by Alfred Summers, special administrator of the estate of Hattie Magar, deceased, and others, against the St. Louis & San Francisco Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

A passenger train, operated by the defendant company and running eastwardly at a rate of speed variously estimated at 10, 15, 25, and 30 miles an hour through the town of Ada, in the Indian Territory, came into collision at a street crossing with a team driven by David Magar, and he was killed. His widow and minor children instituted this suit to recover damages. They charged in their complaint that the railroad company was negligent in operating its train at an excessive rate of speed, in violating a speed ordinance of the town, in failing to keep a proper lookout, in failing to stop the train before it reached the crossing, and that as a result of these acts of negligence Magar lost his life and they were damaged. The defendant denied the acts of negligence, and pleaded contributory negligence as its defense. In the course of the trial it became manifest that the plea of contributory negligence had been sustained, and the trial court so instructed the jury, but submitted the cause on the sole issue whether, notwithstanding the contributory negligence of Magar, the railroad company might, after discovering his peril, by the exercise of ordinary care, have avoided a collision and prevented the death. Defendant at the close of the plaintiffs' evidence moved for an instructed verdict in its favor, on the ground that there was no substantial evidence to support a verdict for plaintiffs on this issue. This motion was denied. Defendant reserved proper exceptions to the ruling and declined to offer any testimony in its behalf. A verdict and judgment in favor of plaintiffs followed, and defendant now prosecutes error.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

E. T. Miller (W. F. Evans, on the brief), for plaintiff in error.

Clinton A. Galbraith, Tom D. McKeown, and A. C. Cruce, for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). The facts, we think, show that the trial court was right in holding that the decedent was guilty of such contributory negligence as precluded plaintiffs' recovery by reason of any of the primary acts of negligence complained of, even if they were established, and no complaint is made of that ruling by plaintiff.

This leaves for our consideration the sole question whether there was any evidence to support the finding necessarily made by the jury that defendant railroad company could, by the exercise of ordinary care, after discovering that the decedent was in a situation of peril and danger, have avoided injuring him. The rule is well settled that, notwithstanding such contributory negligence of a traveler in crossing a railroad track as precludes recovery for the primary negligence of the railroad company in operating its train so as to bring about a collision with him, yet another and different cause of action arises in favor of the traveler if for any reason he is exposed to imminent peril and danger, and the railroad company, after actually discovering that condition, could, by the exercise of ordinary care, have stopped its train, or otherwise have avoided injuring him, and failed to do so. *Chunn v. City & Suburban Railway*, 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219; *Denver City Tramway Co. v. Cobb*, 164 Fed. 41, 90 C. C. A. 459. But in the application of this rule care must be taken to avoid undermining the rule of contributory negligence. Such negligence of the traveler in law fully exonerates the railroad company from the consequences of its original negligence, and some new and subsequent act of negligence must arise to create a cause of action; and this new or secondary act must be established by proof, unaided by the former acts, which have been excused by the traveler's contributory negligence.

Let us therefore inquire whether the servants of the railroad company had actual knowledge of the peril of the decedent, and whether with that knowledge they exercised reasonable care to avoid injuring him. The decedent, at the time he was killed, was engaged in hauling freight at or near the depot in Ada. He was driving a two-horse team southwardly along Townsend avenue, had just driven across one track, called the "mill track," 157 feet north of the main track, and another track, called the "house track," 50 feet north of the main track; and, as his horses reached the main track, an east-bound passenger train struck them, and he was thrown from his wagon, receiving injuries from which he died. There were five witnesses to the accident. Four of them stated that the decedent drove his freight wagon slowly across the mill track and house track, and towards the main track, looking generally in a southern or southeastern direction towards a switch engine, which was standing still on a switch track running south

and parallel with the main track. One witness stated that Magar was trying to hold his horses down, which, he says, were "kind of frightened" at the engine over on the switch track; but, when pressed to tell what Magar did, said:

"I disremember exactly, only he kind of made a haul like this (indicating on his lines."

This evidence, and such evidence as this, is too vague and uncertain, especially when taken with that of the four other witnesses to the accident, which give no such account, to establish any state of peril on the part of Magar which would be reasonably observable by the engineer in charge of the train.

But it is argued that the engineer sounded three or four short whistles when between 300 and 350 feet of the crossing, and that a man on the side of the engine usually occupied by the fireman was seen, at some undisclosed distance from the crossing, to wave his hand out of the window. These facts, together with the fact that the engineer could have seen the crossing, and have seen Magar approaching, a sufficient time to enable him to stop his train before reaching the crossing, are relied on as proof of actual knowledge and appreciation of Magar's danger by the engineer; but they are clearly insufficient for that purpose. There is no showing why the short whistles were sounded, and certainly none that they were sounded because of Magar's danger. Common experience suggests that they were most likely the usual and customary signals given by engineers in charge of railroad trains at the approach of crossings. The waving of the hand from the fireman's window might have been for many purposes other than a recognition of Magar's danger. It may be that the engineer might have seen, and should be presumed to have seen, Magar approaching the main track; but this would constitute no evidence that his peril was appreciated. Common observation and experience teach that men engaged in hauling freight about railroad stations frequently approach close to the tracks with their teams and stand there while trains pass near them. Engineers in charge of trains must be presumed to be familiar with this practice, and to operate their trains in the light of it. It would constitute a serious embarrassment to traffic, if engineers should be required to stop or slow up upon seeing the approach of a wagon to the tracks. They have a right to presume that the drivers will observe the precaution which the law imposes upon them as a duty, and keep off the tracks on the approach of trains.

In the recent case of *Illinois Cent. R. Co. v. Ackerman*, 144 Fed. 959, 76 C. C. A. 13, we had before us a case similar to this. We there held that the men in charge of a train were not obliged to anticipate the negligence of a traveler. We said:

"They could very well have assumed either that he [the traveler] knew of the approach of the cars and intended to stop at the customary safe distance, or that he would look when near the track and then stop before going upon it."

That case controls this.

The judgment must be reversed, and the cause remanded for a new trial in harmony with the views herein expressed. It is so ordered.

WESTINGHOUSE ELECTRIC & MFG. CO. v. WAGNER ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. August 16, 1909. Rehearing Denied October 18, 1909.)

No. 2,857.

1. PATENTS (§ 328*)—INFRINGEMENT—ELECTRICAL CONVERTER.

The Westinghouse patent, No. 366,362, claim 4, for the combination, substantially as described, of an electric converter constructed with open spaces in its core, an inclosing case, and a nonconducting fluid or gas in said case, adapted to circulate through said spaces and about the converter for the purpose of cooling the same, construed, and *held* not infringed by a converter in which spaces were left between the coils, and between them and the inclosing case, for containing a cooling liquid, but which had no open spaces in its core; that being an essential element of the patented combination.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

2. PATENTS (§§ 312, 318*)—INFRINGEMENT—PROFITS RECOVERABLE—BURDEN OF PROOF.

Where an infringing article contains a material and substantial improvement over that of the patent, the patentee is not entitled to recover all of the profits made by the infringer, but only such as resulted from the use of the infringing parts, and the burden rests upon him to separate the profits arising therefrom by reliable and tangible evidence; nor does the fact that the infringer kept no separate account of such profits relieve him from such burden, where the books were so kept before there was any knowledge or belief of infringement, and without reference thereto.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 545, 572, 573; Dec. Dig. §§ 312, 318.*]

Accounting by infringer for profits, see note to *Brickill v. Mayor, etc., of City of New York*, 50 C. C. A. 8.]

Sanborn, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

For opinion below, see 129 Fed. 604.

Thomas B. Kerr and Paul Bakewell (Drury W. Cooper and Bakewell & Cornwall, on the brief), for appellant.

A. C. Fowler and Chester H. Krum, for appellee.

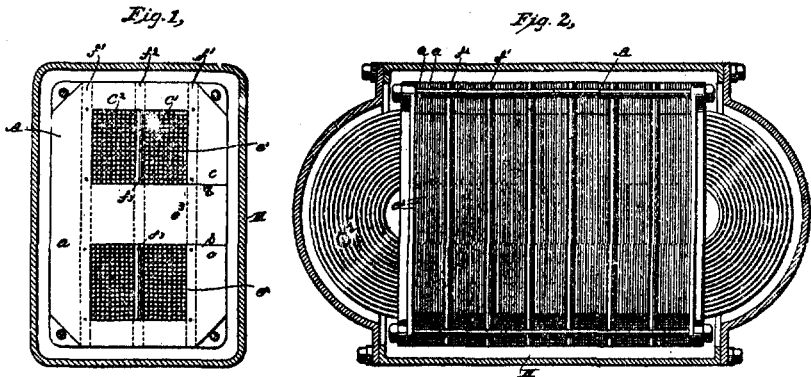
Before SANBORN and VAN DEVANTER, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This was a bill in equity filed by the appellant, Westinghouse Electric & Manufacturing Company, in the Circuit Court of the United States for the Eastern District of Missouri. The bill charges the appellee, Wagner Electric & Manufacturing Company, with infringement of letters patent of the United States, No. 366,362, dated July 12, 1887, issued to George Westinghouse, Jr., and by him assigned to the appellant. The patent relates to improvements in electrical converters or transformers, and the bill prayed for an injunction and an accounting. The general nature and object of the invention is thus stated by the patentee:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"The invention relates to the construction of a class of apparatus employed for transforming alternating or intermittent electric currents of any required character into currents differing therefrom in certain characteristics. Such apparatus are usually termed 'induction coils' or 'converters.' The object of this invention is to provide a simple and efficient converter, which will not become overheated when employed for a long time in transforming currents of high electric motive force, and which will be thoroughly ventilated."

The following drawings, copied from the patent, show a cross-section and a longitudinal section of appellant's transformer:



Having reference to the above drawings, the patentee, in describing the invention, says:

"Referring to the figures, A represents the core of the converter, and C¹ and C² the respective coils. The core is preferably composed of thin plates of soft iron, a, a, separated individually or in pairs from each other by thin sheets of paper or other insulating material. This insulating material is preferably applied to one surface of the plates by being glued or pasted thereto, and these surfaces may lie all in the same direction, thus separating the plates individually, or alternate plates may have their covered surfaces in one direction and the intervening plates have their covered faces in the opposite direction, thus magnetically separating the plates in pairs. The plates are preferably constructed with two rectangular openings, e¹ and e², through which the wires pass. For convenience in inserting the coils, or rather in applying the plates to the coils after the latter have been wound, a cut is made from each opening, as shown at b, b. By bending the ends, c, c, upward, the plates may then be thrust into position, and the ends, c, c, then close about the coils. The tongues, e³, of succeeding plates, are preferably inserted from opposite sides. I do not, however, herein broadly claim an induction coil having its core constructed of thin plates formed in the manner just described; but such invention is claimed in an application of even date herewith, filed by Albert Schmid. Each group of—say five or six—plates thus applied is preferably separated from the succeeding group by air-spaces. These may be produced by passing tubes, f¹, f¹, which may be of soft iron or other metal, or of vulcanized fiber, along the lengths of the plates. It may be sufficient in other instances to block the group of plates apart at intervals, instead of extending the tubes the entire length. Preferably, also, the primary and secondary coils, C¹, C², are separated from each other in a similar manner. In this instance blocks or tubes, f², of nonconducting materials, are used. The tubes may be perforated, as shown at f³, f³. Where the converter is to be used in open air, the tubes, f¹ and f², would permit a free circulation of air, and thus aid in keeping the converter cool. It may be preferred in some instances to surround the converter with some oil or paraffine, or other suitable material, which will assist in preserving insulation and will not be injured by heating. This material,

when in a liquid form, circulates through the tubes and the intervening spaces of the coils and plates, and preserves the insulation, excludes the moisture, and cools the converter. The entire converter may be sealed into an inclosing case, H, which may or may not contain a nonconducting fluid or a gas."

The patent contains five claims, but the bill charges infringement of claim 4 only, which reads:

"The combination, substantially as described, of an electric converter constructed with open spaces in its core, an inclosing case, and a nonconducting fluid or gas in said case adapted to circulate through said spaces and about the converter."

This claim was adjudged valid in *Westinghouse Electric & Mfg. Co. v. Union Carbide Co.* (C. C.) 112 Fed. 417, and 117 Fed. 495, 55 C. C. A. 230, hereafter referred to as the Carbide Case, and in *Westinghouse Electric & Mfg. Co. v. American Transformer Co.* (C. C.) 130 Fed. 550, and its validity was also recognized by the Circuit Court in this case. In the foregoing cases it was decided that most, if not all, of the elements of the combination of claim 4 were old in the art; but, the combination being new, it was held patentable, and in this view we concur. The appellee manufactured and sold two types of transformers—the device involved in the carbide suit, which was there held to be an infringement of claim 4 of appellant's patent, and the device referred to in the record as "Type M." Both are claimed by appellant to be infringements of claim 4 of its patent.

The court below found that appellee's type M device did not infringe claim 4 of appellant's patent, and referred the cause to a master to take and state an account of the "profits, gains, and advantages" received by the appellee, together with all damages suffered by the appellant by reason of the manufacture and sale by the appellee of the transformer held in the Carbide suit to be an infringement of claim 4 of the patent. Upon the incoming of the master's report, exceptions were filed thereto by the appellee, the exceptions sustained, and a decree awarding appellant nominal damages only was entered. Two questions are presented for decision: First. Did appellee's transformer, type M, infringe claim 4 of appellant's patent? Second, what is the proper measure of recovery upon the accounting? These questions will be considered in the order stated.

The appellee's transformer, decided in the Carbide suit to be an infringement of the appellant's patent, had open spaces, not only between the coils and between the coils and the core, but also open spaces in the core, and as to that device it is admitted in the answer that the decision in that case is *res adjudicata* and that a permanent injunction should be granted; but the answer denies that the other type of transformer involved in this suit, known as "Type M," is an infringement of claim 4 of plaintiff's patent, and the appellee insists that, while its transformer, type M, the only one manufactured by it since the decision in the Carbide suit, has open spaces between the coils, and between the coils and the core, it has no open spaces in the core, within the meaning of claim 4 of appellant's patent, and that the open spaces in the core are one of the principal elements of the combination of the claim in suit, and therefore its type M device is not an infringement. Thus the question is presented whether the open spaces between the

coils, and between the coils and the core, found in appellee's device, type M, can be said to be open spaces in the core, within the meaning of claim 4 of appellant's patent. It is not contended that the rectangular openings in the core for the purpose of admitting the coils come within the claim; but it is insisted by appellant that the open spaces between the coils, and between the coils and the core, are open spaces in the core, within the meaning of the claim we are now considering.

That claim is for a combination, and the rule by which we are to be governed in the determination of the question presented is clearly stated in *Water Meter Co. v. Desper*, 101 U. S. 332, 25 L. Ed. 1024, as follows:

"It is a well-known doctrine of patent law that the claim of a combination is not infringed if any of the material parts of the combination are omitted. It is equally well known that if any one of the parts is only formally omitted, and is supplied by a mechanical equivalent, performing the same office and producing the same result, the patent is infringed."

And again, in the same case, the court said:

"Our law requires the patentee to specify particularly what he claims to be new, and, if he claims a combination of certain elements or parts, we cannot declare that any one of these elements is immaterial. The patentee makes them all material by the restricted form of his claim. We can only decide whether any part omitted by an alleged infringer is supplied by some other device or instrumentality, which is its equivalent."

In *Westinghouse Electric & Mfg. Co. v. American Transformer Co.*, supra, the Circuit Court for the District of New Jersey, in contrasting the several claims of the patent, one with another, for the purpose of more certainly ascertaining the meaning of claim 4, said:

"* * * The 'spaces' of claim 4 are 'open spaces in its core.' The 'open space' of claim 1 is that intervening between 'parallel primary and secondary coils.' The combination of claim 2 has as its elements, first, primary and secondary coils; second, a core composed of laminæ of soft iron arranged in groups; and, third, 'open spaces' separating said groups. This claim, aside from the coils, specifically refers to the construction of the core, but lacks the elements of 'an inclosing case' and 'a nonconducting fluid or gas in said case adapted to circulate through said spaces and about the converter,' included in the combination of claim 4. The elements of the combination of claim 3 are, first, a core composed of soft iron plates arranged in groups and, second, 'open tubes,' intervening. This claim specifically refers to a particular construction of the core, but, like claim 2, lacks two of the elements of claim 4. Claim 5 includes the following elements: First, primary and secondary coils; second, a core composed of magnetically separated laminæ of soft iron arranged in groups; third, 'air spaces' separating the different groups from each other; and, fourth, the arrangement of the laminæ of the several groups in different parallel planes. This claim also specifically refers to a particular construction of the core, but, like claims 2 and 3, lacks the same two elements of claim 4. In the combination of claim 4 'open spaces in its core' as well as an 'inclosing case' and 'a nonconducting fluid or gas' therein, are 'substantially as described.' No doctrine of equivalency can dispense with the open spaces in the core of the transformer, for they are a necessary element of the combination. Without them the claim cannot be satisfied. Open spaces might be produced in the core, other than those specifically set forth in the drawings or description, which would be the equivalent of the latter. The core itself might, for instance, be cut into in various directions in such manner as to expose what may be termed internal heat-dissipating surfaces to the oil or other medium surrounding the transformer, and in such case, the other requirements of the combination being satisfied, infringement could be found. But the essence of

the first element of the claim insisted on is that the open spaces of the transformer must be 'in its core.'

And, in passing upon this question in the present case, Judge Adams, then presiding in the Circuit Court, said:

"These numerous parallel open spaces so shown in the drawings and model, and any other open spaces, whether parallel or not, cutting through the body of the surrounding core and extending into the interior opening containing the coils, are, in my opinion, the 'open spaces in its core' contemplated by claim 4. The purpose of these open spaces, as disclosed by the patent and the evidence of experts, is to permit the oil to so bathe the heat-producing surfaces of the transformer, and to so circulate throughout the parts of the transformer, as to preserve the insulation of the coils, and radiate the heat generated by the transformer's action. The use of oil or paraffine in a tank inclosing the transformer for the purposes just specified has been long known to the art, and is recognized by at least two patents prior in date to complainant's patent. Accordingly, the invention has for its main purpose only the physical means for effectually securing this circulation of oil. It deals with the core itself, and divides it up into groups of plates, each group separate from the other in such way as to make numerous parallel open spaces in the core leading from its outer surface on all its four sides into the interior opening made for the introduction of the coils. This interior opening, called in the patent 'two rectangular openings, *e*¹ and *e*², through which the wires pass,' is not, in my opinion, 'an open space in its core,' within the meaning of claim 4. I adopt the views of Prof. Nipher with respect to this rectangular opening. He says: 'The core is not the core of a transformer or converter until these rectangular openings are made through it.' He says further: 'These openings give character to the core.' 'It is not a core until they exist there.' 'The core is in fact given such a form that it surrounds the coil in a certain sense, and the space so surrounded by the core might be called a coil opening.' The core of a transformer is the iron part of it. It must be so constructed as to permit the introduction of the coils of wire approximately through its center. The wire coil must be put in to make a transformer. I cannot understand how this space left in the inside of the iron for this purpose can be an open space in the core. It might be as well said that the space left on the outside of the iron, between it and the incasing tank, is an open space in the core. The defendant's device has a space between the coils, and has also this rectangular opening for the introduction of the coils into the core; but, for the reasons above expressed, these are not 'open spaces in its core,' within the meaning of the patent in suit." 129 Fed. 604.

As already suggested, if we understand appellant's contention, it is that the term "open spaces in the core," in claim 4 of its patent, includes and means spaces between the coils, and between the coils and the core, or that such spaces are the equivalent of spaces in the core. But the trouble with this suggestion is that the claim in suit describes no such spaces, and by its particularization impliedly excludes them. In that claim the patentee describes a combination consisting of certain enumerated elements, and by that enumeration he is bound.

The Circuit Court held that the open spaces in the core, as described in claim 4, and the open spaces between the coils and between the coils and the core, were physically different things; and that this is so is apparent, we think, from an examination of the patent as a whole. As we fully concur in the conclusion reached by the Circuit Court, that the appellee's device, type M, does not infringe claim 4 of appellant's patent, we pass to the second question, namely, the measure of recovery upon the accounting for the admitted infringement which is predicated upon the type of transformer involved in the Carbide Case.

At the conclusion of the appellant's case the appellee demurred to the evidence, on the ground that, under the showing then made, appellant was entitled to nominal damages only. The demurrer was overruled by the master. The appellee then introduced evidence, and the cause was submitted. The master found that each and every part of claim 4 of appellant's patent was old, with the exception of the air-tight inclosing case; that the patentee made a wholly new combination described in claim 4 of his patent; that this new combination constituted an entirely new transformer, complete in itself; that it was infringed in its entirety by appellee's transformer; that the entire commercial value of the infringing transformers manufactured and sold by the appellee during the time concerned in the accounting was due to the presence therein of the combination described in claim 4 of appellant's patent; that the profits made by the appellee on the infringing transformers were merged in the profits of its general business, so that it was impossible to separate them; that the appellee kept no separate account of the manufacture of the infringing transformers, and did not know and could not furnish the cost of the manufacture of them, nor even an estimate of such cost; that the business of the manufacture and sale of the infringing transformers was so intermingled and confused with appellee's general business that approximate results only would be possible; that the profits realized by the appellee from the manufacture and sale of the infringing transformers, as nearly as it could be reached through "estimates, comparisons, and apportionments," were approximately 25 per cent. on the net amount of sales of the infringing transformers; that the gross sales, after deducting commissions, amounted to \$874,060.15; that the labor and material amounted to \$529,733.43; that the factory cost amounted to \$211,893.37; that the profits realized were \$134,433.35; and he recommended that a decree be entered in favor of appellant and against the appellee for that amount.

Exceptions were filed to the findings and recommendation of the master, and upon final hearing the court disapproved the report of the master, sustained the exceptions to his findings and recommendation, and in lieu of the decree recommended by the master entered one allowing appellant nominal damages only. The opinion, to which reference was made in the decree, discloses that the court was of opinion that the patented combination of the appellant was only a part of the infringing transformer manufactured and sold by the appellee; that the appellant was not entitled to the entire profits realized by the appellee from that transformer, but only to so much of the profits as was due to the presence in that transformer of the patented combination; that the burden was upon the appellant to show by competent evidence how much of the entire profits was due to the use of its combination; that the appellant had failed to sustain the burden so resting upon it, and the evidence for the appellee threw no light upon the subject; and that the master's findings and recommendation proceeded upon the erroneous theory that, in that situation, the appellant could recover the entire profits realized by the appellee from the infringing transformer, regardless of what portion of those profits arose from the

use of the appellant's patented combination. We are unable to concur in the master's findings. We think claim 4 is a limited detailed claim—open spaces in the core being one of its chief or distinguishing features. This was the view entertained by Judge Amidon upon an application for a temporary injunction, and by Judge Adams at the hearing upon which the case was referred to the master. 129 Fed. 604. See, also, *Westinghouse Electric & Mfg. Co. v. Union Carbide Co.*, 117 Fed. 495, 55 C. C. A. 230; *Westinghouse Electric & Mfg. Co. v. American Transformer Co.* (C. C.) 121 Fed. 560, 130 Fed. 550.

The evidence clearly shows, we think, that the thing principally to be desired in the construction of a transformer is to keep the coils, rather than the core, from becoming overheated. The appellant's patent, claim 4, seems to have proceeded upon the idea that the thing principally to be accomplished was to keep the core from becoming overheated, and to that end it provided that one element of the combination covered by claim 4 was to be the open spaces in the core; nothing whatever being said in that claim about open spaces between the coils, or about open spaces between the core and the coils. Bearing in mind that the thing desired is to prevent the overheating of the coils, it will be seen that appellant's combination, claim 4, operates to that end only in so far as the core, if becoming overheated, would have a tendency to heat the coils. The appellee, in our view, improved upon appellant's device by providing, in addition to spaces in the core, for spaces between the coils and spaces between the core and the coils, through which the oil or other cooling medium could circulate and thereby much more certainly and efficiently accomplish the purpose desired, viz., keeping the coils at a proper state of temperature. This, we think, was a material and substantial improvement on appellant's combination, claim 4. It must, of course, be conceded that while appellant's combination, claim 4, although really designed to keep the core from becoming overheated, also tended to keep the coils from becoming overheated; but the appellee's transformer much more efficiently accomplished the result desired by providing for a circulation of oil or other cooling medium through the open spaces between the coils, and between the core and the coils, as well as through the open spaces in the core. We conclude, therefore, that the master was in error in finding that the entire commercial value of the infringing transformers manufactured and sold by the appellee during the time concerned in the accounting was due to the combination described in claim 4 of appellant's patent.

And to the extent that the appellee has improved upon that which was covered by appellant's patent, claim 4, the appellant cannot demand the appellee's profits, because the only right of the appellant to complain of the appellee is in the use by the appellee of the patented combination, claim 4, and the only right which the appellant has to profits realized by the appellee is confined to such profits as resulted solely from the use of appellant's combination, claim 4; the profits resulting from the improvement made by the appellee being something in which the appellant has no interest. The evidence shows, we think, that the open spaces between the coils, and between the core and the

coils, performed a very substantial office, and that if added to spaces in the core would, as already suggested, necessarily accomplish the desired result more certainly and more efficiently. The patented device covered by claim 4, being, as we view it, a limited detailed claim, and not being generally for a circulatory system throughout the heat producing parts of the transformer, and the appellee's infringing transformer embracing something of value not covered by that claim, viz., open spaces between the coils, and between the coils and the core, we are of opinion that the appellant, whose patent covered only part of the infringing device, is not entitled to recover all the profits made by the appellee, but only such as resulted from the patented invention. *Stirrat v. Excelsior Mfg. Co.*, 61 Fed. 980, 10 C. C. A. 216; *Baker v. Crane*, 138 Fed. 60, 70 C. C. A. 486; *Robertson v. Blake*, 94 U. S. 728, 24 L. Ed. 245; *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371.

The master's report shows that appellant offered no evidence upon the question of damages, but relied entirely upon the position that the amount which it was entitled to recover could be based upon the profits realized by the appellee from the sale of the infringing device. The master found that the appellee kept no separate account of its profits realized from its infringing device, but, on the contrary, that the profits made by appellee on the infringing transformers were merged with the profits of its entire business, so that it was impossible to separate them, and that the appellee did not know and could not furnish the cost of the manufacture of the infringing transformers, or even an estimate thereof. We do not think the mere failure to keep separate the profits derived from the infringing device, under the circumstances disclosed by the record, warrants the application of the equity rule that where one wrongfully mingles his goods with those of another, so that they are indistinguishable from the mass, the party injured is entitled to take the whole. This rule has been applied in cases of the invasion of a copyright, where the drongdoer has mingled in the book matter to which a copyright does not properly extend with matter covered by the copyright, "the two necessarily going together, when the volume is sold as a unit, and it being impossible to separate the profits on the one from the profits on the other, and the lawful matter being useless without the unlawful." *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547.

There is no evidence tending to show that the appellant's failure to show how much of the appellee's profit resulted from the infringed combination and how much from the presence of the other elements of the infringing transformer was due to any refractory or deceitful conduct on the part of the appellee, such as destruction or hiding of the books, or refusal to produce them for the use of the appellant. The mere failure on the part of the appellee to keep an account separating the profits prior to the sustaining of appellant's patent and at a time when, as the record shows, appellee believed in good faith that it was not invading any right of the appellant, is not conduct which would render the appellee liable as a confuser of goods within the rule just stated, nor such conduct as would relieve appellant from the necessity of carrying the prescribed burden of proof. *Seymour, et al. v. McCormick*, 57 U. S. 480, 14 L. Ed. 1024. In *Keystone Mfg. Co. v.*

Adams, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103, the Supreme Court, discussing a similar question, said:

"While it is undoubtedly established law that complainants in patent cases may give evidence tending to show the profits realized by defendants from use of the patented devices, and thus enable the courts to assess the amounts which the complainants are entitled to recover, yet it is also true that great difficulty has always been found, in the adjudicated cases, in applying the rule that the profits of the defendant afford a standard whereby to estimate the amount which the plaintiff is entitled to recover, and in defining the extent and limitations to which this rule is admittedly subject. Such a measure of damages is of comparatively easy application, where the entire machine used or sold is the result of the plaintiff's invention; but when, as in the present case, the patented invention is but one feature in a machine embracing other devices that contribute to the profits made by the defendant, serious difficulties arise. It is unnecessary, in this opinion, to review the numerous cases, some at law, others in equity, wherein this court has considered various aspects of this question. It is sufficient to say that the conclusions reached may be briefly stated as follows: It is competent for a complainant, who has established the validity of his patent and proved an infringement, to demand, in equity, an account of the profits actually realized by the defendant from his use of the patented device; that the burden of proof is on the plaintiff; that where the infringed device was a portion only of defendant's machine, which embraced inventions covered by patents other than that for the infringement of which the suit was brought, in the absence of proof to show how much of that profit was due to such other patents, and how much was a manufacturer's profit, the complainant is entitled to nominal damages only"—citing *Seymour v. McCormick*, 16 How. 480, 14 L. Ed. 1024; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566; *Mowry v. Whitney*, 14 Wall. 620, 20 L. Ed. 860; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000.

In *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, the Supreme Court quoted with approval a statement of the rule announced by the Circuit Court, as follows:

"The patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative."

And upon this question the burden of proof is upon the complainant. If he fails to carry this burden, he is entitled only to nominal damages. In *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664, the court, in the course of its opinion, said:

"The infringer is liable for actual, not for possible, gains. The profits, therefore, which he must account for, are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention; or, in other words, the fruits of the advantage which he derived from the use of that invention over what he would have had in using other means than open to the public and adequate to enable him to obtain an equally beneficial result. If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits, and the plaintiff's only remedy is by an action at law for damages."

Here the appellant failed to prove by reliable or tangible evidence that the entire value of the infringing transformer as a marketable article was properly and legally attributable to appellant's patented combination embodied therein, and so, in the light of the decisions above cited, and many others, which we have examined, announcing the same rule, we think that the appellant is entitled to recover nominal damages only; in other words, that as part only of the profits made by the

appellee are attributable to the appellant's combination, the balance being attributable to the presence in the infringing device of elements not included in that combination, and as the appellant failed to make proof of how much of the total profits was due to the presence of its combination in the infringing device, there is nothing upon which more than a nominal recovery could be grounded.

The conclusion reached is that the decree finding that the device, type M, without open spaces in the core, now manufactured by the appellee, does not infringe appellant's patent, and that the appellant is entitled to nominal damages only on account of the infringing device, must be affirmed.

SANBORN, Circuit Judge (dissenting). A clear conception of the desideratum, and of the root, principle, or mode of operation of an invention devised to attain it, is indispensable to a correct decision of a question of infringement, because that device or combination is the mechanical equivalent of another under the law of patents which accomplishes the desideratum in substantially the same way, although the devices differ in name, form, location, or shape. *Machine Company v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935; *Winans v. Denmead*, 15 How. 330, 342, 14 L. Ed. 717; *Blandy v. Griffith*, 3 Fish. Pat. Cas. 609, 616, 3 Fed. Cas. 675,678. The claim of the invention involved in this case is:

"The combination, substantially as described, of an electric converter constructed with open spaces in its core, an inclosing case, and a nonconducting fluid or gas in said case adapted to circulate through said spaces and about the converter."

The specification of a patent, which forms a part of the same application as its claim, must be read and construed with it, to ascertain the true meaning and actual intent of the parties to the contract which the specification and the claim evidence, for the purpose of determining what the principle or mode of operation was which the parties intended to secure to the patentee. *Seymour v. Osborne*, 11 Wall. 516, 547, 20 L. Ed. 33; *O. H. Jewell Filter Co. v. Jackson*, 72 C. C. A. 304, 308, 140 Fed. 340, 344. Prior to the invention under consideration it had been impracticable to use converters cooled by the natural circulation of air which had a capacity of more than 10 kilowatts. But by the use of the patentee's combination, by means of which a circulation of oil through and around the converter in an inclosed case was effected, converters with a capacity of 500 kilowatts became serviceable and merchantable. The following terms of the specification show the object and the principle or mode of operation of the invention:

"The object of this invention is to provide a simple and efficient converter, which will not become overheated when employed for a long time in transforming currents of high electromotive force. * * * The core is preferably composed of thin plates of soft iron, a, a. * * * The plates are preferably constructed with two rectangular openings, e¹ and e², through which the wires pass. * * * Each group of—say five or six—plates thus applied is preferably separated from the succeeding group by air spaces. These may be produced by passing tubes, f¹, f², which may be of soft iron or other metal, or of vulcanized fiber, along the lengths of the plates. It may be sufficient in other instances to block the groups of plates apart at intervals, instead of extending

the tubes the entire length. * * * Preferably, also, the primary and secondary coils, C₁, C₂, are separated from each other in a similar manner. * * * It may be preferred in some instances to surround the converter with some oil or paraffine, or other suitable material, which will assist in preserving insulation and will not be injured by heating. This material, when in a liquid form, circulates through the tubes and the intervening spaces of the coils and plates, and preserves the insulation, excludes the moisture, and cools the converter. The entire converter may be sealed into an inclosing case."

The claim under consideration is restricted to the invention of the combination, substantially as described in this specification, of an electric converter with open spaces in its core, an inclosing case, and a non-conducting fluid or gas in the case adapted to circulate through the spaces in and about the converter. What was the object of this invention? The prevention of the overheating of the converter, and of every part of it. What was the root, the principle, or mode of operation whereby this object was to be attained? The circulation of oil in a sealed case over increased radiating surfaces "through the tubes and the intervening spaces of the coils and plates," whereby the converter is cooled, insulation is preserved, and moisture is excluded. In my opinion the principle of the invention patented under claim 4 is not either the rectangular openings across the planes of the iron plates, nor the tubes between the plates, nor the blocked spaces between them, nor the openings between the coils, nor any of the elements of the combination, all of which are described in the specification as preferably employed, but it is the circulation of the oil over increased radiating surfaces by means of the combination patented through open spaces in and about the converter, and what Westinghouse secured by this claim was, not the particular openings he specified as preferably made in the core or in the converter, but, as held by the Circuit Court of Appeals of the Second Circuit, in the decision upon which this and other suits for the infringement of this patent rest—

"the means by which the external and internal surface of the heat-producing parts of a converter were cooled by such an arrangement and separation of parts as would permit the circulation about them of oil, and the means for the retention of said oil within and about said surfaces whereby the heat from the oil radiated to the surrounding air." *Westinghouse Electric & Mfg. Co. v. Union Carbide Co.*, 117 Fed. 495, 498, 55 C. C. A. 230.

The defendant first made and sold a converter with open rectangular spaces in the soft iron plates in which the coils were inserted, with open spaces between the plates, and with open spaces between the coils, and it was adjudged an infringement. It then made and sold a converter, called "Type M," with all the open spaces specified by the patentee except those between the plates, and with spaces between the coils and the plates, and it seeks to escape infringement because it has secured the requisite increased radiating surface by substituting the open spaces between the plates and the coils for the open spaces between the plates described by Westinghouse, while it retains all the other open spaces and details of his description. But the substance of this invention is the circulation of oil around and through increased radiating surfaces in a converter inclosed in a sealed case, and the locality in which the increased surfaces are placed and the forms in which they are embodied are immaterial upon the question of infringement,

because the principle or mode of operation is the same, whether the surfaces are exposed by openings between the iron plates through which the oil circulates to and along the coils from without or by openings between the iron plates and the coils through which the oil may pass. In either case the object of the invention is attained by the circulation of the oil over the increased radiating surfaces of a converter in a sealed case.

It is contended that the spaces between the coils and the plates are more efficient in cooling the coils which are more likely to become overheated than the plates. But in my opinion the evidence fails to sustain this contention, and if it were sustained the defendant could not escape infringement by appropriating and then improving the patented combination of the complainant. The spaces between the coils and the plates are the plain mechanical equivalents of the spaces between the plates, because they do the same work in the same way. They cool the converter by the circulation of the oil through them and over increased radiating surfaces in a closed case, and—

“if two devices do the same work in substantially the same way and accomplish the same result they are the same, even though they differ in name, form, or shape.” *Machine Company v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935.

“Where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form to the substance of the invention for that which entitled the inventor to his patent and which the patent was designed to secure. When that is found there is an infringement, and it is not a defense that it is embodied in a form not described and in terms claimed by the patentee.” *Winans v. Denmead*, 15 How. 330, 342, 14 L. Ed. 717.

Because the open spaces between the coils and the plates, which the defendant substituted for the open spaces between the plates, were the mechanical equivalents of the latter, and because the defendant's type M was a copy of the whole substance of the complainant's invention, that converter seems to me to constitute an infringement of the fourth claim of the Westinghouse patent. Moreover, the limitation of the words “open spaces in the core” in this fourth claim to the open spaces between the plates of the core seems to me to be unwarranted by the claim and specification (1) because the spaces between the plates are the subject of a specific claim, No. 2 in this patent, and therefore these spaces are presumably not covered by the general claim of the combination which is here in suit; and (2) because the specification describes three other classes of open spaces in the core, to wit, “two rectangular openings, e^1 and e^2 , through which the wires pass,” “tubes, f^1 , f^1 , which may be of soft iron or other metal, or of vulcanized fiber, along the lengths of the plates,” and the spaces between the coils, which “are separated from each other in a similar manner”—that is to say, by tubes or blocks between them. Not only this, but the open spaces between the plates are not claimed to be, and are not, an essential element of the combination of the fourth claim, but are expressly stated in the specification to be a mere preferable method of constructing the converter, so as to give it increased radiating surface. On this subject the specification reads:

“Each group of—say five or six—plates thus applied is preferably separated from the succeeding group by air spaces. These may be produced by tubes,

f1, f1. * * * It may be sufficient in other instances to block the group of plates apart at intervals, instead of extending the tubes the entire length."

The statute requires that the inventor shall point out the principle of his invention—

"and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." U. S. Comp. St. 1901, § 4888.

A patent for a combination claimed secures the association of the elements specified, but does not claim or patent any of the elements or details of the specification. They are but a part of the preferable method pointed out, and one who takes and uses the principle and the whole substance of an invention, as the defendant has in its type M, may not escape infringement by the mere substitution of other obviously equivalent means or details for some of the means described by the patentee as a part of his preferable mode of applying his principle. *Paper Bag Patent Case*, 210 U. S. 405, 418, 28 Sup. Ct. 748, 52 L. Ed. 1122; *Deering v. Harvester Works*, 155 U. S. 286, 302, 15 Sup. Ct. 118, 39 L. Ed. 153; *City of Boston v. Allen*, 91 Fed. 248, 249, 33 C. C. A. 485, 486; *Reece Button Hole Ma. Co. v. Globe Button Hole Ma. Co.*, 61 Fed. 958, 964, 10 C. C. A. 194, 200; *Brammer v. Schroeder*, 106 Fed. 918, 928, 930, 46 C. C. A. 41.

Turning to the question of damages for the infringement by the manufacture and sale of defendant's first converter, we are met by the claims that the complainant was entitled to no recovery because the defendant improved the patentee's combination by adding open spaces between the plates and the coils, and no evidence was produced which separated the profits attributable to that improvement from those derived from the patented combination, and because the defendant did not stand in the relation of a trustee of the profits for the patentee, and owed it no duty to keep them separate, or to account for them. There is some testimony in the record that the coils became more overheated than the plates, and that the open spaces between the coils and the plates tend to cool the former more efficiently than the spaces between the plates. But the spaces between the plates permit the oil to circulate between the plates against and around the coils, and the evidence of the superiority of the spaces between the coils and the plates fails to persuade my mind that the latter constituted any real improvement upon the mode described by the patentee. On the other hand, it leads me to believe that these new spaces and this theory concerning them constituted a mere subterfuge of the defendant, conceived to avoid a just liability for its infringement.

Moreover, the measure of the complainant's damages was not the difference between the profits the defendant would have derived from the complainant's combination and those it did derive from its form of it. It was the difference between the profits which the defendant derived from the use of the complainant's combination and those it might have derived from the use of any other combination then known and open to the public which would have produced an equally beneficial result. *Tilghman v. Proctor*, 125 U. S. 136, 146, 8 Sup. Ct. 894, 31

L. Ed. 664. And as there was no such combination or converter the alleged improvement was immaterial. The indisputable facts that converters that have a capacity between 10 kilowatts and 500 kilowatts were first made serviceable and merchantable by the complainant's combination, and that all the converters made and sold by the defendant were of this capacity and embodied the complainant's combination, lie conceded at the foundation of this case. Without the complainant's combination, whereby the oil was circulated in a sealed case through the intervening spaces of the coils and plates and around the converter, the defendant never could have used or sold one of its infringing transformers. In the light of these facts the master found that the entire commercial value of the infringing converters manufactured and sold by the defendant during the time concerned in the accounting was due to the complainant's combination. "The conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified, unless there clearly appears to have been error or mistake on his part." *Tilghman v. Proctor*, 125 U. S. 136, 150, 8 Sup. Ct. 894, 31 L. Ed. 664; *Metsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351, 27 L. Ed. 654. And the evidence not only fails to disclose to my mind any error or mistake in the findings of the master, but compels my assent to his conclusion.

Is the complainant barred from the recovery of any of the profits the defendant derived from its infringement because it failed to separate those derived from its combination from those which the defendant otherwise derived from the infringement? It is settled rule that:

"Upon a bill in equity by the owner against infringers of a patent, the plaintiff is entitled to recover the amount of gains and profits that the defendants have made by the use of his invention. * * * The reasons that have led to the adoption of this rule are that it comes nearer than any other to doing complete justice between the parties; that in equity profits made by the infringer belong to the patentee, and not to the infringer; and that it is inconsistent with the ordinary principles and practice of courts of chancery, either, on the one hand, to permit the wrongdoer to profit by his own wrong, or, on the other hand, to make no allowance for the cost and expense of conducting his business, or to undertake to punish him by obliging him to pay more than a fair compensation to the person wronged. The infringer is liable for actual, not for possible, gains. The profits, therefore, which he must account for, are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention; or, in other words, the fruits of the advantage which he derived from the use of that invention over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result. * * * A court of equity which has acquired, upon some equitable ground, jurisdiction of a suit for the infringement of a patent, will not send the plaintiff to a court of law to recover damages, but will itself administer full relief by awarding, as a substitute for legal damages, a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property to his own advantage. *Root v. Railway Company*, 105 U. S. 189, 214, 215, 26 L. Ed. 975." *Tilghman v. Proctor*, 125 U. S. 136, 144, 145, 146, 148, 8 Sup. Ct. 894, 31 L. Ed. 664.

Let us apply these rules to this case. The complainant is entitled to the fruits of the advantage which the defendant derived over what it would have had in using any other known converter then open to the

public and adequate to enable it to obtain an equally beneficial result. There was no other known converter open to the public which could be used to produce the result obtained by complainant's combination. The complainant was consequently entitled to all the profits and all the advantages derived from the defendant's use of the infringing machine. *Crosby Steam Gage Valve Company v. Consolidated Safety Valve Company*, 141 U. S. 441, 448, 449, 12 Sup. Ct. 49, 35 L. Ed. 809; *Manufacturing Company v. Cowing*, 105 U. S. 253, 26 L. Ed. 987.

The decisions present two classes of cases, each governed by its own measure of profits recoverable for an infringement. Where the patented device is a slight improvement upon an existing and operative machine, which accomplished the same result without as with the patented improvement, as in *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, where the patented improvement was a slight change in the jaw of a well-known and operative mop head, *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103, where the improvement patented was a revolving winged shaft attached to an old operative and successful corn sheller to facilitate the movement of the corn into the sheller, and in *Seymour v. McCormick*, 16 How. 480, 14 L. Ed. 1024, where the improvement was a driver's seat upon an operative and successful harvesting machine, the profits from the sale or use of the entire machine, the entire mop head, the entire corn sheller, or the entire harvesting machine may not be recovered by the patentee; but his recovery is limited to the profits derived from the patented improvement to the operative machine only. And when a complainant has a patent upon improvements to a machine, parts of which are patented to others under prior grants, as in *Blake v. Robertson*, 94 U. S. 728, 24 L. Ed. 245, the recovery is likewise limited to the profits derived from the complainant's patented improvement separated from those derived from the improvements patented to others. But where the complainant's patent secures a new combination, or a new machine, which accomplishes a result never attained before it was invented, the entire profits derived from the infringing device are recoverable; for, since no combination or device existed before the invention by which the desired object could be attained, there is no combination or device but the inventor's to which the profits can be lawfully attributed. *Crosby Steam Valve Company v. Safety Valve Company*, 141 U. S. 441, 448, 449, 454, 12 Sup. Ct. 49, 35 L. Ed. 809; *Brennan & Company v. Dowagiac Mfg. Co.*, 162 Fed. 472, 475, 89 C. C. A. 392, 395; *Dowagiac Mfg. Co. v. Superior Drill Company*, 162 Fed. 479, 481, 89 C. C. A. 399; *Elizabeth v. Pavement Company*, 97 U. S. 126, 24 L. Ed. 1000; *Manufacturing Company v. Cowing*, 105 U. S. 253, 26 L. Ed. 987; *Hurlbut v. Schilling*, 130 U. S. 456, 9 Sup. Ct. 584, 32 L. Ed. 1011; *Warren v. Keep*, 155 U. S. 265, 15 Sup. Ct. 83, 39 L. Ed. 144; *Ruggles v. Eddy*, 20 Fed. Cas. No. 12,116; *Zane v. Peck* (C. C.) 13 Fed. 475; *Fifield v. Whittemore* (C. C.) 33 Fed. 835; *Creamer v. Bowers* (C. C.) 35 Fed. 206; *Orr & Lockett Hdwe. Co. v. Murray*, 163 Fed. 54, 56, 89 C. C. A. 492.

I am unable to escape the conviction that the case in hand falls

under the latter rule. The claim upon which this suit is founded is for a patented combination of old elements. It is not restricted to the open spaces between the plates, or to the inclosing case or to anything but the association of all the elements described and claimed. Neither the open spaces between the plates, nor the tubes, nor the plates, nor the coils, nor the oil, nor the spaces between the coils, nor any other detail of the combination, is patented by this fourth claim of the patent. Any one may use, without infringing this claim, not only these details, but also any one, or all but one, of the essential elements of the combination. The thing patented is one, single and entire. It is the combination of all the essential elements into the entire new converter which the combination produces. No one can infringe this claim of the patent who does not appropriate this entire new combination and this machine which that combination produces. And as this new combination and the converter it produces accomplished a result never attained before, a result that no known device or combination open to the public while the infringement here in controversy was continuing would produce, this case is not governed by the rule applicable to slight improvements on old machines which accomplished the same result before as after the patented improvement, illustrated by *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, and other cases of that class; but the complainant is entitled to all the profits which the infringer derived from the appropriation of the new combination and machine. *Brennan & Company v. Dowagiac Mfg. Company*, 162 Fed. 472, 475, 89 C. C. A. 392; *Yesbera v. Hardesty Mfg. Co.* (C. C. A.) 166 Fed. 120, 125, and cases of that class cited above.

It appears to me, therefore, that the complainant was the owner of all the profits which the defendant derived from the manufacture and sale of the infringing converter, and that the defendant was in equity a trustee of those profits for the complainant. The Supreme Court declares that it is the established rule of the nation that in a case of this nature a court of equity will administer full relief by awarding "a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property to his own advantage." *Tilghman v. Proctor*, 125 U. S. 136, 148, 8 Sup. Ct. 894, 31 L. Ed. 664. What is that rule? Chancellor Kent stated it in *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62, 108, in these words:

"The rule of law and equity is strict and severe on such occasions. If a party, having charge of the property of others, so confuse it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it."

The Supreme Court approved this statement of the rule in *The Idaho*, 93 U. S. 575, 576, 23 L. Ed. 978.

The primary duty of a trustee is to keep the property of his cestui que trust separate from his own, to keep an account of it, and to deliver it to the cestui que trust. This infringer kept no account of these profits, but mingled them with the profits of its general business, so that it was impossible for it, or for any one, to accurately separate them.

But the record contains persuasive evidence of the entire amount which the defendant received from the sale of the infringing converters, and that it customarily added to the cost of manufacture and sale a profit of 25 per cent. to make up its selling price. There is also persuasive evidence of the total amount received by the defendant from all its business during its infringing years and of the total profits derived from its business during these years. These are ample facts upon which to base a just and equitable finding of the amount of profits which the defendant derived from the sale of these infringing machines. The master has made a finding after a careful consideration of all the evidence upon the subject, and that finding is presumptively right. The indisputable facts that for years the defendant continued to infringe, until it had made and sold infringing machines from which it realized more than \$800,000, are sufficient to satisfy the mind that its appropriation of the complainant's combination was profitable, and when to this is added the evidence that 25 per cent. of the cost was ordinarily added by it to make its selling price, it seems to me to be inequitable to permit the defendant to keep this property of the complainant, because it mingled it with its own, and thus allow it to take advantage of its own wrong. Of such a defense Lord Chancellor Brougham said in *Docker v. Somes*, 2 Myl. & Keene, 674:

"When did a court of justice, whether administered according to the rules of equity or law, ever listen to a wrongdoer's argument to stay the arm of justice grounded on the steps he himself had successfully taken to prevent his iniquity from being traced? Rather, let me ask, when did any wrongdoer ever yet possess the hardihood to plead, in aid of his escape from justice, the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying: 'You had better not make the attempt, for you will find I have made the search very troublesome?' The answer is: 'The court will try.'"

The defendant cites again the cases of *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371, *Seymour v. McCormick*, 57 U. S. 480, 14 L. Ed. 1024, and *Keystone Mfg. Co. v. Adams*, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103, in defense of its course; but they are inapplicable, because in such cases of slight improvements on operative machines it is often impossible for the infringer to know the portion of the profit attributable to the improvement, and hence its duty to keep that part separate is not so imperative. But where, as in the case in hand, the complainant is entitled to the entire profits from the infringing devices of the defendant, the duty is imperative, and the failure to discharge it, or the failure to distinguish subsequently such profits from its own, subjects, and ought to subject, the infringer, and not its victim, to any unavoidable loss that results from the inaccuracy either of the defendant's disclosure of its profits or of the complainant's proof, when there is any substantial evidence upon which to base an estimate of the profits derived from the infringing devices.

In like cases, upon evidence similar, but far less accurate and convincing than that in this record, infringers have been refused permission to take advantage of their own wrong, and have been required to pay the estimated profits they derived from the infringing devices by the Circuit Court of Appeals of the Sixth Circuit in *Brennan & Company v. Dowagiac Mfg. Company*, 89 C. C. A. 392, 396, 162 Fed.

472, 476, Dowagiac Mfg. Company v. Superior Drill Company, 89 C. C. A. 399, 400, 162 Fed. 479, 480, and P. P. Mast & Company v. Superior Drill Company, 154 Fed. 45, 57, 83 C. C. A. 157, and by the Circuit Court of Appeals in the Second Circuit in Wales v. Waterbury Mfg. Co., 101 Fed. 126, 130, 41 C. C. A. 250, 253, 254, and I am of the opinion that this court ought to pursue the same course in the case before us.

For the reasons which have been stated, I am unable to concur in the view of the majority that the decree of the court below should be affirmed; and I think it should be reversed, and a decree should be rendered for the complainant.

SIROCCO ENGINEERING CO. v. B. F. STURTEVANT CO.

(Circuit Court, S. D. New York. October 21, 1909.)

1. PATENTS (§ 138*)—REISSUE—EFFECT OF DELAY IN MAKING APPLICATION.

Where a patentee, on obtaining information of prior foreign patents and becoming convinced that some claims of his patent had inadvertently been made too broad, promptly applied for a reissue which did not broaden the invention claimed, and no rights are shown to have intervened, the fact alone that the application was not made for seven years after the granting of the original does not render the reissue invalid.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 201-203; Dec. Dig. § 138.*]

Time for application for reissue, see note to United Blue-Flame Oil Stove Co. v. Glazier, 55 C. C. A. 560.]

2. PATENTS (§ 328*)—REISSUE—VALIDITY.

The Davidson reissue patents Nos. 12,796 and 12,797 (original No. 662,395), for a centrifugal fan or pump, are not so clearly void as to justify their being so held on demurrer.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by the Sirocco Engineering Company against the B. F. Sturtevant Company for infringement of reissued letters patent Nos. 12,796 and 12,797 (original No. 662,395), for a centrifugal fan or pump granted to Samuel C. Davidson. On demurrer to amended bill. Demurrer overruled.

For prior opinion, see 171 Fed. 440.

Arthur C. Fraser, for complainant.

O. F. Hibbard, for defendant.

HOUGH, District Judge. The decision upon demurrer to the original bill substantially held that some reason or explanation must be given for a delay of over seven years in applying for reissued letters patent. By amendment an explanation has been given, viz., that the original letters patent were drawn in good faith, but "without full knowledge of the prior art nor of the precise nature or novelty of the invention"; that, after commercial success had been obtained, the patentee became aware that his letters patent "were being infringed by the defendant herein," and thereupon an action was brought in this

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court; that several months after such action was begun this defendant set up as an additional defense "a certain alleged newly discovered foreign patent never previously cited nor known" to the patentee; that thereupon careful consideration was given said foreign patent (in connection with knowledge already at hand) for between two and three months, at the end of which time the patentee, under advice of counsel, concluded that "certain of the claims" of the original patent were "void or of doubtful validity," and that said original patent really "included three separable and distinct improvements or inventions which could and should have been patented separately," wherefore the patentee concluded to correct "this error," i. e., the failure to obtain three patents originally, and the undue "breadth of said claims," by reissuing the original patent in three divisions, all of which was accordingly done with great diligence, and thereupon this action was brought against the same defendant confessedly for the same infringement but only upon two of the reissues.

The amended bill does not explain in what the "undue breadth" of claims consisted. Profert is made of the patents to be considered. Defendant now asserts that the excuse or reason given for obtaining the reissues is insufficient, and that the reissues are void.

As explained on argument, error is alleged in the patentee's proceedings in two regards: (1) The plaintiff was not entitled to any reissue whatever under the statute, and (2) if he was originally so entitled seven years' delay has deprived him of that right.

Under the decisions of which *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, and *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783, are the leading cases, neither proposition advanced by defendant can be considered with any satisfaction, without examining and comparing the original and reissued patents. This is because these cases draw a clear distinction between broadened reissues and "narrowed and truthful reissues." *Maitland v. Goetz Mfg. Co.*, 86 Fed. 128, 29 C. C. A. 611. Mere convenience, or an orderly desire to have inventions neatly arranged, is not enough to authorize a reissue. The original patent must have been either inoperative or invalid, and the defect must arise either from a specification defective or insufficient, or because the patentee claims as his own more than he had a right to claim; and, further, such error must grow out of inadvertence, accident, or mistake, without intention to defraud or deceive. An examination of the original patent (662,395) shows very plainly that what the patentee conceived himself to have invented is a particular form of fan or pump. Its most familiar embodiment is commonly known as a centrifugal ventilator. The fan is appropriately described in argument as a "squirrel cage"; that is, it is a cylinder formed by the affixing of narrow fan blades close together to the periphery of a circular disc, and at right angles to the plane of said disc. Such a construction is obviously a cylinder of a length regulated by the length of the fan blades; open at one end, closed by the disc at the other, and having a hollow center of great diameter as compared with the diameter of the cylinder formed by the circumferential blades. This cylindrical construction when revolved rapidly upon its axis (by appropriately con-

necting the hub of the disc to proper machinery) constitutes a method according to the patent of drawing any fluid (either gaseous or liquid) into the hollow "intake chamber, in which it expands without perceptibly revolving until it is caught by the blades and drawn into the (spaces) between them, whereby the fluid in these (spaces) is converted into a whirling shell of fluid, whereby it is thrown outward by centrifugal force and discharges from the outer sides of the (spaces between the blades) as a whirling and expanding shell of fluid, the individual particles of which move in a tangential direction."

The patentee did not and does not assert that there were no centrifugal fans before his, but he does assert that such other fans had employed "blades of great radial measurement" or were propeller fans, i. e., wheels with paddles which merely acted "upon the fluid with a wedging action, pushing it from them without materially rotating it." The patentee discovered (as he originally asserted) that "by providing a relatively large intake chamber practically unobstructed by the projection into it of blades or other parts, and by employing blades which extend as short a distance from the periphery of the fan inward as is consistent with strength of construction," vibrations and eddies were minimized, and the "velocity and volume of fluid discharged for a given speed of revolution (were) greatly increased." This was the kernel of complainant's invention. In other words, the discovery consisted in providing a means of constructing and operating a centrally rotating narrow bladed fan or pump of cylindrical form with a large unobstructed axial intake chamber. The patent covered a large variety of forms, all cylindrical, all with large intake chambers, all with narrow blades, all axially rotated, and differing from each other only in the shape and size of the fan blades, their relations to each other in peripheral or circumferential adjustment, and the relation of casing to fan or pump.

As reissued, No. 12,796 shows the same construction and repeats many of the original claims, but modifies others so as to describe a construction in which the intake edges of the peripheral fan blades shall be as nearly as possible the same distance from each other as are the outer or discharging edges of the same. The effect of this is said to be that the "inner edges revolve at a peripheral speed so nearly approaching that of the outer edges that the fluid is drawn in at (said) inner edges at approximately the same rate as it is discharged from the outer edges." No. 12,797 sets forth the same construction as in the original patent, but modifies most of the claims so as to cover only that form of construction wherein curved or polygonally angled blades are employed and circumferentially arranged so that their "outer edges incline forwardly in advance of their inner edges, and which are concave on their advancing sides." The patentee then states in this reissue that "such forward inclination of the blades results in the discharge of the fluid at a velocity exceeding the circumferential speed of the outer edges of the blade. This effect is most marked when the outer width of the (spaces between the blades) is less than their inner width." The third reissue is not involved in this case, and covers a form of construction in which the blades are open at their intake ends. If I have cor-

rectly followed the transmutations of this patent, the two reissues now in suit present inventions which were clearly described in the original patent. I do not think it would have been possible for any form of drum-shaped axially rotating fan with narrow blades and a large unobstructed axial intake chamber to have been constructed which would not have been either an infringement or an anticipation according to the time of its devising. The only effect of these two reissues is to separate that form of fan in which the blades are as nearly parallel to each other as cylindrical construction will admit, from that in which concave blades are so arranged as to be nearer each other at their outer edges than they are at their inner. Of course, the different rates or velocities of tangential discharge set up in the reissues as marking these differing forms of construction cannot be patented; only the means for producing such results can be protected.

By mere reading the patents, without the aid of expert testimony, or examination of actual machines, no entirely satisfactory conclusion can be reached. But by construing the patents as read most favorably for the complainant, I conclude:

The reissues in question are not broadened; that is, everything claimed or described in either of the reissues in suit was fully described and (in my opinion) claimed in the original patent. But neither have the claims been narrowed; that is, the sum of the three reissues is exactly equal to the original patent. Inasmuch as there has been no broadening, and it is not and cannot be shown on demurrer that any intervening rights have arisen by reason of delay, I do not think that the mere fact of seven years' delay has taken away the right to a reissue (provided that such reissue be otherwise lawful).

But if the patents or the claims thereof are not narrowed, what was there in the original patent or the circumstances of obtaining the same which justified a reissue under the statute? What was the defect or insufficiency, and how did it arise? Rather from argument than from the language of the bill, I come to the conclusion that the real defect or insufficiency was this, viz., the draughtsman of the original specification did not know of the foreign patent above referred to. He therefore included in one application all embodiments of the applicant's idea that he could think of, including one form or some forms which he now thinks or fears may have been anticipated by this foreign invention. Having drawn his application (so to speak) generically, he was afraid that some court or courts might (perhaps erroneously) find that an anticipation of one of the species of his genus invalidated his patent, and he therefore transformed his generic patent into three specific patents, and now sues upon the species he believes or hopes not to have been anticipated by that which he did not know of seven or eight years ago. If this be a true reading of the story told by the pleadings, the question remains, Is such a reissue lawful?

I know of no decision in which the effect of several reissues, in the aggregate exactly equal to an originally well-drawn patent, has been considered; and counsel have not been able to bring any such decision to my attention. For myself, I think this original patent good on its face, with well-drawn specifications and appropriate claims. I am,

however, quite unable to see what good or harm has been done to the patentee or the public by these reissues, and (so far as the court is now informed) the defendant is not harmed, nor are there any known intervening rights. Whatever, therefore, may be the fate of these reissues when the evidence is all in, it appears to me that at present the language of *Milloy Electric Co. v. Thompson-Houston Electric Co.*, 148 Fed. 843, 78 C. C. A. 533, is instructive and conclusive. "We think that when the grounds are disclosed for thinking there may be an error or mistake, he (the patentee) is bound in duty to the public to correct it by obtaining a reissue."

In this case there may not be any mistake; the patentee may have obtained his reissues without just cause; it may have been better for him to have stood on the original patent; but my bare reading of the patent may easily be corrected by evidence, and (in effect) the patentee swears that he thought that there was an error, dangerous to himself (courts being what they are), which might be corrected by a reissue, and there is nothing now to show that such correction was or is injurious to any other law-abiding citizen.

Under these circumstances I think that the validity of these reissues should not be decided on demurrer, and the demurrer is accordingly overruled, with leave to answer on the rule day succeeding entry of order, on payment of costs as taxed.

CITY OF POCA TELLO v. MURRAY.

(Circuit Court, D. Idaho. May 3, 1909.)

1. CONSTITUTIONAL LAW (§ 128*)—OBLIGATION OF CONTRACTS—CONTRACT WITH CITY.

Where a city, having power to do so, entered into a contract with a water company, granting a franchise and fixing charges which might be made to consumers, and also providing the mode by which such charges might be changed from time to time after a fixed term, such provision was a material part of the contract, which could not be impaired or affected by a subsequent state statute providing a different mode of establishing rates generally.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 372-379; Dec. Dig. § 128.*]

2. WATERS AND WATER COURSES (§ 203*)—JURISDICTION—FIXING WATER RATES.

A court of equity is without power, at suit of a city, to fix the rates to be charged by a water company in the future, which is not a judicial function.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 292; Dec. Dig. § 203.*]

In Equity. Suit by the City of Pocatello against James A. Murray, doing business under the name of the Pocatello Water Company. On demurrer to bill. Demurrer sustained.

W. H. Witty and H. V. A. Ferguson, for plaintiff.

D. Worth Clark, for defendant.

DE HAVEN, District Judge. The questions arising upon the demurrer to the bill have been ably argued by counsel for the respective

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

parties, and have been fully considered by me. In order to clearly understand the questions involved, it is only necessary to say that the bill of complaint alleges, in substance, that the defendant is the owner, and in possession, of a system of waterworks in the city of Pocatello, under franchise granted to him by that city on June 1, 1901, by a certain ordinance numbered 86, alleged to be in full force and effect, and set out in the bill. This ordinance recites that the supply of water furnished the city—

"* * * is deemed inadequate for the present and future need of said city, and said James A. Murray agrees to bring in the waters of Mink creek and to make all extensions of street mains warranted by the growth of said city, thereby necessitating the laying of several miles of pipe, at a large additional expenditure of money; and

"Whereas, said James A. Murray, before incurring so great an additional outlay, as a condition precedent to the expense of laying said pipe line, desires to be protected against unreasonable or arbitrary changes in the rates and charges for water and water service, and asks some reasonable assurance that such unreasonable or arbitrary changes shall not be made; and

"Whereas, the demand of said James A. Murray is considered reasonable and just, and it is deemed to be for the best interest of the city of Pocatello to extend and give the assurance asked for"—

and then proceeds to name a schedule of water rates which the defendant was authorized to charge for a period of five years. The ordinance then further provides:

"Sec. 3. The foregoing rates and charges are hereby adopted by the city of Pocatello, by and for itself, and as trustee for the use and benefit of all private consumers of water within the corporate limits of said city, for a period of five years from and after the passage and approval of this ordinance. At the expiration of said time, if the earnings of said water system shall exceed 5 per cent. above reasonable expenses upon the value of said water system as then agreed upon, or as may be ascertained as hereinafter provided, then the rates as set forth in the 'Schedule of Water Rates' of section 2 of this ordinance may be readjusted so as to yield not less than 5 per cent. above reasonable expenses on the valuation, but no readjustment shall hereafter be made that will yield less than 5 per cent. above reasonable expenses, on the value of the investment ascertained as hereinafter provided for in section 4.

"Sec. 4. If, at the expiration of five years, or at any time thereafter, it should be deemed necessary to readjust rates under the provisions of section 3, and if the city of Pocatello and the said James A. Murray, or his successors or assigns, cannot agree upon the value of said water system, for the purpose of such readjustment, then the value of said water system shall be ascertained in the following manner, to wit: A committee of four experienced and disinterested hydraulic engineers, who must be members of the American Society of Civil Engineers, shall be selected, two by the city of Pocatello, and two by the said James A. Murray, or his successors or assigns, and the following questions shall be submitted to them: For what sum can the water system of James A. Murray be now duplicated? If a majority of the four cannot agree, they shall select a fifth; and, if they cannot agree upon a fifth, they shall request the president of the American Society of Civil Engineers to appoint a fifth member. The decision of a majority of the committee so selected shall fix the value of said water system for the purpose of readjusting said rates, and such decision shall be final."

The five-year period for which rates and charges were fixed by section 3 of the ordinance expired on June 6, 1906, and the bill alleges:

"That said schedule of rates and charges has ceased to be reasonable and proper, and is no longer a just measure of the amounts that ought to be paid by the plaintiff and the inhabitants thereof for water furnished to them under

said franchise, in view of the growth and expansion of said city and the inferior and unsatisfactory water service furnished by said defendant, and that said rates are now excessive, extortionate, and oppressive in each and every instance."

It is also alleged that, under an act of the Legislature of Idaho approved March 16, 1907 (Laws 1907, p. 555), entitled "An act to amend section 2711 of the Revised Statutes of the state of Idaho, as amended by an act approved March 9, 1905" (Laws 1905, p. 192):

"It is provided that the rates to be charged for water by all persons, companies, or corporations supplying water to towns and cities must be determined by commissioners to be selected as therein provided, to wit: Two by the town or city authorities, each to be a taxpayer of the given town or city, and two by the person, company or corporation supplying water, the last two to be selected within thirty days after written notice of the action of the town or city, which said notice shall have been given and made within ten days after the selection by the town or city of the first two commissioners"—

and in case the commissioners so selected cannot agree upon rates, then a fifth shall be chosen in the manner provided by the act and set out in the bill of complaint, and that the rates fixed by such commissioners are to continue in force for three years. The bill further alleges that, prior to the commencement of this action, the plaintiff made and appointed two commissioners under the act above referred to, that written notice of its action was given to the defendant, and that defendant has failed and refused to name commissioners to act with those appointed by the plaintiff.

The prayer of the bill is, that the court fix and promulgate reasonable rates and charges for water to be furnished by the defendant under his franchise to the plaintiff and its inhabitants—

"for the period of three years next ensuing from the date of the court's order and judgment in the premises, and adjudge and decree that the same, as fixed, made, and promulgated, are just and reasonable, and that defendant be restrained and enjoined from making, fixing, or promulgating any other rate or rates, charge or charges, for water so to be furnished for said period of time, and from collecting or receiving any other or greater rate or rates, charge or charges, for water during said time."

And it also prays for a judgment against the defendant for the sum of \$14,300.00, for its past default, "and for the further sum of \$100 per day from the date of the filing of this bill of complaint to the date of final judgment herein" as a penalty for defendant's refusal to appoint commissioners to jointly act with those of the plaintiff in fixing charges and rates for water under the above referred to statute of Idaho.

The defendant has demurred to the bill upon the ground that it does not state a cause of action entitling the complainant to any equitable relief, and also upon the ground that the bill is multifarious.

1. I do not deem it necessary to consider whether the bill of complaint is subject to the objection of multifariousness, as in my opinion the demurrer must be sustained upon the broad ground that the bill does not state a cause of action entitling the complainant to the equitable relief prayed for. The reasons for this conclusion will be briefly stated. The city of Pocatello, under its general power to provide the city with water, was authorized to contract with any person or cor-

poration to furnish water for it and its inhabitants; and Ordinance No. 86, under which the defendant is furnishing water to the complainant and its citizens, constitutes a valid contract between the complainant and defendant. Sections 3 and 4 of that ordinance are a substantial part of that contract, and are for that reason not affected by the subsequent statute of Idaho of March 16, 1907, amending section 2711 of the Revised Statutes of 1887 of the state of Idaho referred to in the bill of complaint, and upon which the complainant relies. The sections of the ordinance referred to provide a particular mode by which the schedule of rates named in the ordinance may be changed, and it is clear from the recitals contained in the ordinance that these sections were inserted because the defendant desired "to be protected against unreasonable or arbitrary changes in the rates and charges for water and water service" before undertaking to incur the expense necessary to enable him to furnish the amount of water required by the city. Having been inserted for such a purpose, argument is not necessary to show that they are an essential part of the contract, and create an obligation upon the part of the city of Pocatello to pursue the mode pointed out in these sections in readjusting or changing the water rates named in the ordinance, an obligation which, under article 1, § 10, of the Constitution of the United States, cannot be impaired by subsequent legislation by the state. The method which these sections prescribe for adjusting and fixing the charges to be allowed the defendant for water furnished by him, under the ordinance, cannot be said to be unreasonable, and in my judgment must be held to be binding upon the complainant.

2. But I am further of the opinion that even if it should be conceded that the statute of Idaho above referred to is applicable to the contract under which the defendant is supplying water to the city of Pocatello, and so prescribes the method by which that city may change the schedule of water rates named in the ordinance, this court would still be without jurisdiction to fix and promulgate the water rates and charges, which the defendant shall have the right to collect, during the next three years, under his franchise. The fixing of such rates, when not a matter of contract, "is a legislative or administrative, rather than a judicial, function." *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 397, 14 Sup. Ct. 1047, 38 L. Ed. 1014. *Southern Pacific Co. v. Colorado Fuel & Iron Co.*, 101 Fed. 779, 42 C. C. A. 12. This is the general rule, and the fact alleged in the bill that defendant has refused to join with the complainant in naming commissioners to fix the rates which he shall be allowed to charge for furnishing water under his franchise, as provided in the statute relied on by complainant, is not sufficient to create an exception to the rule, and does not authorize the court to extend its jurisdiction, and take upon itself the exercise of the "legislative or administrative" power to determine in advance what will be a reasonable schedule of water rates for the defendant to charge for the next three years.

The demurrer to the bill of complaint is sustained, and the bill dismissed; the defendant to recover costs.

DODDRIDGE COUNTY OIL & GAS CO. v. SMITH et al.
SMITH et al. v. DODDRIDGE COUNTY OIL & GAS CO.

(Circuit Court, N. D. West Virginia. October 18, 1909.)

1. EQUITY (§ 429*)—INTERLOCUTORY DECREE—MODIFICATION.

In a suit in equity to determine the validity of an oil lease, an interlocutory decree was entered sustaining the lease and restoring complainant as lessee to the possession of the premises, but requiring it to pay the actual cost of certain wells drilled by defendant, to be ascertained on a reference, and requiring defendant to account for the production of such wells. On such reference it appeared that one of such wells, although represented in defendant's pleading to be a very fair well, was practically worthless. *Held*, that the decree was interlocutory as to the accounting, and would not be held to bind complainant to accept and pay the cost of such well, but would be so modified as to give it an election.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1027; Dec. Dig. § 429.*]

2. EQUITY (§ 431*)—DECREE—RELIEF—DAMAGES.

Under a decree of a federal court of equity, sustaining the validity of an oil lease and awarding the lessee "its direct damages and costs incurred by reason of its exclusion from the lease," it is not entitled to recover from defendant the amount paid its counsel for services, beyond the docket fee taxable under Rev. St. §§ 823, 824 (U. S. Comp. St. 1901, p. 632), either as costs or direct damages.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1048, 1050; Dec. Dig. § 431.*]

3. RECEIVERS (§ 200*)—COMPENSATION—LIABILITY OF PARTIES.

In a suit by an oil lessee, which had been excluded from possession of the leased premises and its wells, drilled under the lease, by the lessor, for an injunction and accounting and the appointment of a receiver, where such receiver was necessary, his compensation, on a recovery by complainant, is recoverable as damages from defendant, if paid by complainant, or from the proceeds of the wells, to which complainant was entitled.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 397, 398, 401; Dec. Dig. § 200.*]

In Equity. Suit by the Doddridge County Oil & Gas Company against Smith and another. On exceptions of complainant and defendants to report of special master. Report modified.

W. S. Smith and A. A. & A. H. Bemis, for complainant.

George W. Johnson, for defendants.

A. G. Patton, for receiver.

DAYTON, District Judge. On the 24th day of July, 1907, I filed a written opinion in these causes ([C. C.] 154 Fed. 970), in which the facts are fully stated. In accordance with this opinion, on the 8th day of August, 1907, a decree was entered, adjudging, among other things, that the lease in controversy was not forfeited or surrendered, but was in full force and effect, and that, while the company should have the right to re-enter and take possession thereunder, it was not, however, entitled to the three wells drilled prior to the date of the lease, or to the oil that might be in the future derived therefrom; that the company should pay to Smith the actual costs and expenses of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

completing the second and third wells, both of which were drilled in since the date of the lease, but such costs and expenses should be limited to the value of the work done and material furnished, without any personal compensation to him for doing it; and that Smith should pay to the company all direct damages and costs incurred by it by reason of its exclusion from the lease.

The cause was by this decree referred to a master, to make an accounting and to ascertain the amount due from the company to Smith and from Smith to the company, to settle the accounts of the receiver, and ascertain his compensation. In the decree it was agreed by the parties, without consenting to the matters adjudged, that the company should have the right for a period of 30 days to purchase at fair and reasonable value such material and machinery belonging to the said Smith and in use in the operation of the wells drilled since the date of the lease, and in case such purchase should be made the special master should not be required to ascertain and report in reference to the value of material belonging to Smith as being on the property prior to the date of the lease. In obedience to this decree the special master, H. O. Hiteshew, has filed as of the 1st day of June, 1909, his report, to which the company has filed 20 exceptions, and the said Smith has filed 12. Their consideration will be expedited by disposing of three matters raised by them, constituting the larger amounts in dispute:

First. It is insisted by the company that the master has erred in charging it with the costs and expenses of drilling well No. 3, named in his report, or named No. 6 in the former opinion. This well, it will be remembered, was drilled by Smith after he had unlawfully ousted the company from the lease, as heretofore held by me, and it had been charged in his cross-bill as "a very fair well." The company now insists that, notwithstanding the decree herein, ascertaining it to be liable to pay the actual expense for the drilling of this well, this decree was entered under the assumption that the company would and did elect to take over this well under its lease, notwithstanding it had been drilled by Smith de son tort. On the other hand, it is insisted by Smith that the terms of this decree are absolutely final and binding upon the company, requiring it to take this well over and pay the expenses to Smith of its drilling. The master has felt himself bound to adopt this latter view, and has reported something over \$2,700 in favor of Smith for the drilling of this well. It clearly appears from the evidence that the well was practically worthless, yielding substantially only a half a barrel of oil a day.

In view of the fact disclosed by this record, that Smith had unlawfully taken charge and ousted the company from this lease, and in his cross-bill represented this well to be a fair one, I do not believe it to be in accord with the dictates of equity and good conscience to require this company to pay for drilling this worthless well against their protests. Nor do I think that they have by acquiescence in this decree lost their right, after ascertaining the true facts in relation to it, to repudiate liability on account thereof. While it is insisted that the decree was final and unappealed from, it does not seem to me that these provisions of it related to any other than the details of the accounting

to be had between the company and Smith. Its adjudication of the real matter in controversy—that is, as to the validity of the lease—was final and binding, in that it settled the matter upon which the whole controversy turned. When it came to determining the details of the accounting to be had between the parties, it was purely interlocutory, depending upon the facts that should be ascertained by the master. Again, it may be said it was entered under a mistaken knowledge of the facts, for which Smith, by the allegation of his cross-bill was responsible, and therefore could not be binding upon the company so misled.

I have therefore determined that, if the company so elect, I will not hold it responsible for the expense of drilling third well, and, of course, will allow it no share or part in the oil that has been received therefrom.

Second. It is insisted by the company that, under the clause of this decree which provides that it "shall recover all the direct damages and costs incurred by reason of its exclusion from the lease," it is entitled to a decree against Smith for something over \$4,900, attorney's costs, expenses, and fees. This contention has been overruled by the master, and such claim disallowed, and I think properly so. Sections 823 and 824 of the Revised Statutes (U. S. Comp. St. 1901, p. 632) expressly provide that an attorney's docket fee of \$20 only shall be taxed in the bill of costs for which a final decree in equity can be rendered. These statutory provisions do not, of course, prevent attorneys from charging and receiving from their clients, in addition to this taxable docket fee, reasonable compensation for their services, but it must be from their client, and not his adversary, in the nature of costs. In *Steamer Baltimore et al. v. Rowland*, 8 Wall. 377, 19 L. Ed. 463, it is held:

"Attorneys, solicitors, and proctors may charge their clients reasonably for their services, in addition to the taxable costs; but nothing can be taxed as costs against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein [in the statute] described and enumerated."

And in the closing sentence of its opinion in *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. Ed. 628, the Supreme Court says:

"It is a settled rule in this court never to allow counsel on either side to be paid out of the funds in dispute."

To this general rule there has been certain exception made in cases where a plaintiff has in his own interest and that of others impounded a fund for the mutual benefit of all. In such cases the solicitors of plaintiff have been allowed their fees out of the funds so impounded and decreed to those in the same class as their client. Such cases arise where suits are brought to set aside conveyances for the benefit of creditors, for the administration of decedents' estates, for appointment of receiver and to wind up insolvent estates, to enforce stockholders' liability, and in bankruptcy. *Fechheimer v. Baum* (C. C.) 43 Fed. 719; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Central R. R. v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915; *Jefferson Hotel Co. v. Brumbaugh* (C. C. A.) 168 Fed. 867; *Lawton v. Perry*,

45 S. C. 319, 23 S. E. 53; *Burden Central S. R. Co. v. Ferris S. M. Co.*, 87 Fed. 810, 31 C. C. A. 233; *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435; *Bankr. Act* July 1, 1898, c. 541, § 64b, subd. 3, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447); note to *Campbell v. Provident, etc., Society*, 54 L. R. A. 817.

Governed by the principles laid down by these and other similar authorities, it is clear that this case is not one coming under the exception, but must be governed by the statute, and therefore the attorney's fees and expenses incurred by the company cannot be decreed against Smith as costs. Nor can they be allowed as "direct damages." *Day v. Woodworth*, 13 How. 363, 14 L. Ed. 181. In *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 43, it is said:

"The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to (*Day v. Woodworth*, supra), and we think is substantially determined by that adjudication. In debt, covenant, and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of delicacy on the part of the court to scale down the charges, as might sometimes be necessary. We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

This rule is upheld in a long line of decisions, among which are *Flanders v. Tweed*, 15 Wall. 450, 21 L. Ed. 203; *Tullock v. Mulvane*, 184 U. S. 497, 22 Sup. Ct. 372, 46 L. Ed. 657; *Missouri, K. & T. R. Co. v. Elliott*, 184 U. S. 530, 22 Sup. Ct. 446, 46 L. Ed. 673; *Gilbert v. American Surety Co.*, 121 Fed. 499, 57 C. C. A. 619, 61 L. R. A. 253; *Fidelity Ins. Co. v. Roanoke Iron Co.* (C. C.) 91 Fed. 19.

Third. Exception is taken to the compensation of the receiver and his attorney by the company in the event it is to be charged with any part thereof. I am clearly of the opinion that these compensation charges of \$400 for the receiver and \$150 for his attorney are very reasonable and should be allowed. I am just as clearly of the opinion that such compensation charges should be ultimately paid in full by Smith, although, as to the receiver himself, payable out of any funds in his hands. If paid out of funds due to the company, it will be entitled to a decree over against Smith therefor. The appointment of this receiver was an absolute necessity, occasioned by the unlawful taking possession of the lease and the property upon it by Smith. While such appointment was at the instance of the company, which makes it primarily liable to the receiver for his compensation, such sum, if expended by it, comes clearly within the "direct damages and costs" incurred by it by reason of its exclusion from the lease.

The other exceptions taken substantially relate to specific items in the account stated by the master between the parties. It is sufficient to say that as to many of these the evidence is conflicting, that the master has with very great care and discrimination considered, and I think fairly and correctly determined as to them, and these exceptions will therefore be overruled.

If decree can properly be based upon the master's present report in accord with the principles herein set forth, it will be directed; or, if counsel insist, the cause will be recommitted to the master to reform his report in accordance with this opinion.

MUTUAL LIFE INS. CO. OF NEW YORK v. FARMERS' & MECHANICS'
NAT. BANK OF CADIZ, OHIO, et al.

(Circuit Court, S. D. Ohio, E. D. September 16, 1909.)

No. 1,429.

1. EXECUTORS AND ADMINISTRATORS (§ 57*)—PERSONAL PROPERTY—RIGHT TO RECOVER INSURANCE PREMIUMS FRAUDULENTLY PAID—OHIO STATUTE.

Under Rev. St. Ohio 1908, § 3628, which provides that any person may insure his life for the sole benefit of his wife or children, and that the insurance shall be payable to them exempt from all claims by the representatives or creditors of the insured, "provided, that, subject to the statute of limitations, the amount of any premiums for said insurance paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy," the administrator of an insolvent intestate who so paid premiums in fraud of his creditors may maintain an action to recover the amount thereof, with interest, out of the proceeds of the policy, to be distributed as part of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 309; Dec. Dig. § 57.*]

2. EXECUTORS AND ADMINISTRATORS (§ 57*)—PERSONAL PROPERTY—SUIT TO RECOVER PROPERTY FRAUDULENTLY TRANSFERRED.

An administrator of an insolvent intestate, by virtue of the powers conferred on him by the general administration statutes of Ohio, and under the decisions of the Supreme Court of the state thereunder holding that an administrator primarily represents the creditors and secondarily the heirs, and that where the estate is insolvent and the interests of the heirs is merely technical his duties are analogous to those of an assignee for the benefit of creditors, may maintain a suit in equity to recover personal property transferred by the decedent in fraud of his creditors.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 309; Dec. Dig. § 57.*]

3. EXECUTORS AND ADMINISTRATORS (§ 38*)—"ASSETS"—PROPERTY CONSTITUTING ASSETS.

The term "assets" in modern usage, as applied to decedents' estates, means property, real or personal, tangible or intangible, legal or equitable, which can be made available for, or may be appropriated to, the payment of debts.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 38.*]

For other definitions, see Words and Phrases, vol. 1, pp. 556-559.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. INTERPLEADER (§ 35*)—COSTS AND FEES.

A life insurance company which in good faith files a bill of interpleader against adverse claimants to the proceeds of a policy and pays the money into court is entitled to its costs and counsel fees from the fund.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 76; Dec. Dig. § 35.*]

5. WORDS AND PHRASES—"REPRESENTATIVES."

The word "representatives," as used in Bates' Ohio St. 1908, § 3628, subd. 2, exempting the amount of life insurance policy from "all claims by the representatives and creditors" of the insured, means personal representatives.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6110-6115; vol. 8, p. 7785.]

On Final Hearing. Interpleader by the Mutual Life Insurance Company of New York against the Farmers' & Mechanics' National Bank of Cadiz, Ohio, the administrator of M. J. Brown, deceased, and others. Decree for administrator.

M. J. Brown was president, cashier, and a debtor of the Farmers' & Mechanics' National Bank of Cadiz, Ohio, from the date of its organization in 1877 to his death in 1908. He was reputed to be possessed of considerable wealth, but, excluding controverted claims to the amount of about \$50,000, of which about \$36,000 are claimed by the bank as unpaid interest, he became insolvent in 1895, and remained so. In 1883 he took out an insurance policy in the Mutual Life Insurance Company of New York, payable to his wife, who died in 1904, and in case of her death preceding his, then to such children of his body as should be living at her death. The premiums were all paid by him out of his own funds. Suits having been brought by the bank in the state court to obtain the respective interests of certain of Brown's children in the insurance, to which suits the insurance company was made a defendant, the company filed its bill, making the children, the bank, and the administrator of Brown's estate parties defendant, and, having deposited the money in court, asked the allowance of its attorney fees, that the claimants of the fund be required to interplead, and that it be relieved from further liability. The bank, as creditor of all, and as assignee of some, of the heirs, claims the fund. Brown's administrator also asserts a right to the fund by virtue of the powers vested in him as such under the Ohio administration act, and under the provisions of section 3628, Rev. St. Ohio 1908 (Act April 19, 1898; 93 Ohio Laws, p. 130.) He alleges that Brown was insolvent when he insured his life, and ever afterward remained so, and that all the premiums were paid by him in fraud of his creditors. If the bank's claim for the above mentioned \$36,000 be maintained as provable and valid, Brown was insolvent when he took out the insurance, and remained so thereafter.

Hollingsworth & Worley, for administrator.

R. H. Minter, for Farmers' & Mechanics' Nat. Bank.

SATER, District Judge (after stating the facts as above). At the threshold the administrator's right to maintain his action is challenged on two grounds: First, that section 3628, Rev. St. Ohio, 1908, does not contemplate or provide for a suit by a personal representative, but gives a right of action to creditors only; second, that an Ohio administrator of an insolvent estate cannot maintain an action, at law or in equity, to recover and subject to the payment of his decedent's debts personal property, or its avails, transferred by the intestate in fraud of his creditors. Section 3628 is as follows, the paragraphs, for convenience, being numbered:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"(1) Any person may effect an insurance on his life, for any definite period of time, or for the term of his natural life, to inure to the sole benefit of his widow and children, or of either, as he may cause to be appointed and provided in the policy;

"(2) And the sum or net amount of insurance becoming due and payable by the terms of insurance, shall be payable to his widow, or to his children, for their own use, as provided in the policy, exempt from all claims by the representatives and creditors of such persons;

"(3) Provided, that, subject to the statute of limitations, the amount of any premiums for said insurance paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy;

"(4) But the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless, before such payments notice shall be given the company by a creditor specifying the amount of his claim and the premiums which he alleges have been so fraudulently paid."

The foregoing section first found expression in the act of February 8, 1847 (45 Ohio Laws, p. 53; 1 Swan & C. Rev. St. p. 737, c. 59, § 1). The first two paragraphs of the original act were the same as those of the present law, but following them, and constituting the residue of the section, was the proviso:

"That the amount of premiums annually paid on such policy shall not exceed the sum of one hundred and fifty dollars (\$150), and, in case of such excess, there shall be paid to the beneficiaries named in the policy such portion of the insurance as the sum of one hundred and fifty dollars (\$150) will bear to the whole annual premium, and the residue to the representatives of the deceased."

That an administrator, under the original act, was authorized to recover the amount of insurance in excess of that which the insured was authorized to carry, clearly appears from *Union Central Life Ins. Co. v. Eckert*, 6 Am. Law Rec. 452; *Wagner v. Karman*, 7 Am. Law Rec. 670; *Cross v. Armstrong*, 44 Ohio St. 613, 10 N. E. 160; *McCall v. Pixley*, 48 Ohio St. 379, 27 N. E. 887; and *Weber Loper & Co. v. Paxton*, 48 Ohio St. 266, 26 N. E. 1051. The last-named case involved in their then existing form both sections 3628 and 3629, and recognized the right of both creditors and personal representatives to sue for a recovery. The omission in section 3628, as amended, of express authorization on the part of the deceased's personal representatives to maintain an action, is claimed to be an expression of legislative intent to vest in the creditors alone the right to the recovery of premiums paid in fraud of creditors. The notice provided for in the fourth paragraph of the section may be served by a creditor, whether the policy matures in the lifetime or at the death of the insured. Under the act in its original form a creditor might, and, in its amended form, he may, maintain an action for himself, or in behalf of himself and of other creditors, as the case may be. The sum recovered under the original act passed to the personal representatives, to be distributed in the orderly administration of the estate (*McDonald v. Aten*, 1 Ohio St. 293; *Hoffman v. Kiefer*, 19 Ohio Cir. Ct. R. 401), and such must be the rule under the existing law.

Both the original and the amended act were adopted for the protection of creditors. The right of the beneficiaries named in the original act to such insurance as an annual premium not in excess of \$150 would purchase was absolute. So much of the proceeds of the policy,

however, as were purchased by the portion of the annual premium in excess of \$150 insured to the benefit of creditors, if required for the payment of their claims. The amended act secures to creditors from the proceeds of the policy the premiums, with interest thereon, paid in fraud of them—the sums, with interest thereon, subtracted by the insured from his estate to maintain the insurance—and no more. The money paid for premiums constituted, at their respective dates of payment, a part of the insured's estate, which, if not diverted for the maintenance of insurance, would at his death pass to his creditors, preferred or common, or both, as circumstances might require, in the course of the administration of his estate. The purpose of the present act is to restore the estate to the position in which it would have been had there been no diversion of funds by the insured to the payment of premiums. It attempts no classification of creditors into common and preferred, nor does it change the order of distribution provided in section 6090, Rev. St. Ohio 1908. If the premiums recovered should not be distributed by the administrator under the provisions of the administration act, but by the court in which the recovery is had, the administration of the estate would be conducted partly in such court and partly in the probate court. The solidarity of administration designed by the administration act and recognized by the courts would be impaired, and this, too, notwithstanding the fact that the title and right of possession to the intestate's personal property, of which premiums fraudulently paid constitute in reality a part, as hereafter will more fully appear, vested in the administrator at the intestate's death. The amended section does not purport to place any limitation on the powers of an administrator as conferred by the administration act, nor was it designed to change the mode of settling decedents' estates.

The word "representatives" occurring in the second paragraph of the section means, as it did in the original act, "personal representatives." The use of the words "widow and children," which persons are entitled to the whole amount of the insurance, unless some or all of the premiums were paid in fraud of creditors, precludes the idea that legal representatives are meant in the exempting clause. The administrator may, therefore, in behalf of the creditors, lay claim to and sue for premiums paid in fraud of their rights. The situation would be anomalous which permits an administrator to lay claim to a fund and yet denies his right, by appropriate action, to recover it.

If the conclusion thus reached, that an administrator of an insolvent intestate may maintain an action of this character, be erroneous, then a determination of the second point urged by the bank may be decisive. Whether or not an administrator of an insolvent estate, appointed under the laws of Ohio, may maintain an action in equity to recover and subject to the payment of his intestate's debts personal property transferred, or, as in this case, money paid out by his intestate, in fraud of his creditors, had not, in 1877, been authoritatively settled. *Lockwood v. Krum*, 34 Ohio St. 1, 10. No reported case since that date has been found in which the point has been raised and decided. If the administrator succeeds not only to the rights of his decedent, but stands in the rights of creditors also, the action may be maintained. *Doney v. Clark*, 55 Ohio St. 294, 304, 45 N. E. 316;

Woerner, Adm. Est. § 296. At common law and under the English statutes, particularly 13 Eliz. c. 5, a transfer of property in fraud of creditors is void as to them, but is binding between the parties and on the heirs, legatees, and devisees of the transferor, and consequently the personal representative of a decedent cannot, where the common-law rule prevails or such statutes control, impeach the conveyance of his intestate on the ground of fraud. In many jurisdictions, however, by special statutory enactment or by judicial construction of statutes, the administrator or executor, as the representative of creditors, may prosecute proceedings to set aside a fraudulent conveyance made by his decedent, if the property so conveyed is required for the payment of his debts. 20 Cyc. 433; 14 Am. & Eng. Ency. Law, 333. In view of the Ohio statutes, does the common-law rule still prevail?

In *Benjamin v. Le Baron*, 15 Ohio, 517, decided in 1846, the question was left undetermined, but it was there held that an administrator of an insolvent estate cannot maintain an action of trover to recover goods transferred by his intestate to defraud his creditors, with an intimation that the remedy in such a case is in equity. The views of a majority of the court are thus expressed:

"We hold that the administrator can only maintain such action as the intestate might, if living. He represents the intestate; he steps into no other right. As between the fraudulent vendor and vendee, the transfer is good. Such conveyances are void only as to creditors. This is the well-settled doctrine in Ohio. Hence, as between the vendor and vendee in this case, the vendor had no rights, and of course his administrator could have none. But it is said that, unless we sustain a suit of this sort on the part of the administrator, creditors will have no remedy. This does not follow. When a bill shall be filed for that purpose, it will be time to consider of it."

The last-quoted sentence was held in *Lockwood v. Krum*, supra, to be an intimation that equity would afford relief where the property was required to pay debts of the estate; in *Hoffman v. Kiefer*, supra, that a creditor might maintain a bill in equity to recover fraudulently transferred personal property; and in *Longley v. Sewall*, 2 Ohio N. P. 376, that such a bill might be maintained by an administrator.

The conveyances alleged to be fraudulent in *Benjamin v. Le Baron* were made in September, 1837. An examination of the court records of Belmont county reveals that *Le Baron* died in December, 1839. Administration was granted on his estate March 1, 1843, and the declaration was filed by his administrator July 11th of the same year. The provisions of section 6090 were quite substantially embodied in the eighteenth section of the administration act of February 11, 1824 (22 Ohio Laws, p. 124). The act of March 12, 1831 (29 Ohio Laws, p. 229), repealed that of 1824, but incorporated its provisions, including those of section 18. The act of March 23, 1840 (38 Ohio Laws, p. 146), superseded all prior legislation on the subject of decedents' estates, and, with slight amendments, is still in force. Section 83 of that act differs but slightly from section 6090. The majority opinion contains no reference to any administration act, but states the common-law rule. The briefs filed in the case, excepting an allusion in that filed in behalf of the administrator to the provision authorizing an administrator to recover lands fraudulently conveyed, make no mention of any Ohio legislative enactment. In the dissenting opinion, however, the view is expressed

that the majority of the court misconceived the office and duties of an administrator under the laws of the state, and ignored the provisions of the administration act of March 23, 1840, and that under that statute the administrator represents the creditors of a deceased person making a fraudulent conveyance, and is bound to pursue the property for the benefit of creditors, which they might have reached had the intestate lived. It is unnecessary to speculate on whether or not the case was decided solely on common-law principles or with reference to any of the above-mentioned statutory enactments, or whether the act of 1840 applied to the estate of a decedent whose death occurred prior to the date of its passage, for subsequently the court ascribed to an administrator, as regards creditors, powers more enlarged than those possessed by him at common law, and such as were attributed to him, as above mentioned, in the minority opinion. In *Sheldon v. Newton*, 3 Ohio St. 494, 495, 504, so distinguished a jurist as Judge Ranney held that, under the act of 1824, the executor or administrator was a trustee alike for creditors and heirs. It would logically follow from this that, if an estate were insolvent, the interest of the heirs then being merely technical, the executor or administrator would be a trustee, for all practical purposes, for the creditors alone. In *Kilbourne v. Fay*, 29 Ohio St. 264, 23 Am. Rep. 741, the soundness of the conclusion reached by the majority of the court in *Benjamin v. Le Baron* was called in question. The paramount issue was whether or not, where a chattel mortgage is declared void by the statute as against the creditors of the mortgagor, and the mortgagee dies in possession of the mortgaged property, leaving an insolvent estate, such property becomes assets in the hands of the executor or administrator of the mortgagor; but the powers of an executor or administrator under the state statutes were also involved. Section 83 of the act of 1840, the provisions of which section were almost identical with those of section 6090, as regards the distribution of estates, was under consideration. It provided, among other things, that every executor or administrator shall proceed with diligence to pay the debts of the deceased, and shall apply assets arising from the personal estate and effects to the payment of (1) funeral expenses, those of the last sickness, and the expenses of administration; (2) the allowance to the widow and children for their support for twelve months; (3) debts entitled to preference under the laws of the United States; (4) public rates and taxes, and sums due the state for duties on sales at auction; and (5) debts due to other persons. In the course of his opinion Judge McIlvaine said:

"I shall not stop to cite cases wherein the trustee or administrator has been held to be a trustee for the benefit of the creditors of the estate. The provisions of the eighty-third section of the administration act, above quoted, clearly establish such relation. The ordinary course of administration is the means and process provided by law, whereby creditors of a deceased debtor receive payment. It is true that in the case of a solvent estate the heir has also a beneficiary interest in the trust as a distributee; but where the estate is insolvent, the interest of the heir is merely technical, as all of the assets in such case are administered for the exclusive benefit of creditors. The analogy between the duties of the office of an administrator of an insolvent estate and those of an assignee of an insolvent debtor are [is] so perfect that we might at once affirm that the doctrine of *Hanes v. Tiffany*, 25 Ohio St. 554, must control the decision of the present cases. * * *

"Our attention has also been called to *Benjamin v. Le Baron's Adm'r*, 15 Ohio, 517, wherein it was held 'that an administrator cannot maintain an action of trover to recover goods transferred by his intestate to defraud his creditors.' At common law, the injured creditor might sue such fraudulent vendee as executor de son tort, and recover for his own benefit; but as no such relation as executor of his own wrong is recognized in our system of administration, I can see no good reason why the rightful representative of the estate should not be allowed to prosecute such wrongdoer for the benefit of creditors, to the end that a ratable disbursement should be made among them; yet it is not necessary now either to approve or disapprove of that decision."

The announcement there made has since been accepted as a correct definition of the status of an administrator. In *Straman v. Rechtime*, 58 Ohio St. 443, 457, 51 N. E. 44, in considering the lien which a decedent's creditors, in default of personal assets, had on lands of which he died seised, it was held:

"The exact nature of this lien has never been determined, but that to creditors it is a valuable right, cannot be doubted. It is of the same character and nature as the lien or trust in favor of creditors in cases of assignments for their benefit. In assignment cases the title to property passes to the assignee by the act of the owner, the assignor; and in the case of deceased persons the title to the personal property passes to the administrator by action of law upon the death of the owner, and the real estate vests in the heir, burdened with the debts of the ancestor, subject to be sold by the administrator for the payment of his debts; and the property is held by the assignee in the one case, and by the administrator in the other, in trust for the creditors, and the creditors in either case can only work out the payment of their claims through the said trustee. * * *

"In *Kilbourne v. Fay*, 29 Ohio St. 264, it is said on page 279 that the rights of creditors can be asserted through an assignee for their benefit, as they can be by judgment and execution against the property; and on the next page it is said that the analogy between the duties of an assignee and an administrator of an insolvent estate is perfect. That being so, it follows that the rights of creditors can be asserted through an administrator as fully and effectually, but not always as speedily, as by judgment and execution against the property."

The latest utterance of the Supreme Court on the question is found in *Lingler v. Wesco*, 79 Ohio St. 225, 86 N. E. 1004. The language employed in *Kilbourne v. Fay* is again quoted as a correct statement of the law, and the analogy between the duties of an administrator of an insolvent estate and those of an assignee of an insolvent debtor is said to be perfect.

The last four cases are not in harmony with the doctrine announced by the majority of the court in *Benjamin v. Le Baron*, but rest on a sound interpretation of the Ohio administration act, as will appear from repeated adjudications and the provisions of the act itself.

The title to an intestate's personal property vests in the administrator, that of the real estate in the heirs, burdened with the debts of the ancestor and subject to sale for their satisfaction. An intestate's personal property is primarily, and his real estate secondarily or contingently, liable for his indebtedness. The heirs take no part of the ancestor's estate until his debts are paid. The provisions of the act of 1840 relating to the settlement of insolvent estates (now sections 6224-6253, Rev. St.) deal wholly with creditors. In none of them is there any mention of the heirs, and for the manifest reason that heirs have no beneficiary interest in such an estate. The administrator primarily represents the creditors, secondarily the heirs, and especially is this

true in relation to the settlement of insolvent estates. *Giauque's Settlement of Decedents' Estates* (4th Ed.) 276, 277; *Dawson v. Dawson*, 25 Ohio St. 443, 450. The assets of an estate are "the property in the hands of an heir, executor, administrator, or trustee, which is legally or equitably chargeable with the obligations which such heir, executor, administrator, or trustee, is, as such, required to discharge." *Favorite v. Booher's Adm'r*, 17 Ohio St. 558. Whatever may have been the definition affixed to the term "assets" in the earlier history of the law, it means, in modern usage, as applied to decedents' estates, property, real or personal, tangible or intangible, legal or equitable, which can be made available for, or may be appropriated to, the payment of debts. *District Tp. of Williams v. District Tp. of Jackson*, 36 Iowa, 216; *Stanton v. Lewis*, 26 Conn. 444, 447; 11 Am. & Eng. Ency. Law, 828, 829; 3 Cyc. 1111. "In an accurate and legal sense," says Justice Story, "all the personal property of the deceased, which is of a salable nature, and may be converted into ready money, is deemed assets. But the word is not confined to such property; for all other property of the deceased which is chargeable with his debts and legacies, and is applicable to that purpose, is, in a large sense, assets." Story's Eq. Jur. § 531; *Marvin v. Marysville St. R. & T. Co.* (C. C.) 49 Fed. 436, 437; *Wilson v. Tootle* (C. C.) 55 Fed. 211, 213. A fraudulent grantee having in his possession property, conveyed to him by an insolvent grantor in fraud of his creditors, holds for them, by operation of law, as trustee, that which ought to be applied, and which, if the grantee be restored to his sense of moral duty, will be applied, to the satisfaction of their debts. *Swift v. Holdridge*, 10 Ohio, 232, 36 Am. Dec. 85; *Hallowell v. Bayliss*, 10 Ohio St. 536, 542, 543; *White v. Brocaw*, 14 Ohio St. 341; *Starr v. Wright*, 20 Ohio St. 107. "A fraudulent conveyance," said Chief Justice Kent, "is no conveyance against the interests intended to be defrauded." *Sands v. Codwise*, 4 Johns. (N. Y.) 536, 598, 4 Am. Dec. 305; *Burdick v. Gill* (C. C.) 7 Fed. 668; *Swift v. Holdridge*, supra; 14 Am. & Eng. Ency. Law, 311. In the theory of the law, as against creditors, property fraudulently conveyed passes nothing and affects none of their rights. It still remains the property of the debtor for the purpose of satisfying his creditors' claims, and they may, notwithstanding such conveyance, avail themselves of all remedies which the law has provided for collecting their debts out of the property or its proceeds. *Pratt v. Wheeler*, 6 Gray (Mass.) 520; *Webb v. Brown*, 3 Ohio St. 247, 257; *Carr v. Hilton*, 1 Curt. 230, Fed. Cas. No. 2,436. As the title to a decedent's personal property passes to the administrator, and as his personal property conveyed in fraud of his creditors, if it is still in the possession of the fraudulent grantee, remains and is deemed as against creditors the property of the intestate, charged with his obligations, which the administrator is to satisfy, if practicable, the administrator, as trustee for their benefit, takes the title as of the date of the death of the intestate, clouded apparently by the fraudulent conveyance to the vendee. It is property so far belonging to an insolvent decedent's estate when he died that it may rightfully be used by the administrator in discharging the obligation, which his office imposes on him, of paying the intestate's debts,

and it therefore is, in an important sense, as to creditors, an asset of the estate. *Giauque on Settlement of Decedents' Est.* (7th Ed.) 340. The general purpose of the administration act requires that a decedent's property shall be distributed among his creditors who prove their claims. It is therefore made the duty of an administrator to collect, as far as he is able, the assets of the estate. Section 6062. No function of his office calls for greater energy, promptness, and discretion than this. It is the primary essential of prudent administration, because it precedes in natural order the settlement of debts and charges. *Schouler, Executors*, § 269. Diligence is exacted of him in the payment of debts (sections 6062, 6074, 6090, Rev. St. Ohio), and also in the prosecution of actions to collect assets, under the penalty of his personal liability on his bond for any loss the estate may sustain by his neglect (*Rockel's Comp. Ohio Prob. Pr.* § 441). His pursuit and recovery of assets is limited only by the means at his command and sound discretion. *Id.* § 441; *Schouler, Executors*, § 273. If the estate be insolvent, as trustee for the benefit of creditors, he may remove the apparent cloud resting on the title to personal property conveyed in fraud of creditors, and subject it to the payment of the debts due them.

Schouler in his work on *Executors*, § 297, says:

"The representative's duty in pursuing assets extends to all assets of the decedent which are applicable to the payment of debts. Not only may he in some instances set up fraud to defeat the decedent's own act, but he may institute proceedings for setting aside a fraudulent transfer made by the decedent; and if he neglects doing so, to the injury of creditors and others concerned in such assets, he renders himself liable as for other malfeasance or nonfeasance in the performance of his trust, and under like limitations. The executor or administrator may consequently maintain an action at law or a suit in equity for the purpose of setting aside a transfer or conveyance of personal property made by his decedent for the purpose of defrauding his creditors, notwithstanding the decedent himself would have been barred. For a personal representative is not estopped by the acts and conduct of his testator or intestate under all circumstances; but is bound to settle the estate as justice and the interests of all concerned, in their turn, may demand. And in bringing such proceedings he should use due diligence."

Among the cases cited to support the text is *Doney v. Clark*, 55 Ohio St. 294, 45 N. E. 316. The primary question involved in that case was the administrator's right to recover from a fraudulent grantee the value of land conveyed to him by the intestate in fraud of creditors, and thereafter, prior to the death of the fraudulent grantor, sold by such grantee in violation of his fraudulent agreement with the grantor to an innocent third party for value. The opinion, however, states a rule applicable alike to fraudulently conveyed personal and real property, is in accord with Judge *McIlvaine's* pronouncement in *Kilbourne v. Fay*, and is as follows:

"It is true that, upon the subject of the rights of the administrator to maintain an action for the recovery of property fraudulently transferred by his decedent, the decisions in other states are not uniform. The decisions have been much influenced by statutory provisions. Where the administrator is regarded as succeeding only to the rights of his decedent, a recovery has, of course, been denied. Where he is regarded as standing in the rights of creditors also, it has been allowed."

The text-writer last mentioned is also authority for the statement (section 220) that:

"Any gift, assignment, conveyance or transfer of property within the statute 13 Eliz. c. 5, and analogous legislation, is void against creditors; and, consequently, it becomes the duty of a personal representative to procure the property by instituting on their behalf appropriate proceedings, considering the means of litigation at his disposal and the proof obtainable. * * * Generally speaking, property which has been assigned or conveyed by the deceased, after the manner of a gift, confers a title upon the donee or grantee, subject to the lawful demands of prior existing creditors of the estate. The executor or administrator, representing these and other interests, against the express or implied wishes of the deceased himself, if need be, may and ought to procure all assets suitable for discharging demands of this character. But if any balance is left over, it goes, not to the next of kin, but to the donee; for the revocation of any gift for the benefit of creditors of the decedent is only *pro tanto*."

In Williams on Executors (7th Am. Ed.) vol. 3, 130, it is said:

"He (the administrator) has a right of action for property in the hands of third persons which has been conveyed to them by the deceased in fraud of creditors."

Such a practice is highly salutary. The splitting up of the administration of estates between creditors and personal representatives, and the confusion resulting therefrom, a situation not contemplated by the general administration act, is thereby obviated. It quite as much advances the remedy of creditors, avoids a multiplicity of suits, and reduces costs, as does the administrator's right to recover fraudulently conveyed real estate. *McCall v. Pixley*, 48 Ohio St. 379, 27 N. E. 887. Should a creditor recover, as he may, property fraudulently conveyed by an insolvent intestate, the property so recovered, as we have already seen, must be placed in the hands of the personal representative to be administered under the orders of the probate court.

No valid argument can be based on the fact that the statute authorizes an administrator to recover real estate of an insolvent intestate conveyed in fraud of creditors, and contains no like express provision relating to personalty so conveyed. The administrator is clothed by operation of law with the title to personal property, but he has no interest in, or right to, or inherent power over the lands of the intestate. The title and the right of possession to them is in the heirs. If the lands have been fraudulently conveyed, the title is apparently in the fraudulent grantee. The administrator has no right of entry, and cannot bring an action to recover seisin or possession. He cannot count on the seisin of the intestate, because he derives no interest in them from the intestate by virtue of his administration. He cannot count on his own seisin, because his entry as to the tenant in possession would be tortious. *Drinkwater v. Drinkwater*, 4 Mass. 354; *Schouler, Executors*, § 509.

Nearly all of the Ohio administration act was copied from that of Massachusetts, which has been in force nearly 100 years, and is founded on a similar policy. The Massachusetts act had been construed as to the precise point here in issue by courts of that state prior to the passage of the act of 1840. It is reasonable to suppose that the

Legislature, in adopting the provisions of the Massachusetts act relating to the powers and duties of administrators, had in view the construction put upon it in that respect, and intended that it should receive the same construction here, especially as such construction is warranted by the language, as well as the policy, of the act so adopted. *Favorite v. Boohers*, 17 Ohio St. 548, 553, 554; *McDonald v. Hovey*, 110 U. S. 619, 628, 4 Sup. Ct. 142, 28 L. Ed. 269; 26 Am. & Eng. Ency. Law, 700, 701.

In *Martin v. Root*, 17 Tyng, 222, decided in 1821, *Gibbens v. Peeler*, 8 Pick. (Mass.) 254, decided in 1829, and *Holland v. Cruft*, 20 Pick. (Mass.) 321, decided in 1838, an administrator of an insolvent estate was held to be the representative of the creditors, and his right to maintain an action to recover, for the payment of debts, personal property which the intestate had transferred or conveyed in fraud of creditors, was sustained. In the first and last of these cases he was likened to an assignee of a bankrupt. In *Holland v. Cruft* a bill in equity was filed by an administratrix to recover personal property assigned by the intestate for the purpose of defrauding his creditors. The contention was made that the conveyance was valid as between the parties and binding on the administratrix, and could be avoided only by creditors. In the course of the opinion Shaw, C. J., said:

"In many respects the administrator is the trustee and representative of creditors, and as such may stand upon their rights, and assert claims, which the intestate himself could not have asserted. The whole course of proceeding in this commonwealth, especially in relation to the settlement of insolvent estates, proceeds on the assumption that the executor or administrator is in the first instance the trustee and representative of the creditors, and only secondarily the trustee of heirs. By various provisions of statutes, all the estate of a debtor is made liable for all debts, as well those by simple contract as those by special, and heirs have no claims except for the residue. * * * He (the administrator) holds the means in his hands to carry on such a suit for the common benefit. He is charged by the nature of his office to act in the first instance for the benefit of all creditors, and his fidelity is secured by bond and oath, by all the guards which the law can raise to secure it. The creditors are often very numerous, and many of them interested to a small amount. It might be extremely difficult to bring them to act in concert. Should all not unite, the great object of the law, an equal pro rata distribution, might be defeated or rendered difficult. Whereas the administrator is in the nature of a public officer, pointed out by the law to collect, apportion, and distribute the assets, and is placed in a situation to do it most conveniently and effectively for the interests of all concerned."

So much of the foregoing as relates to concerted action on the part of creditors and a possible unequal distribution can have no application to the Ohio practice, but the residue of the quoted passage is in harmony with the later utterances of the Ohio Supreme court and the general administration act.

In *Chase v. Redding*, 13 Gray (Mass.) 418, the right of an administrator to maintain a bill in equity to recover promissory notes secured by mortgage, which had been made *donatio mortis causa*, resulting in fraud upon the intestate's creditors, was sustained, on the ground that, in his capacity of trustee for the creditors, he might avail himself of legal means to get in the trust fund. Other cases in point are *Wall v. Provident Institution for Savings*, 6 Allen (Mass.) 320; *Welsh v. Welsh*, 105 Mass. 229; *Parker v. Flag*, 127 Mass. 28.

The administration acts of Nebraska and Iowa are strikingly like that of Ohio. In *Blackman v. Baxter, Reed & Co.*, 125 Iowa, 118, 100 N. W. 75, 70 L. R. A. 250, a case quite similar to *Kilbourne v. Fay*, and involving personal property, it is held that the heir's interest in such property is burdened with the claims of creditors, and until they have been discharged he is not entitled to distribution, or to exercise control over it, and that the administrator of an insolvent estate holds it for the discharge of the debts of the intestate, the heir's interest in it being purely technical. Not only is *Kilbourne v. Fay* quoted with approval, but the language of *Cooley v. Brown*, 30 Iowa, 470, in which it was held that an administrator may, for the benefit of the creditors of the estate, maintain an action to recover personal property, or its value, voluntarily or fraudulently conveyed by the decedent, is adopted as follows:

"Ordinarily it must be true that an administrator can maintain only such actions at law as the intestate might, if living. This must be invariably so in all actions for the enforcement of rights grounded upon the inheritance. So far as the administrator represents the heirs and the actions brought by him are to secure their rights and interests, he must be limited to such as the decedent himself might have maintained. But under the general statutes relating to the distribution of estates and the duties of administrators, the latter are charged with certain trusts in favor of the creditors of the estate. They are required to collect the assets, and to pay them over to the estate's creditors. Whatever ought to be applied to the payment of debts ought to be recoverable by the administrator representing the rights and interests of the creditors."

The powers of the administrator are likened, in the *Blackman Case*, to those of a receiver or an assignee in trust for the benefit of creditors.

In *Becker v. Anderson*, 11 Neb. 493, 498, 9 N. W. 640, 641, Judge Maxwell said:

"Where the estate is solvent, the heir has a beneficiary interest in the trust as distributee; but if the estate is insolvent, his interest is technical merely, and the executor becomes a trustee for the creditors of the estate, and in that capacity he is bound to protect their interests."

The view above expressed finds support in federal authority. In *Hagan v. Walker*, 14 How. 29, 14 L. Ed. 312, one of the reasons assigned for maintaining a bill in equity by creditors to recover fraudulently conveyed property is that the administrator for two years had failed to take action to reduce the assets to possession. In *Central National Bank of Washington v. Hume*, 3 Mackey (D. C.) 360, 51 Am. Rep. 780, an administrator and creditors contested for the premiums paid by an insolvent debtor on life insurance policies taken out for the benefit of his wife and children. The case was quite similar in that respect to the one at bar. The right of the administrator, as the representative of the creditors, to assail a fraudulent transfer, was one of the issues in the case. It was argued that an administrator is estopped from attacking the transactions of his intestate as fraudulent, but his right to do so was maintained by the court. The case was taken on review to the Supreme Court of the United States (128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370), and was there decided under 13 Eliz. c. 5. The administrator's right to maintain such an action was again fully argued pro and con. The administrator was, on the facts and the state of the law, denied a recovery, but not on the ground that he was

not a proper party and could not maintain the action. In *Masonic Life Ass'n v. Paisley*, 111 Fed. 32, the administrator was a contesting party representing the creditors in an action to recover insurance, the premiums to maintain which had been paid by an insolvent debtor.

Conflicting decisions have been rendered by the common pleas and circuit courts of Ohio as to the powers of an administrator. In *Sayle v. Guarantee Savings & Loan Co.*, 2 Ohio Cir. Ct. R. (N. S.) 401, for instance, adherence is had to the rule announced in *Benjamin v. Le Baron*. In that case, however, the powers of a receiver, and not of an administrator were involved. *Benjamin v. Le Baron* is the only case cited. Other cases recognizing an administrator as a trustee for the benefit of creditors, and concurring with the views announced in *Kilbourne v. Fay*, are *Jones v. Molster*, 11 Ohio Cir. Ct. R. 432, 440; *Kittredge v. Miller*, 19 Ohio Law Bul. 119, 120 (decided by Judge Taft); *Goepper v. Pfau*, 6 Ohio Law Bul. 17; *Linghler v. Kraft*, 3 Ohio N. P. (N. S.) 653, 654, 655.

The administrator may maintain this suit under section 3628, and also by virtue of the powers conferred on him by the general administration act. The entire fund will be paid to him, awaiting the determination of the controversy as to the bank's claim against Brown's estate for interest. *Union Central Life Ins. Co. v. Eckert*, 6 Am. Law Rec. 452. The administrator is entitled to receive at once, to apply toward the satisfaction of decedent's debts, the premiums paid in 1895 and each of the succeeding years, with interest on each premium from the date of its payment. The bank, if it fails in the controversy relating to the \$36,000 interest claim, will receive the residue of the proceeds of the policy. If it succeeds in establishing the validity of such claim, the administrator, in consequence of the finding that the intestate, in event such claim is valid, was insolvent at the time the policy issued, will take the whole of the proceeds of the policy, as they are less than the aggregate of the payments, with interest.

The costs, and also an attorney's fee of \$150, for complainant's counsel, will be paid from the proceeds of the policy now on deposit in court. *McNamara v. Prov. Sav. Life Assur. Soc.*, 114 Fed. 910, 52 C. A. 530.

The question as to the right of an administrator of an insolvent estate to maintain an action at law to recover personal property fraudulently conveyed by his intestate does not arise in this case, and is not considered.

An order may be taken in accordance with the foregoing.

UNITED STATES v. BREESE et al.

(Circuit Court, W. D. North Carolina. August 27, 1909.)

1. CONSPIRACY (§ 45*)—CRIMINAL PROSECUTION—EVIDENCE.

On a trial for criminal conspiracy, in determining whether a conspiracy was formed and whether acts were done to effect the same, the acts and conduct of a defendant not on trial may be considered in connection with those of the defendant or defendants on trial.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 102; Dec. Dig. § 45.*]

2. CONSPIRACY (§ 47*)—CRIMINAL PROSECUTION—EVIDENCE.

In prosecutions for criminal conspiracy it is as competent to prove the conspiracy by circumstances as by direct evidence, but proof of the combination charged must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 106; Dec. Dig. § 47.*]

3. CONSPIRACY (§ 47*)—FEDERAL STATUTE—SUFFICIENCY OF EVIDENCE.

A charge under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), of conspiracy between officers of a national bank to embezzle, abstract, or willfully misapply its funds in violation of section 5209 (U. S. Comp. St. 1901, p. 3497), is supported by evidence that, acting together with a common understanding, defendants largely overdraw their respective accounts with the bank, to such an extent that they were wholly unable to meet the same, as they must have known, and that, to cover up such overdrafts, by a common understanding they placed worthless notes in the bank with the intent and result of injuring and defrauding the bank and impairing its capital.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 105-107; Dec. Dig. § 47.*]

4. CRIMINAL LAW (§ 312*)—EVIDENCE—INTENT.

Persons charged with crime will be held to have intended the necessary, usual, and actual result of their acts, and such presumption is not overcome by their testimony merely that they had no wrongful intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 26, 27; Dec. Dig. § 312.*]

5. CONSPIRACY (§ 28*)—FEDERAL STATUTE—EMBEZZLEMENT BY NATIONAL BANK OFFICERS—DEFENSES.

The most formal vote of the directors of a national bank cannot authorize the embezzlement, abstraction, or willful misapplication of its funds by an officer, and will not constitute a defense to a prosecution for conspiracy to commit such offense.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 41; Dec. Dig. § 28.*]

6. CRIMINAL LAW (§ 150*)—FEDERAL STATUTE—LIMITATION OF PROSECUTION.

Limitation does not begin to run against a prosecution for conspiracy between officers of a national bank to embezzle, abstract, or willfully misappropriate its funds so long as the conspiracy continues or acts to effect its object are committed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 275; Dec. Dig. § 150.*]

7. CONSPIRACY (§ 38*)—FEDERAL STATUTE—VIOLATION OF NATIONAL BANKING LAW—DEFENSES.

It is not a defense to a prosecution for conspiracy between officers of a national bank to embezzle, abstract, or willfully misappropriate its funds by means of excessive loans or overdrafts for their benefit that the Comptroller of the Currency did not do all he might have done to compel a correction of such irregularities.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 38.*]

Prosecution of William E. Breese and Joseph E. Dickerson for conspiracy to commit an offense against the United States. Charge to jury.

See, also, 172 Fed. 761, 765.

A. E. Holton, Dist. Atty., for the United States.

Moore & Rollins and Locke Craige, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NEWMAN, District Judge (charging jury). The defendants in this case are charged with conspiracy. Conspiracy is an agreement between two or more persons to do an unlawful thing, or a lawful thing by unlawful means. These defendants are charged with conspiring to do certain unlawful acts. The conspiracy charged against them is under section 5440 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3676). That section reads as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty," etc.

Under this section of the statutes, as you will perceive, it is necessary that one or more of the parties to the conspiracy should do some act to effect the object of the conspiracy. The purpose of this, you will also perceive, is that while parties might conspire and agree to do an unlawful thing, yet, if they change their minds and do nothing to carry it into effect, it will not constitute an offense. It is necessary that they should do some act to effect the object of the conspiracy.

It is charged that they conspired to commit an offense against the United States; that is, an offense in violation of section 5209 of the Revised Statutes of the United States. That section, so far as important here, is as follows:

"Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts or willfully misapplies any of the moneys, funds, or credits of the association, * * * shall be guilty of a misdemeanor," etc.

The indictment charges that the persons named therein, William E. Breese, being president, W. H. Penland, being cashier, and Joseph E. Dickerson, being a director, respectively, of the First National Bank of Asheville, on July 1, 1897, contriving and intending to injure and defraud the banking association, and one Reuben R. Rawles, and divers other individual persons too numerous to be here named, their shareholders, depositors, and creditors of the said banking association, did conspire to embezzle, abstract, and misapply the moneys, funds, and credits of the bank, and to fraudulently misapply the same to their private uses.

It is further charged that, at the time aforesaid, the three persons named as such officers had in their possession and under their control, by virtue of their said offices, and while they were employed therein, moneys, funds, and credits of the said bank to a large amount, and of great value, to wit, \$250,000, the particular kinds of moneys, funds, and credits being to the grand jurors unknown.

It is further charged that, in pursuance and fulfillment of their said conspiracy, combination, and agreement, the three persons named, Breese, Penland, and Dickerson, on the 1st day of July, 1897, did embezzle, abstract, and misapply a large sum of the moneys, funds, and credits of the banking association, to wit, the sum of \$250,000 in value, of the said moneys, funds, and credits, the same being then and there in their possession and under their control, with intent to cheat and defraud the said banking association, and the said Reuben R. Rawles, and divers other individual persons too numerous to be here men-

tioned, with shareholders, depositors, and creditors of the banking association. William E. Breese and Joseph E. Dickerson alone are on trial.

For the purpose of determining whether a conspiracy was formed, and in determining whether or not the defendants are guilty, you will have a right to consider the acts and conduct of Penland in connection with Breese and Dickerson. That is, in reaching a conclusion as to whether a conspiracy was formed, and as to whether acts were done to effect the same as charged, you will consider the evidence so far as it relates to Penland, as well as the evidence so far as it relates to Breese and Dickerson, although, as Breese and Dickerson only are on trial, a verdict could be rendered against them only.

If you believe that either of the defendants now on trial—that is Breese or Dickerson—was not a party to the conspiracy (if you believe there was a conspiracy), but that the other was guilty of a conspiracy, with Penland, of the character charged in the indictment, and that acts were done to effect the object of the conspiracy, as charged, then you would be authorized to find the defendant now on trial who did so conspire with Penland (if acts were done in furtherance of the conspiracy) guilty on this trial.

It requires two persons to form a conspiracy; one person cannot conspire with himself; but one person may be convicted of conspiracy although the other conspirator is not on trial. To explain it to you more fully: If Breese, one of the defendants on trial, conspired with Penland, and acts were done to effect the object of the conspiracy, you might convict Breese on this trial. Or if Dickerson conspired with Penland, and acts were done to effect the object of the conspiracy, you might convict Dickerson on this trial. If Breese and Dickerson conspired with each other, whether Penland was or was not a party to the conspiracy, if acts were done in furtherance of the conspiracy, and to effect the object of the conspiracy, then you would convict both Breese and Dickerson on this trial. If you believe that all three were parties to the conspiracy, and acts were done to effect the object of the conspiracy, then you would be authorized to convict both Breese and Dickerson on this trial.

It is not necessary, in order to establish the fact of a conspiracy, that some one should have testified that they heard the alleged conspirators agree and combine together to do the unlawful thing, but the fact of a conspiracy may be gathered and derived by the jury from the combined and concerted actions of the alleged conspirators in the commission of the unlawful act. After a conspiracy is formed, the acts of each and all of the conspirators are binding upon the other conspirators. It is not necessary that all of the conspirators should actually assist in doing all the acts necessary to carry out the conspiracy, but one of the conspirators may do one act, and the others other acts, if the tendency and intent and purpose of all the acts is in pursuance of the unlawful agreement, and to carry out and effectuate the same, and to accomplish a common unlawful result.

It is proper, gentlemen of the jury, that I should give you a definition of the offense which the defendants here are alleged to have conspired to commit. Embezzlement, speaking generally, is a breach of

trust or duty with respect to moneys, properties, or effects in possession of a party and intrusted to him by another, and the appropriation of such moneys, properties, or effects, or a part thereof, to the use of the party so intrusted. Embezzlement, as applied to this case and to the relation sustained by these defendants to the First National Bank of Asheville, is this: The charge is that they were intrusted with moneys, funds, and credits of the First National Bank of Asheville, to which they bore the relation of officers, charged in the indictment as I have stated to you, and that, being so intrusted, they conspired to misapply the same to their private uses, and did, in furtherance of that conspiracy, embezzle moneys, funds, and credits of the bank to the extent of \$250,000. Embezzlement is a technical expression, and applies only to cases in which the party charged occupies a trust or fiduciary relation, and takes the money or properties so intrusted and unlawfully applies the same to his own use. It is different from every other form of taking the property of another, in that it embraces the fact of having the same in possession, and in trust when it is taken, and misapplied to the private use of the person charged.

To abstract does not involve the same trust relation. It means to "take from," or "withdraw," so that to abstract the moneys from the bank is to take and withdraw from the possession and control of the bank its moneys, funds, and credits. To constitute the offense of abstracting, it should be done without the knowledge and consent of the bank, and with intent to injure and defraud it or some other company or person. Abstracting the funds of the bank may be done by one act or a succession of acts. It may be done under the color of loans, discounts, or checks. The means used would be immaterial if the result is the wrongful withdrawal of funds or moneys from the bank without its actual knowledge and consent, and to convert the same to the use and benefit of the abstractor.

Willful misapplication, as described in the statute, means a misapplication willfully and unlawfully made by one or more of its officers of the moneys, funds, or credits of the bank, and done with intent to injure the bank, and the funds so misapplied must be converted to the use of the officer or officers making such misapplication, or to the use of some other person than the bank. Of course, embezzlement would embrace either misapplication or abstraction, but the reverse would not be true, because a person might be guilty of abstraction and misapplication without being guilty of the technical offense of embezzlement.

It will be necessary for you to inquire, first, whether there was a conspiracy between Breese, Dickerson, and Penland, or any two of them, and in ascertaining that you will look at all of the acts and transactions shown in this evidence. It is not necessary, as I have stated to you, that there should be an express agreement in words between them to constitute a conspiracy, but it is sufficient that they acted together with a common understanding and a common intent to accomplish a common unlawful purpose. It is sufficient that the minds of the parties met understandingly so as to bring about an intelligent and deliberate agreement to do the acts and commit the offense

charged, although such an agreement be not manifested by any formal words.

If you believe that the conspiracy was formed and existed between these defendants, or any two of them, as I have stated to you, and there was a common agreement and understanding to that effect—that is, to embezzle, abstract, or misapply the moneys, funds, or credits of this bank—then you would proceed to inquire, was an act done, or were acts done to effect the object of the conspiracy? The conspiracy and the overt act, as it is called—that is, an act done to effect the object of the conspiracy—are separate and distinct, though, as I have stated to you, you may gather or derive the fact that there was an unlawful agreement between the parties from combined and concerted actions in the performance of the unlawful act.

It is as competent to prove an alleged conspiracy by circumstances as by direct evidence. In prosecutions for criminal conspiracy, the proof of the combination charged must almost always be extracted from the circumstances connected with the transaction which forms the subject of the accusation. The acts of the parties in the particular case, the nature of those acts and the character of the transactions or series of transactions, with the accompanying circumstances, as the evidence may disclose them, should be investigated and considered as the source from which evidence may be derived of the existence or nonexistence of an agreement, which may be expressed or implied, to do an unlawful act. Guilty connection with a conspiracy may be established by showing association by the persons accused in and for the purpose of the prosecution of the illegal object. Each party must be actuated by an intent to promote the common design, but each may perform separate acts or hold distinct relations in forwarding that design. There must be an intentional participation in the transaction or transactions, with a view to the furtherance of the common design and purpose. If persons work together to advance an unlawful scheme, having its promotion in view, and actuated by the common purpose of accomplishing the unlawful end, they are conspirators.

If you believe that these defendants, or any two of them acting together with a common understanding, largely overdrew their accounts with the bank, and to such extent that they were wholly unable to meet the same, and that this must have been known to them when such overdrafts were made and permitted, and that then, to cover up and make good these overdrafts, they placed or caused to be placed, by a common understanding, worthless notes in the bank, and thereby the capital of the bank was impaired and its credit destroyed, then, in the opinion of the court, the defendant so acting would be guilty under this indictment. This should be done with intent to injure and defraud the bank, but such intent may be gathered by you from the acts themselves, if you believe them to have been knowingly and willfully and intentionally done, as I have stated to you.

The willful misapplication made an offense by this statute means the misapplication for the use and benefit of the party charged, or some company or person other than the association. Therefore, to constitute the offense of willful misapplication, there must be a conversion

to his own use or the use of some one else of the moneys, funds, and credits of the association by the party charged.

If, therefore, the moneys, funds, and credits of the First National Bank of Asheville were willfully misapplied, as charged in the indictment, and the moneys, funds, and credits were converted from the use of the bank to the use of the defendants, thereby, as a necessary, natural, and legitimate consequence, the bank's capital was reduced or placed beyond the control of its directors, and its ability to continue in business was destroyed, the intent to injure or defraud the bank must be presumed. Acts involving such consequence, when knowingly and willfully committed, establish the guilty intent to injure and defraud mentioned in the statute, and disclose a situation utterly inconsistent with innocent intent.

It is not necessary that the fact should be shown to your satisfaction and beyond a reasonable doubt that the defendants had a motive or ill will to constitute an intent to defraud. The intent to defraud may be entirely consistent with an interest on their part for the success and welfare of the institution.

There must be an intent to commit the unlawful act, and that intent must be corrupt. There must, therefore, be a wrongful conversion or appropriation by a bank officer of some of the moneys, funds, or credits of the bank to his own use, or to the use of some person other than the bank, with the intent just stated.

The defendants have been allowed to testify as to their intent in the various transactions brought out here. If the ordinary, usual, and necessary result of the acts of these defendants was to violate the law, either to embezzle, abstract, or misapply the moneys, funds, and credits of this bank, the fact that they say now that they did not have any wrongful intent could not prevail against what would be the ordinary, usual, and necessary result of their acts. Persons charged with crimes will be held to have intended the necessary and actual results which would follow their acts.

The charge approved by the Supreme Court of the United States on the subject of intent, in a case like this, substituting the name of the bank in question here instead of the bank in question there, is as follows:

"The law presumes that every man intends the legitimate consequence of his own acts. Wrongful acts, knowingly or intentionally committed, can neither be justified or excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed. It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action. If, therefore, the funds, moneys, or credits of the First National Bank of Asheville are shown to have been either embezzled, or willfully misapplied by the accused and converted to his own use, whereby, as a necessary, natural, or legitimate consequence, the association's capital was reduced or placed beyond the control of the directors, or its ability to meet its engagements or obligations or to continue its business was lessened or destroyed, the intent to injure or defraud the bank may be presumed."

If a man knows that the act he is about to commit will naturally or necessarily have the effect of injuring or defrauding another, and he voluntarily and intentionally does that act, he is chargeable, in law,

with the intent to injure or defraud. It is not necessary that his object or purpose was primarily to injure or defraud. It may have been to benefit himself. These terms, used in the statute, mean nothing more than that general intent to injure or defraud which always arises, in contemplation of law, when one willfully or intentionally does that which is illegal or fraudulent, and which, in its necessary and natural consequence, must injure another. The law presumes that every man intends the natural and ordinary consequence of his acts, and, as I have stated to you, wrongful acts knowingly or intentionally committed cannot be justified on the ground of innocent intent.

It is not meant, by what I have stated to you, to say that these defendants might not, by proper evidence, by their own evidence, if they can do so, show to you that there was nothing unlawful or wrongful about their acts and transactions which have been put in evidence here. If they have shown by their evidence, or any other evidence, that there was nothing wrongful or unlawful about their acts, or if the whole of the evidence taken together failed to satisfy you that such acts were wrongful and unlawful in the way I have stated to you, you should give them the benefit of it.

Evidence has been offered to show the action of the board of directors on different occasions, as shown by the book of minutes of the bank, and also by the evidence of the defendants, that action was taken by the board of directors authorizing certain loans and certain transactions, and to show that what was done in the bank was known to the board of directors. I instruct you, about this question, that an arrangement or agreement with the bank or its duly authorized directors, committees, or officers must be an exercise of their official discretion, in good faith and without fraud, and made for the advantage of the association, or its supposed advantage. If loans or discounts or overdrafts are permitted to be made in bad faith, for the personal advantage and account of the officers, and not in the honest exercise of official discretion, such action would not be the action of the bank, or the consent of the bank and the defendants would not be protected by such authority so given, if they were parties to the arrangement. If fraudulent credits were given upon the books of the bank, either to the defendants or other persons acting for them, neither one would acquire thereby any right to the funds represented by such credits. Credits upon the books of the bank, to be valid and to create the relation of creditor and debtor between the parties having such credits and the bank, should represent value received by the bank in the shape of cash, or what is honestly believed to be its equivalent. It must represent bona fide indebtedness. The authority of the directors, officers, or committees of the bank extend only to legitimate transactions intended for the benefit of the bank, and, if you find that such authorization was given as claimed, you should consider with whom and under what circumstances it was made, whether in good faith and for the actual or supposed benefit of the bank. Whether Rawles, the member of the board besides the persons charged in this indictment, knew or did not know of the character of the transactions, if you believe that loans were permitted, overdrafts allowed, and the substitution of worthless notes for overdrafts was permitted, and that the

same was done for the personal advantage of Breese, Penland, and Dickerson, or either of them, such action would confer no valid authority. Every act of fraud, every departure from duty by the board in connivance with these defendants, or either of them, for the plain purpose of sacrificing the interests of the stockholders of the bank, would be excess of power, from its illegality, and, as such, void as an authority to protect them against the charge here made, if the charge be otherwise sustained.

The most formal vote of the board of directors could not authorize the embezzlement, abstraction, or willful misapplication of the funds of the bank. To knowingly and willfully allow the bank's moneys, funds, and credits to be withdrawn on worthless notes, knowing the notes to be such, would be a misapplication of the funds of the bank in the meaning of the statute on the part of the official of the bank allowing such withdrawal. It is not necessary that cash should be actually paid over the counter of the bank to constitute a misapplication of the moneys, funds, and credits. The funds of the bank might be appropriated by these officers to their own use, or the use of a third party, without actually handling any of the money, by giving to some one a fraudulent credit on its books and then permitting the same to be shifted from one person to another, by means of checks, if by the transaction the value of the moneys, funds, and credits of the bank was lessened. To substitute a worthless note knowingly and willfully for a good, solvent note, understanding the substituted note to be worthless and the one withdrawn good, would be a misapplication of the credits of the bank.

It is not necessary that the jury should find that the amount or exact sum stated in the bill of indictment was intended to be embezzled or abstracted. If, under the circumstances and conditions already mentioned, you find that the defendants converted to their own use moneys, funds, and credits of the bank, no matter how small the amount may have been, it would be sufficient to sustain a verdict of guilty, provided the same was so misappropriated by the defendants with a common design and purpose to abstract and misapply the funds with intent to injure and defraud the bank.

If you find from the evidence that Breese, Dickerson, and Penland, or any two of them, were officers of the First National Bank of Asheville, as charged in the indictment—no question is made about that, as I understand it; however, it is a fact for you to determine—and as such they had the custody and control and management of the moneys, funds, and credits of the said banking association, and as such officers and directors that they agreed with each other to allow the moneys, funds, and credits to be wrongfully withdrawn, abstracted, or willfully misapplied by them, or either of them, for their own use and benefit, or for the use and benefit of another person other than the banking association, and in pursuance of this agreement they unlawfully and willfully and fraudulently withdrew the moneys, funds, and credits of the banking association, and fraudulently converted the same to their own use, it makes the conspiracy complete, and it would be your duty to return a verdict of guilty.

This case comes within the class of cases which will be barred in three years from the time the offense is committed; that is, the offense cannot be prosecuted unless it has been committed within three years prior to the finding of the bill of indictment. The defendants have invoked from the court the application of this law to the present case.

In the opinion of the court the law applicable here, and to the facts of this case, is this: The indictment charges a conspiracy was entered into on July 1, 1897. It would be immaterial whether the conspiracy charged, if you believe there was a conspiracy, originated more than three years before the finding of the bill of indictment, indeed it would be immaterial if it was entered into soon after this bank was established, in 1888, 1889, 1890, or 1891, provided you believe that overt acts were committed all along down during the succeeding years and to a period within three years before the finding of the bill of indictment; if also there was a continued unlawful agreement and understanding between the parties, amounting to a conspiracy, all along down to and within the period of three years before the bill of indictment was found true on October 5, 1897. The law is that there may be a renewal or a continuance of a conspiracy if there be renewed and continued combination, agreement, and understanding between the alleged conspirators, and successive acts are done in pursuance of and to effect and consummate the conspiracy. No matter when the conspiracy originated, if you believe that there was a continued understanding, expressed or tacit, amounting to a conspiracy, between the alleged conspirators, or any two of them, and acts were done in furtherance of and to effect the object of the conspiracy along, down to, and embracing a period within three years before the finding of this bill of indictment, which, as stated, was October 5, 1897, then you would be authorized to consider the same and act upon the same, notwithstanding the fact that these defendants, in your opinion, had an agreement and understanding and did acts to consummate and carry the same into effect more than three years before the finding of the bill of indictment. The conspiracy, however, must have been in existence and have been in operation within three years of the finding of the bill of indictment, and, further, there must have been some act done by at least one of the conspirators to effect the object of the conspiracy within the three years.

No person can borrow from a national banking association more than one-tenth of its capital actually paid in and unimpaired, and no person can borrow from such banking association on the security of the shares of its own capital stock, unless it be upon a debt previously contracted in good faith, and, while to do this would be a violation of law, it is not a criminal liability unless it involves, under the instructions given you, a misapplication of the funds of the bank to the use of the person so violating the law, and with the intent to injure and defraud the bank in the way I have stated to you.

Something has been said here about communications to the Comptroller of the Currency, and it is claimed, as I understand it, that this officer was satisfied with the condition. It will be entirely for you to

judge, but, so far as I have been able to see, the Comptroller was trying to get the bank to cease overdrafts and excessive loans; but even if it be true that the Comptroller of the Currency did not do all he should have done towards correcting irregularities in the bank, this would not be an excuse for acts otherwise illegal.

The jury should be satisfied of the guilt of these defendants beyond a reasonable doubt. They come before you with a presumption of innocence in their favor, and this presumption continues until the government has, by competent evidence, established every ingredient necessary to constitute the offense with which they are charged, beyond a reasonable doubt. Reasonable doubt is not a bare conjecture or a bare possibility of innocence. It is a doubt, as the law expresses it, arising from the evidence or lack of evidence in the case. A doubt born of a mere merciful inclination or disposition to save the defendants from the penalty of the law, or one prompted by sympathy for them or those connected with them, is not what is meant by a reasonable doubt. If the whole evidence, when carefully weighed and compared, produces in your mind the settled conviction or belief of the guilt of the defendants, such a conclusion as you would act upon in the more weighty and important matters relating to your own affairs, you should find a verdict of guilty in accordance with that conviction or belief. You should be satisfied beyond a reasonable doubt that the acts done were done with wrongful and fraudulent intent to embezzle, abstract, and misapply the moneys, funds, and credits of the bank, although the intent, as I have stated to you, may be gathered from the character of the acts if you believe the character of the acts justifies such finding.

Evidence has been offered by the defendants to show good character; that is, good character prior to the time when this offense was alleged to have been committed, and indeed prior to the time when the bank failed. This evidence goes to you to have the weight to which you think it is entitled. It is a matter which the jury may fairly consider. It has been held to be sufficient in a proper case, of itself, to raise a reasonable doubt. It is for you, however, to give it the weight to which you think it is entitled. If, notwithstanding the evidence as to good character, you are satisfied that they are guilty under this indictment, you should so find.

The jury should not be influenced in reaching a conclusion in this case by any feeling of friendship for these defendants or their friends, or allow themselves to be influenced in any way against them by any other feeling, but you should disregard absolutely and entirely any feeling or influence one way or the other, except to reach a true verdict on the facts as developed by the evidence here, applying to that the law as given you in the charge of the court.

Reference has been made here at various times to other trials. You should not consider the same in any way whatever in arriving at a verdict in this case. You should determine this case on the law and the facts as I have stated to you.

The jury is the exclusive judge of the facts, and, while the court may comment on the same, I have not done so to any great extent, as you will observe, and whatever the court has said is simply by way

of comment, leaving the full determination of the facts to the jury. If the government has failed to show to your satisfaction, and beyond a reasonable doubt, that a conspiracy was formed and existed as charged in the indictment, either to embezzle, abstract, or misapply the moneys, funds, and credits of this bank, and also that some act was done by them in furtherance of and in execution of the conspiracy, as I have stated to you, then you should acquit the defendants or either of them as to whom it has not been so shown. If, on the other hand, the government has established to your satisfaction and beyond a reasonable doubt that the defendants entered into a conspiracy, as charged, and continued the same to a period within three years prior to the finding of this bill of indictment, and did acts within said period to execute the same, then you should find the defendants now on trial guilty, or any one of them whom you may believe to be guilty, as I have stated to you.

You have been patient and attentive, gentlemen, during the long trial of this case, while the evidence was being offered and while the case was being argued, and while I have been instructing you as to the law, and it is a case which deserves this careful consideration and attention. You may retire to your room and give the case a fair, impartial, and just consideration, and find a true verdict in accordance with your convictions and belief.

If you believe that both of the defendants now on trial are guilty, so express it when you return to the courtroom. If you believe one of the defendants now on trial to be guilty and not the other, so express it. If you do not believe either of them to be guilty, say so. Take the case, gentlemen, and find a verdict.

THE SANTA RITA.

(District Court, N. D. California. June 22, 1909.)

No. 13,643.

1. TORTS (§ 15*)—GROUNDS OF ACTION—PROXIMATE CAUSE OF INJURY.

The fact alone that an act of defendant was in violation of a penal statute does not afford ground for the recovery of damages by a third person, unless such act was also the proximate cause of the injury complained of.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 19; Dec. Dig. § 15.*]

2. NEGLIGENCE (§ 59*)—"PROXIMATE CAUSE" OF INJURY—NATURAL AND PROBABLE CONSEQUENCES.

An act of negligence is not the "proximate cause" of an injury, in a legal sense, where there was an independent intervening cause, unless the injury was not only the natural, but the probable, result of such negligence, and the intervening cause should reasonably have been foreseen.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. § 59.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. SHIPPING (§ 79*)—PROXIMATE CAUSE OF INJURY—INTERVENING EFFICIENT CAUSE.

A steamer lying beside Long Wharf at Oakland, Cal., discharged a considerable quantity of fuel oil, which had escaped into the hold, into the waters of the bay, in violation of the statute, and it floated under the wharf, which was 90 feet wide, and around vessels lying on the opposite side. By some independent means a fire was started on the wharf, which burned a portion of the flooring and some cars, and damaged a vessel lying on the opposite side from the steamer; her injury being increased by burning oil which floated around her sides and caught fire from the burning wharf. *Held*, that the act of the steamer in discharging the oil into the bay was not the proximate cause of the injury, nor a concurrent cause, but only created a condition which made the subsequent fire, which was the proximate cause, more disastrous, and that she was not liable for such injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 344; Dec. Dig. § 79.*]

In Admiralty. Libel by the Société Nouvelle D'Armement, as owner of the French bark Boieldieu, against the steamer Santa Rita for damages. Libel dismissed.

William Denman, for libellant.

Pace, McCutchen & Knight, for the Santa Rita.

DE HAVEN, District Judge. This is a libel by the owner of the French bark Boieldieu against the steamer Santa Rita to recover damages. The libel alleges that the Boieldieu was injured by a fire caused by the ignition of fuel oil of a highly inflammable character, negligently discharged from the Santa Rita into the waters of San Francisco Bay.

It appears, from the evidence, that on March 11, 1907, the Santa Rita, a steam vessel 450 feet long, was moored to the northerly side of Long Wharf, Oakland; the wharf being on her starboard. The British ship Whittliebourn and the French bark Boieldieu were moored on the southerly side of the same wharf. There was a space of about 60 feet between the two last-named vessels. The wharf was 90 feet wide, and, lying as they did, parallel to the Santa Rita, the Whittliebourn reached from the stern of the Santa Rita to forward of her midships, and the Boieldieu overlapped the bow of the Santa Rita. It will thus be seen that in the position in which these three vessels were moored they, with the floor of the wharf, formed a covered lane or alleyway on the water 450 feet long and 90 feet wide, with an opening or space on one side of about 60 feet. The ends of the wharf were, of course, also open.

The Santa Rita was, upon the day above stated, discharging a cargo of pipe upon the wharf, and had been so engaged for two or three days prior thereto. This pipe was taken from a hold into which large quantities of fuel oil and water had escaped, and in lifting the pipe from the hold more or less of the oil was carried on the deck of the vessel, and thence found its way into the waters of the bay. There is also evidence tending to show that some oil and water had been pumped from the cargo hold directly onto the deck or into the ship's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

scuppers, while the pipe was being discharged; but how much does not appear.

Between the hours of 4 and 5 o'clock of the afternoon of March 11, 1907, a portion of the wharf, adjacent to the Boieldieu's berth and extending back a few feet toward the berth of the Whittlieburn, caught fire, and about 4,500 square feet of its flooring was burned, and some empty cars and three or four cars loaded with hay, which were on that part of the wharf, were also burned. The Boieldieu also caught fire, and as the result thereof a number of the steel plates covering her hull, on both port and starboard sides, were badly warped or buckled, and a portion of her rigging was also burned. It further appears that on the afternoon of this fire a light wind was blowing against the port quarter of the Santa Rita. It was also shown that at the time of the fire a donkey engine was being used in discharging the cargo from the Whittlieburn.

The contention of the libelant is that the oil which had been discharged from the Santa Rita accumulated in large quantities under the wharf and around the Boieldieu, and that a spark from an engine on the wharf, or some live coals taken from the fire box of the donkey engine, or from the Boieldieu's galley, were thrown into the bay, igniting the oil floating thereon, and that in this way the fire was started, resulting in damage both to the wharf and the Boieldieu. My conclusion, however, from the evidence, is that the fire started on the floor of the wharf, and was thence, after some little time, communicated to the Boieldieu.

The evidence also shows that if there was, in fact, a large body of oil floating on the water, under the wharf, and around the Boieldieu, such oil could have been ignited by subjecting it to a very high degree of heat, and bringing the vapor, which it would throw off, in contact with fire; and there is also evidence that oil was seen burning upon the water on the port side of the Boieldieu, the side next to the wharf. The heat from the wharf was probably sufficient to buckle the steel plates on the Boieldieu's port side, and set fire to her rigging, without the presence of oil; but I am unable to account for the injury which the opposite, or starboard, side of the Boieldieu sustained, except upon the assumption that it was caused by burning oil floating on her starboard, the flames of which came in direct contact with the steel plates on that side of the vessel. Upon consideration of all the evidence, I have, with some hesitancy, reached the conclusion that fuel oil, discharged by the Santa Rita in large quantity, was floating on the water around the Boieldieu, and was ignited by fire and heat from the burning wharf.

It also appears that the Santa Rita was unharmed, and the testimony of the witness O'Neil, which I think is entitled to credit, is to the effect that, if the Boieldieu was injured by burning oil, there was not, at that time, any connection between such oil and the Santa Rita; that, if the Santa Rita had been then discharging oil into the bay, the conflagration would have gone back to the source of supply, because a body of oil ignited on one side will burn over the surface which it covers.

1. Section 374½ of the Penal Code of the state of California makes it a misdemeanor, punishable by fine or imprisonment, for any person to deposit or "to pass in, or into the waters of any navigable bay or river, in this state, any coal tar or refuse or residuary product of coal, petroleum, asphalt, bitumen or other carbonaceous material or substance." But the mere fact that the act of the Santa Rita, of which libellant complains, was a violation of this statute, will not entitle the libellant to recover, unless such act was the proximate cause of the injury complained of. *Shearman & Redfield on Negligence*, §§ 13, 27. *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117. *Stone v. Boston & Albany R. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

The question, then, for decision at this time, is whether or not the negligent or wrongful act of the Santa Rita in discharging fuel oil into the waters of San Francisco Bay was the proximate cause of the damage sustained by the Boieldieu. The rule is elementary that:

"The breach of duty upon which an action is brought must be not only the cause, but the proximate cause, of the damage to the plaintiff." *Shearman & Redfield on Negligence*, § 26.

"If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote." 1 *Cooley on Torts* (3d Ed.) p. 99.

And the same principle has been stated in this language:

"A prior and remote cause cannot be made the basis of an action, if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury. If no danger existed in the condition, except because of the independent cause, such condition was not the proximate cause." 29 *Cyc.* 496.

The rule thus stated is, however, subject to this qualification:

"If the intervening act is such as might reasonably have been foreseen or anticipated as the natural or probable result of the original negligence, the original negligence will, notwithstanding such intervening act, be regarded as the proximate cause of the injury." *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117.

In *Russell v. German Fire Ins. Co.*, 100 Minn. 528, 111 N. W. 400, 10 L. R. A. (N. S.) 326, it is said:

"Whatever may have been the original meaning of the maxim, '*Causa proxima et non remota spectatur*', it has been clearly settled, by a long line of decisions, that what is meant by proximate cause is not that which is last in time or place, not merely that which was in activity at the consummation of the injury, but that which is the procuring, efficient, and predominant cause."

And the court in that case further defined proximate cause, as:

"That from which the effect might reasonably be expected to follow, without the concurrence of any unforeseen circumstances."

In *Beckham v. Seaboard Air Line Railway*, 127 Ga. 550, 56 S. E. 638, 12 L. R. A. (N. S.) 476, the court reaffirms the following statement of the rule found in an earlier decision of that court:

"To entitle a party to recover damages of a railroad company on account of the negligence of its agents, it should appear that the negligence was the natural and proximate cause of the injury; for, should it appear that the negligence of the company would not have damaged the party complaining, but for the interposition of a separate, independent agency, over which the railroad company neither had nor exercised control, then the party complaining cannot recover."

In *Davis v. Chicago, M. & St. P. Railway Co.*, 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935, the court said:

"The negligence is not the proximate cause of the accident, unless, under all the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is the natural consequence of the negligence. It must also have been the probable consequence."

A comprehensive statement of the rule concerning actionable negligence and what constitutes the proximate cause of an injury is the following, found in the opinion of Judge Sanborn in *Cole v. German Savings & Loan Soc.*, 124 Fed. 115, 59 C. C. A. 595, 63 L. R. A. 416:

"An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury."

Then follows this clear definition of the meaning of the phrase "natural and probable consequence," used by the courts in announcing the rule of law that a defendant is not responsible for damage resulting from a negligent act, unless it was the "natural and probable consequence" of such act:

"A natural consequence of an act is the consequence which ordinarily follows it; the result which may reasonably be anticipated from it. A probable consequence is one that is more likely to follow its supposed cause than it is to fail to follow it."

When the rule, stated in the foregoing cases, is applied to the facts of this case, it would seem clear that the libellant is not entitled to recover. The alleged negligent or wrongful act of the Santa Rita was not the proximate cause of the damage to the Boieldieu. The natural consequence of discharging crude oil into the waters of San Francisco Bay, under the circumstances appearing here, would not be the production of a conflagration. The oil was absolutely harmless while lying upon the surface of the water, and, but for the burning of the wharf, would have remained so. *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583. The burning of the wharf was entirely disconnected and unrelated to the original act of the Santa Rita in discharging the oil, and was not caused by any person connected with that vessel and whose actions were subject to her control. Unless, therefore, the burning of the wharf and the consequent ignition of the oil were matters which ought to have been reasonably anticipated as probable—that is, more likely to occur than otherwise—the burning of the wharf must be found to be the efficient cause of the damage to the Boieldieu.

Was the burning of the wharf, and the ignition of the oil, something more likely to occur than not—something that a person of ordinary prudence would have thought to be probable? The result has shown that such a fire, the ignition of oil thereby, and the consequent damage to the Boieldieu, were matters which might occur—events which any person of ordinary judgment would have known to be possible; but the question is, not whether a person of ordinary prudence would have known that such results were possible, but whether they would have been regarded by him as probable—something likely to occur, and therefore to be guarded against—by not discharging fuel oil into the bay. It seems to me this question must receive a negative answer. A man of extreme caution might have anticipated the result; but one of ordinary prudence and foresight would not have thought, in view of all the surrounding circumstances, that fuel oil, if discharged into the waters of the bay, with its tides and winds, would probably be set on fire, by the accidental or negligent burning of the wharf, or by live coals thrown into the bay and coming in contact with the oil.

A case very much in point is that of *Stone v. Boston & Albany R. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794, decided by the Supreme Judicial Court of Massachusetts. It was there held, as appears from the syllabus, given in the annotated report, that:

"Negligence in storing oil upon a station platform, and permitting it to remain there in violation of statute, is not the proximate cause of damage by a fire which is started by the careless dropping of a match by a man who comes to the platform to deliver goods, and who is in no sense a servant, agent, or guest of the railroad company."

The court in its opinion laid stress upon the fact that the person who started the fire was in no sense a servant of the defendant, or one whose actions the defendant had the right to control, and, while conceding that it is the rule of law that the act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such intervening act ought to have been reasonably foreseen, thus proceeded to dispose of the question before it:

"Was the starting of the fire by Casserly the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is, not whether it was a possible consequence, but whether it was probable; that is, likely to occur, according to the usual experience of mankind. That this is the test of responsibility, applicable to a case like this, has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experiences, but only for a consequence which is probable, according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against the injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so. * * * Tried by this test the defendant was not responsible for the consequences of Casserly's act. * * * It was, of course, possible that some careless person might come along and throw down a lighted match where a fire would be started by * * * But it was not according to the usual and ordinary

course of events. In failing to anticipate and guard against such an occurrence or accident, the defendant violated no legal duty which it owed to the plaintiff."

So, in this case, the most that can be said is that a prudent man would have known that it was possible that some one might set the wharf on fire, or throw live coals upon the floating oil, and that as a result of either of these acts the oil might be ignited; but such a succession of events was not probable, and for that reason the prior negligence of the Santa Rita in discharging the oil into the bay cannot be regarded as the efficient or proximate cause of the injury to the Boieldieu.

2. The libellant, however, contends that the negligence of the Santa Rita was concurrent with that of the persons responsible for the burning of the wharf, or the ignition of the oil, and that she was therefore a joint tort-feasor, and so liable for the whole damage. A similar question was presented in the case last cited, and in reply to the contention of the plaintiff there, that the negligence of the defendant in leaving the oil upon the platform of the railroad company was concurrent with the negligent act of Casserly in starting the fire, the court said:

"But this is not a just view of the matter. The negligence of the defendant preceded that of Casserly, and was an existing fact when he intervened."

The same may be said in the present case. The act of the Santa Rita only furnished the condition which, it may be conceded, made the subsequent burning of the wharf more disastrous in its effects; but it did not cause the fire, and the rule which governs is that which was followed in *Lapline v. Morgan's Louisiana & Texas R. & S. Co.*, 40 La. Ann. 761, 5 South. 49, 1 L. R. A. 378, in which case it was held, in substance, that:

"When two causes co-operate to produce the damage resulting from the legal injury, the proximate cause is the originating and efficient cause which sets the other causes in motion."

See, also, *Insurance Company v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395.

It follows, from these views, that the libel must be dismissed, with costs to claimant; and it is so ordered.

FREEMAN v. THE TRADE REGISTER. Inc.

(Circuit Court, W. D. Washington, N. D. October 18, 1909.)

No. 1,276.

1. COPYRIGHTS (§ 26*)—PROCEEDINGS TO OBTAIN—REQUISITES TO VALIDITY.

The law of copyright in the United States is entirely statutory, and all the conditions prescribed are essential and must be observed to give a valid copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 24; Dec. Dig. § 26.*]

2. COPYRIGHTS (§ 27*)—PROCEEDINGS TO OBTAIN—TITLE OF WORK.

The fact that the January number of a monthly periodical called the "Pacific Fisherman," which contained a review of the fishing industry for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the preceding year, bore on the cover the words "Pacific Fisherman Annual," did not necessarily make such words the title of the publication within the meaning of the copyright law, and the depositing instead of the regular title of "Pacific Fisherman," cut from an inner page of the number, was a compliance with Rev. St. § 4956, amended by Act March 3, 1891, c. 565, § 3, 26 Stat. 1107 (U. S. Comp. St. 1901, p. 3407).

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 25, 26; Dec. Dig. § 27.*]

3. COPYRIGHTS (§ 29*)—PROCEEDINGS TO OBTAIN—"TITLE PAGE."

A preliminary page in a periodical which followed advertisements and preceded general reading matter, containing in display type the name of the publication and also the volume, number, and date of the issue, and a copy of which was deposited as the title to obtain copyright protection, must be considered the "title page" within the meaning of Act June 18, 1874, c. 301, 18 Stat. 78 (U. S. Comp. St. 1901, p. 3411), upon which or the page following the copyright notice is required to be printed, rather than a subsequent page containing the title in smaller type but without volume, number, or date, and the printing of such notice on the latter page only was not such a compliance with the express requirement of the statute as will sustain an action for infringement.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 29.*]

In Equity. Suit by Miller Freeman against The Trade Register, Incorporated. On final hearing. Bill dismissed.

Bogle & Spooner, for complainant.

Aust & Terhune, for defendant.

DONWORTH, District Judge. This suit is brought to restrain the circulation and distribution by the defendant of a publication called "The Trade Register Salmon Review.—Season 1904," on the ground that it infringes a copyright. It appears that complainant is the proprietor and publisher of a monthly publication called "Pacific Fisherman," published at Seattle for several years before and since the time mentioned. During the time complained of, it was the only periodical published on the Pacific Coast devoted exclusively to news and information concerning the fisheries. In the year 1904, particularly during the last four or five months of that year, complainant at considerable trouble and expense procured original data relating to the fishing industry on the Pacific Coast, for the purpose of publishing, at the year's close, an extensive annual review containing statistics and other items of interest bearing upon that subject. In order to make this attractive, complainant procured by correspondence and personal application numerous photographs of persons and places appropriate to such a publication. The work was completed and put into circulation toward the close of January, 1905, as a supplement to the regular January issue of the Pacific Fisherman. It contained, among other illustrations, two cuts labeled "Gulf of Georgia Cannery" and "Eagle Harbor Cannery," representing salmon canneries situated in British Columbia; also a cut entitled "Columbia River Fish Wheel," and another entitled "Fishing Scene on the Columbia River." The general illustrations were numerous and interesting, and there were many illustrated advertisements. The work was well printed on paper of good quality,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and, taken altogether, not only afforded important and valuable information, but also constituted a very readable and attractive volume. The defendant for a number of years had been publishing at Seattle a periodical called "The Trade Register," devoted to general business news, and in March, 1905, it issued a supplement headed "The Trade Register Salmon Review.—Season 1904." This supplement contained, as its heading indicated, a review of the salmon fishing industry for the year named, and there were also advertisements and illustrations. The four cuts above mentioned which had been printed in the Pacific Fisherman supplement also appeared in the Trade Register publication, and it is admitted by the defendant that they were actually copied by photographic half-tone process from the pages of the Pacific Fisherman.

The briefs of counsel discuss a number of propositions, but, as the question whether complainant has complied with the copyright laws of the United States lies at the threshold of the case, it must be first decided. Act June 18, 1874, c. 301, 18 Stat. 78 (3 U. S. Comp. St. 1901, p. 3411), enacts:

"That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published on the title page, or the page immediately following, if it be a book, * * * the following words, viz:—'Entered according to act of Congress in the year ———, by A. B. in the office of the Librarian of Congress at Washington' or at his option the word 'Copyright' together with the year the copyright was entered and the name of the party by whom it was taken out, thus:—'Copyright 18— by A. B.'"

Another section of the statute regulating copyrights requires the person applying for the copyright to deliver at the office of the Librarian of Congress, or deposit in the mail addressed to him, a printed copy of the title of the book for which he desires a copyright (Rev. St. § 4956, as amended by Act March 3, 1891, c. 565, § 3, 26 Stat. 1107 [U. S. Comp. St. 1901, p. 3407]). The act also provides that:

"Each number of a periodical shall be considered an independent publication subject to the form of copyrighting as above." Act March 3, 1891, c. 565, § 11, 26 Stat. 1109 (3 U. S. Comp. St. 1901, p. 3417).

The law of copyright in the United States is entirely statutory. All the conditions prescribed by Congress are important and essential and must be observed, or there is no right of action. This has been the uniform holding of the Supreme Court. In *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055, it is said at page 665:

"All the conditions are important; the law requires them to be performed; and consequently their performance is essential to a perfect title. On the performance of a part of them the right vests; and this was essential to its protection under the statute; but other acts are to be done, unless Congress have legislated in vain, to render the right perfect."

This principle has been applied in numerous subsequent decisions. *Banks v. Manchester*, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425; *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547; *Thompson v. Hubbard*, 131 U. S. 123, 9 Sup. Ct. 710, 33 L. Ed. 76; *Higgins v. Keuffel*, 140 U. S. 428, 11 Sup. Ct. 731, 35 L. Ed. 470; *Boucicault v. Hart*, Fed. Cas. No. 1,692; *Parkinson v. Laselle*, Fed.

Cas. No. 10,762; *Pierce Co. v. Werckmeister*, 72 Fed. 54, 18 C. C. A. 431; *Osgood v. A. S. Aloe Co.* (C. C.) 83 Fed. 470.

Defendant urges that there was a failure to comply with the requirement of the statute relating to the depositing of a printed copy of the title of the publication. It contends that the real title of the work is that appearing on the cover, "Pacific Fisherman Annual," whereas the title deposited with the Librarian of Congress was cut from page 19 of the publication, and is an exact reproduction of the top four inches of that page. This contains in large type, occupying the full width of the page, the words "Pacific Fisherman," followed by the words, in smaller type of various sizes, "A Journal Devoted Exclusively to the Fishing Industry.—Volume III.—Seattle, Wash., San Francisco, Cal., and Vancouver, B. C.—January, 1905.—No. 1." I find no merit in defendant's contention on this point. The words on the cover are not the best evidence of the title of the work. In addition to the display heading on page 19, all other pages of the publication have printed in large type across the top the words "Pacific Fisherman"; and there is no question but that the work is a number or part of a number of that periodical, and that the title deposited was the correct one and fulfilled the requirements of the law.

A more serious question now presented is whether complainant has complied with the provision of the statute requiring notice of the copyright to be inserted on the title page, or the page immediately following, of the copyrighted work. This suit is, of course, to be determined without reference to the new copyright act of 1909. The act of 1874 made no distinction between books and periodicals so far as concerns the place for inserting the copyright notice. The work in question contains 106 pages consecutively numbered, besides four pages of paper cover. The cover and the first 18 pages are devoted exclusively to advertisements, embellished, as is customary, with advertising cuts. Page 19 is the first page which contains ordinary reading matter. That page has the display heading or title above described, and this is immediately followed by a descriptive article entitled, "Edible Mollusks of the Pacific," with the name of the writer, the rest of page being occupied by that article. The following pages to and including page 90 are devoted mainly to statistics and descriptive articles treating of the fishing industry and persons and things relating to that subject, with numerous illustrations, although advertisements frequently appear scattered throughout the general matter. The pages from 91 to the end, like the pages at the beginning, are confined to advertising. There are only two pages which can be suggested as being "the title page" of the work, namely, page 19, mentioned above, and page 51. Page 51 carries the same general heading, "Pacific Fisherman," across the top that is carried on every page of the work except page 19. It is divided into two columns. At the head of the left-hand column appear the words "Pacific Fisherman" in type somewhat larger than the general heading at the top of the page, but considerably smaller than the type used for the same words in the display heading on page 19. In the same column, next after the first line, the following is printed in small type: "A Monthly Journal Devoted Exclusively to the Com-

mercial Fisheries of the Pacific Coast." This is followed by ten lines of small type setting forth that the publication has been entered in the Post Office as second-class matter, that it is published on the 1st of each month by the Pacific Fisherman Company at a place named, and stating the terms of subscription, and the names of the editor and manager. Under this is printed, "Copyrighted 1905 by the Pacific Fisherman Company." The rest of that column and a part of the next are occupied by an article of an editorial nature, and this is followed by general reading matter. This notice of copyright is the only one printed in the entire work.

It is to be noted that there is nothing on page 51 indicating the volume or number of the periodical, or the date of the publication. For aught that appears on that page, the publication may belong to any volume or number of the Pacific Fisherman without regard to date. The heading on page 51 fails in essential particulars to set forth the title which had been deposited with the Librarian of Congress, whereas the full and accurate title so deposited appears on page 19.

No doubt it is often difficult to determine what is the title page in publications of this character. A number of the definitions of "title" and "title page" given in dictionaries in common use are set forth in the attached note.¹

It is open to question whether any of the meanings assigned to those words by these authorities is at the same time sufficiently comprehensive and sufficiently exclusive to furnish a legal definition of the idea that Congress intended to convey by their use in the copyright statute. I do not find any adjudged case construing the statute in this particular. There is no doubt that it is the intention of the law that each book shall have a title—that is, some word or set of words by which it shall be known—and that the book shall contain one particular page de-

¹ Century Dictionary. Title, "A prefixed, designating word, phrase or combination of phrases; an initial written or printed designation; the distinguishing name attached to a written production of any kind; as the title of a book, a chapter or section of a book, etc.; the title of a poem. The title of a book in the fullest sense includes all the matter in the title page preceding the author's name or whatever stands in place of it. * * * The title by which a book is quoted, however, is nearly always the shortest form that will serve to designate it distinctively." Title page, "The preliminary page of a book or of a written or printed work of any kind, which contains its full title and particulars as to its authorship, publication, etc."

Webster's International Dictionary. Title, "The inscription in the beginning of a book usually containing the subject of the work, the author's and publisher's names, the date, etc." Title page, "The page of a book which contains its title."

Standard Dictionary. Title, (several definitions, but) "in cataloguing and quoting whatever part of the title page serves for precise identification." Title page, "A page at the front of a literary production containing the title. In books it usually contains the names of author and publisher and date of publication."

Worcester's Dictionary. Title, "An inscription over, or at the beginning of, something, serving as a name by which the thing is known, as the title of a book." Title page, "The page containing the title of a book."

Stormonth's Dictionary. Title, "The inscription at the beginning of a book intimating the subject of the work and usually the author's and publisher's names." Title page, "The first page of a book containing the title."

voted, in whole or in part, especially to the title. This page should be one that is readily found without examining every page in the work. The page embracing the title in that way is "the title page" mentioned in the act. Usually the title page is looked for near the beginning of the work, and most of the dictionary definitions of "title" and "title page" embody that idea. The law, however, does not in express terms specify in what part of the work the title page shall appear, and common usage is certainly an element to be considered. Different classes of publications will present different characteristics, and the law must be reasonably applied to each class. But whatever features may or may not be definitive of the title page, it would seem to be beyond controversy that the title page must be a page which contains the title.

As above noted, the act of 1891 provides that each number of a periodical shall be considered an independent publication, and this may imply that, in copyrighting the successive numbers, either the volume or number or date must be expressed. In the printed instructions sent out by the register of copyrights, this construction is adopted, and it is stated that, "in order to obtain copyright protection for a periodical, it is necessary to apply for the entry of the title of each separate issue distinguished by a statement of the volume, number and date of each issue." Whether the omission of volume, number, and date or any of them in the title deposited with the Librarian of Congress would be a fatal defect, it is not now necessary to decide, because the title deposited by complainant contained those particulars. I think it is plain, however, that when the title so deposited sets forth the volume, number, and date, they are so far essential elements of the title that they cannot be ignored in ascertaining the title page. In cataloguing and quoting, and even in ordinary conversation, either the volume and number or the date of a periodical must be stated, if anything approaching definite identification is desired. Consequently (confining the ruling to the facts of this case) a preliminary page which contains those particulars, and which further displays the general name of the periodical in a way calculated to induce the reader to consider it the title page, is the title page, rather than a subsequent page which prints the general name in smaller type without anything to identify the issue. General information relating to the periodical, such as names of editor and publisher, place of publication and terms of subscription, may be appropriate to the title page, but its presence or absence cannot be considered controlling in this case in view of the other facts above stated.

The president of the defendant, who has been engaged in the publishing business for a number of years, testifies that before copying the illustrations in question he examined complainant's publication for notice of copyright. He confined his examination to the cover and page 19 (which he considered the title page) for a copyright notice on the general work, and looked at the several pages containing the illustrations for copyright notices as to them. He discovered no notice. He did not examine page 51 until the commencement of suit caused him to make a more thorough examination.

Both parties have introduced evidence concerning the usage prevalent among publishers for the purpose of showing what is understood to be the title page, and a large number of periodicals published in the United States, some very well known and others not so well known, have been introduced in evidence or their usage shown. Complainant has produced some eight publications (all trade journals) which print the copyright notice, not on any preliminary page, but on a subsequent page partaking more of the nature of an editorial page, where the name of the publisher, terms of subscription, and similar information are given. However, on examining these publications it is found that, with perhaps one exception, the page on which the copyright notice is printed, contains not only the general name of the periodical, but, in addition, either the volume and number, or the date, of that particular issue. Where this is done, the distinctive title, of course, appears upon that page. These publications, therefore, do not tend to establish a usage in accordance with the treatment of the matter adopted by the complainant.

The foregoing considerations lead to the conclusion that page 19, and not page 51, was the title page of complainant's publication. The only remaining question is whether the requirement that the prescribed notice shall appear upon the title page, or the page immediately following, is so vital that omitting it from those pages, though printing it on another, is a noncompliance with essential conditions imposed by the statute. It is plain that this question must be answered in the affirmative, as otherwise it would be necessary to examine practically all of the pages of a book to ascertain whether or not it be copyrighted. Since Congress has designated the things to be done in order to maintain an action for infringement of copyright, everything prescribed by the act must be done in accordance with its dictates. In *Thompson v. Hubbard*, 131 U. S. 123, 149, 151, 9 Sup. Ct. 710, 719, 720, 33 L. Ed. 76, it appeared that Thompson was the original proprietor of a book which he duly entered for copyright in accordance with the provisions of the statute and obtained a valid copyright, and that he afterwards transferred his rights in the work and copyright to Hubbard. The first edition of the book contained a notice of copyright in accordance with the statute, but afterwards Hubbard changed the form of the notice so that in some editions it read only "Entered according to act of Congress," and in other editions it read only "Copyright 1880." The forms used by Hubbard did not comply with the statute, in that one of the forms did not state either the year in which the copyright was entered or by whom it was entered, while the other form mentioned the year but not the name. Notwithstanding that the acts constituting the alleged infringement were done by the original owner of the copyright, who, of course, had actual notice of the copyrighting, it was held that no action for infringement could be maintained. The court said:

"It is very clear that Hubbard, as the proprietor of the copyright, was bound to give the statutory notice in the several copies of every edition published by him, and that he did not do so. * * * His failure to give such notice debars him from maintaining an action for the infringement of his copyright. The word 'action' means an action either at law or in equity."

The court adds:

"The view is urged that the only object of the notice required by the statute is to give notice of the copyright to the public; and that as Thompson himself took the copyright, and had vested the title to it in Hubbard, he has no right to infringe the copyright, although it may be invalid as to the rest of the world. But we are of opinion that the failure of Hubbard to comply with the statute operated to prevent his right of action against Thompson from coming into existence. This right of action, as well as the copyright itself, is wholly statutory, and the means of securing any right of action in Hubbard are only those prescribed by Congress."

For these reasons I am constrained to hold that the notice printed by complainant in the work now under consideration fails to comply with the requirements of the law. It follows, under the express provisions of the statute, that this suit cannot be maintained.

The bill will be dismissed, with costs.

UNITED STATES v. NEWARK MEADOWS IMP. CO. et al.

(Circuit Court, S. D. New York. October 15, 1909.)

1. CRIMINAL LAW (§ 97*)—JURISDICTION—LOCALITY OF OFFENSE—CRIMES AGAINST UNITED STATES.

A point on the waters of the ocean within a marine league of the coast of New Jersey is within the state by Act N. J. May 17, 1906 (P. L. p. 542), and therefore within the federal district of New Jersey; and under Const. U. S. art. 3, § 2, and the sixth amendment, a criminal offense against the laws of the United States committed at such point can only be prosecuted in that district.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 177-191; Dec. Dig. § 97.*]

2. CRIMINAL LAW (§ 97*)—JURISDICTION—LOCALITY OF OFFENSE—HARBORS—DEPOSITS OF REFUSE—FEDERAL STATUTE.

Under Act June 29, 1888, c. 496, 25 Stat. 209, as amended by Act Aug. 18, 1894, c. 299, § 3, 28 Stat. 360 (U. S. Comp. St. 1901, p. 3534), which makes it a criminal offense to dump refuse in the tidal waters of New York Harbor within prescribed limits, or to deviate from the dumping grounds specified in a permit granted thereunder, an offense is not committed until refuse is dumped in some prohibited place, and such place fixes the locus of the crime and the venue for its prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 177-191; Dec. Dig. § 97.*]

3. STATES (§ 12*)—BOUNDARIES—EXTENSION INTO OCEAN WATERS.

A state bordering on the sea may, in the exercise of its sovereignty, extend its own borders for the distance of one marine league from low-water mark, and make the region so annexed as much a portion of the state as any other part of its territory.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 6-11; Dec. Dig. § 12.*]

4. WORDS AND PHRASES—"MAIN SEA"—"HIGH SEA."

"Main sea" and "high sea" are synonymous.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4277; vol. 4, pp. 3287, 3289.]

5. WORDS AND PHRASES—"HIGH SEAS."

The term "high seas" includes waters on the seacoast and without the boundaries of low-water mark.

Demurrer to an indictment of the Newark Meadows Improvement Company and others for illegally dumping "two pockets of mud" into the "tidal waters of the lower bay of the New York Harbor and its adjacent waters" at a place $2\frac{1}{4}$ miles from the Sandy Hook shore and one-quarter of a mile east-southeast of the inner South Channel Buoy. Demurrer sustained.

William S. Ball, Asst. U. S. Atty.

Thomas D. Thacher, for defendants.

HOUGH, District Judge. This indictment is framed under Act June 29, 1888, c. 496, 25 Stat. 209, and Act Aug. 18, 1894, c. 299, § 3, 28 Stat. 360 (U. S. Comp. St. 1901, p. 3534), and the place of dumping accurately specified, confessedly in order to test on demurrer the jurisdiction of this court. Said place so described is within a marine league of that portion of the coast of New Jersey known as Sandy Hook. The point on Sandy Hook nearest the dumping place is within the national military reservation containing Ft. Hancock. Admittedly, however, the cession of Sandy Hook by New Jersey to the United States does not prevent such military reservation from being within and territorially a portion of the state of New Jersey. *Hamburg-American S. S. Co. v. Grube*, 196 U. S. 407, 25 Sup. Ct. 352, 49 L. Ed. 529; *Middleton v. Compagnie Générale*, 100 Fed. 866, 41 C. C. A. 98. Cf. *Beekman v. Railroad Co.* (C. C.) 35 Fed. 3.

The demurrer, therefore, asserts that this indictment lays the crime as committed within the territorial limits of the state of New Jersey, and therefore of the district of New Jersey (Rev. St. § 531 [U. S. Comp. St. 1901, p. 316]), from which it follows that this criminal prosecution must not be brought in New York, but before "an impartial jury of the * * * district wherein the crime" was committed (Const. Amend. 6; also article 3, § 2), viz., the district of New Jersey. Most shortly stated, therefore, the question presented is whether a point on the waters of the ocean within a marine league of the coast of New Jersey is within that state, and consequently that federal district.

Under the statutes authorizing this prosecution, it has been suggested (though not urged in this case) that the crime consists in the "deviation" from the dumping or discharging place specified in the permit issued by the supervisor of New York Harbor. Act Aug. 17, 1894, Supp. Rev. St. (2d Ed.) p. 249. But this act must be read in conjunction with the earlier act of June 29, 1888, *supra*; and from that statute it appears to me to be plain that the crime set forth in this indictment is not only not complete, but is not committed, until forbidden matter shall have been "placed, discharged or deposited" in the "tidal waters of the harbor of New York or its adjacent or tributary waters." The crime is committed where the scow is dumped.

It might also be attempted to draw a distinction between a point on the surface of the ocean and the land under water at the same point. Without considering whether any such distinction can be drawn under accepted doctrines of international law, it seems entirely clear that these statutes proscribe as a crime the "placing, discharging or deposit-

ing" of forbidden matter in tidal waters, and it is therefore quite immaterial whether by action of tide or current the unlawfully discharged matter is, before reaching bottom, carried to a place not within the waters described in the act.

The indictment alleges that the Southern district of New York is the one in which defendants herein "were found and into which they were first brought and apprehended for the offense" charged. This means that Rev. St. § 730 (U. S. Comp. St. 1901, p. 585), is deemed applicable, and involves the assertion that the offense here charged was committed "upon the high seas or elsewhere out of the jurisdiction of any particular state or district."

It is not denied that, in so far as it is competent for the state of New Jersey to embrace within its territorial limits a marine league of ocean, such annexation of territory has taken place. Act N. J. May 17, 1906 (P. L. p. 542). By this statute the place described in the indictment is clearly within not only the state of New Jersey, but also within the county of which Sandy Hook is a part.

For some purposes, however, the point or place in the indictment set out is within the harbor of New York; that is, within the line from Navesink Lighthouse to Scotland Light, thence to the Whistling Buoy in Gedney's Channel, and thence to Rockaway Point, prescribed by the Secretary of the Treasury as the limits of the waters of the harbor of New York pursuant to Act Feb. 19, 1895, c. 102, 28 Stat. 672, Supp. Rev. St. (2d Ed.) p. 381 (U. S. Comp. St. 1901, p. 2899). This legislation, however, was for the purpose of delimiting the inland waters of the United States, in order to inform navigators where the inland rules of navigation, as distinguished from the international rules, become applicable. It does not purport to change the boundaries of any federal district, nor enlarge the jurisdiction of any particular federal court; and it is obviously beyond the power of Congress directly or indirectly to enlarge or narrow the territorial limits of New Jersey.

By convention between New York and New Jersey the boundary line between the states runs "through the center of Raritan Bay to a point between Sandy Hook and Coney Island, as the same is shown on a map filed with the Secretary of State and dated October 12, 1877, thence easterly to the main sea." Consol. Laws N. Y. c. 57, § 7. As this line is distinctly north of the dumping place specified in the indictment, it is not contended that the dumping occurred within the territorial jurisdiction of the state of New York, or any federal district thereof. But the curious condition exists that by convention or agreement between New York and New Jersey the boundary line between them terminates at the "main sea," yet "main sea" and "high sea" are synonymous (*United States v. Grush*, 26 Fed. Cas. 48; *Johnson v. 21 Bales*, 13 Fed. Cas. 855; *United States v. Smith*, 27 Fed. Cas. 1166); and "high seas" include waters on the seacoast without the boundaries of low-water mark (*De Lovio v. Boit*, 7 Fed. Cas. 428; *United States v. Ross*, 27 Fed. Cas. 899).

It follows that New Jersey has by the act above referred to extended (or declared) its boundaries so as to include therein a space one marine league in width beyond the point at which, when convention was made

with New York, its territory terminated or was thought to terminate. Can this lawfully be done? In *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248, it was held that each state owns the bed of all tide waters within its jurisdiction, and that similarly the states own the tide waters themselves. In *Manchester v. Massachusetts*, 139 U. S. 240, 258, 11 Sup. Ct. 559, 562, 35 L. Ed. 159, the court citing the case just referred to, declared that it must be regarded as established that as between nations the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast. Both from the language quoted and from the nature of the decision in the *Manchester Case*, it seems to me to follow that New Jersey may, in the exercise of its sovereignty, extend its own borders for the space of one marine league from low-water mark and make the region so annexed as much a portion of the state as any other part of its territory.

That the territorial jurisdiction of the United States extended a marine league from the coast of New Jersey was asserted by the trial court and approved by the Supreme Court in *Wiborg v. United States*, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289. (It is curious to note that this holding was made and approved before the New Jersey act of 1906.) The existence of territorial jurisdiction (which must imply territorial ownership) is also asserted under various circumstances in the following cases: *Bigelow v. Nickerson*, 70 Fed. 113, 7 C. C. A. 1, 30 L. R. A. 336; *United States v. Smiley*, 6 Sawy. 640, Fed. Cas. No. 16,317; *The Ann*, 1 Call. 62, Fed. Cas. No. 397; *Humboldt Lumber Mfg. Ass'n v. Christopherson*, 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264.

It seems to me to follow, from the rulings and statutes cited, that the state of New Jersey may extend and has extended its limits to and beyond the place where the alleged crime was committed. That place is on the high seas, or the main sea; but (entirely apart from constitutional provisions) that fact alone is not enough to render applicable Rev. St. § 730, for under that act, in order to give this court jurisdiction under the circumstances shown, the offense must have been committed, not only upon the high seas, but "out of the jurisdiction of any particular state or district." But, if that portion of the high seas which lies within a marine league of a nation's coast may be territorially appropriated by such nation, then such portion is within a "particular state or district."

This conclusion does not lessen or interfere with the national jurisdiction in admiralty. Admiralty causes may be promoted wherever the res or respondent is found and seized or served. A remedy in admiralty might have been given for the offense of illegal dumping; but this proceeding has no relation to admiralty. It is strictly criminal, and the place where the crime was committed governs jurisdiction. This alleged crime was committed in New Jersey.

Demurrer sustained.

In re ABRAMS & RUBINS.

(District Court, S. D. New York. October 25, 1909.)

1. BANKRUPTCY (§ 384*)—COMPOSITION—REMEDY OF CREDITOR NOT INCLUDED.

After a composition in bankruptcy has been confirmed, the court has no power by order to require the bankrupt to pay the composition percentage to a creditor whose claim was not scheduled nor filed; his only remedy being to procure the setting aside of the composition for fraud.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 592; Dec. Dig. § 384.*]

2. BANKRUPTCY (§ 387*)—COMPOSITION—RIGHTS OF CREDITOR NOT INCLUDED.

Except in case of fraud, a creditor of a bankrupt, who, knowing his debt is not scheduled, neglects to file his claim, takes the risk that a composition may be made and confirmed without his being included.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 611; Dec. Dig. § 387.*]

In the matter of Abrams & Rubins, bankrupts. Motion by creditor to be included in composition overruled.

Frank P. Nohowel, for petitioning creditor.

H. & J. J. Lesser, for bankrupts.

HAND, District Judge. In this case it is quite clear that I cannot grant the relief, asked for in the petition; i. e., that the bankrupts pay the same proportion of their debt to the petitioners that he has paid to others. No such relief is known, and it would upset all compositions, were I to grant it now. The petition, however, may be reformed as a petition to reopen the composition, if the petitioner wishes it to stand as such.

To set aside a composition once confirmed, I must find that it was procured by fraud; for that is the only ground allowed by the statute (section 13). There are in this case only two possible sources of fraud: First, that the bankrupts omitted the claim in bad faith, knowing that it had some validity; and, second, that they deceived the petitioner into supposing that he need not file his proof of claim until he actually did, and that he could still come into the composition, all the while hurrying through the composition so as to exclude him. If the petitioner wishes a reference on either or both of those issues, I will grant it, and upon proof of either I will set aside the composition, at least to the extent of preventing the bankrupts' taking advantage of it as a discharge.

It will be quite enough for the purpose to show that the bankrupts' attorneys, while the composition was being put through, kept assuring the petitioner that there was no haste, and that he would be included in the composition. Even if such assurances are to be construed as no more than agreements, yet they would clearly be fraudulent; for they would be made with a deliberate determination at the time not to fulfill them. Whatever may be the rule in the state courts, in this court such a representation is a fraud. While the answering affidavits do not seem to deny the charges in the petition, the issue is serious, and, if the bankrupts wish to dispute it, I will give them the chance.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Except in the case of fraud, it is quite clear that one who knows he is not included in the schedules takes his own risk of a composition being made and confirmed without his being included. *Re Rudnick* (D. C.) 93 Fed. 787, 2 Am. Bankr. Rep. 114.

If a reference is made, it will also include the determination of the validity of the claim, as well as of the issue of fraud. Any creditor may intervene.

HAZLE v. SOUTHERN PAC. CO.

(Circuit Court, D. Oregon. October 16, 1909.)

No. 3,414.

1. RAILROADS (§ 394*)—INJURY TO PEDESTRIAN—ACTIONS—PLEADING—ALLEGATION OF WILLFUL AND WANTON INJURY.

A complaint in an action against a railroad company to recover for an injury to plaintiff by being struck by an engine while crossing defendant's track by a footpath used generally by the public, which alleges that defendant's servants "wantonly and willfully and with gross negligence failed and omitted to keep any lookout from said locomotive or give any signal while approaching said crossing," is insufficient to charge willful and wanton negligence, the use of such words being insufficient to legally characterize the acts of defendant unless the requisite facts are set forth in connection therewith.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 394.*]

2. NEGLIGENCE (§ 11*)—"WILLFUL."

A "willful" act is one that is done knowingly and purposely, with the direct object in view of injuring another.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 13; Dec. Dig. § 11.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7468, 7481, 7835, 7836.]

3. NEGLIGENCE (§ 11*)—"WANTON NEGLIGENCE."

Wanton negligence consists in a heedless and reckless disregard for another's rights, with the consciousness that the act or omission to act may result in injury to that other.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 13; Dec. Dig. § 11.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7385, 7832.]

Action by D. W. Hazle against the Southern Pacific Company. Demurrer to complaint overruled.

R. G. Smith, E. Kelley, and John A. Jeffrey, for plaintiff.

W. D. Fenton, R. A. Leiter, Ben C. Dey, and James E. Fenton, for defendant.

WOLVERTON, District Judge. The question is presented here, by a demurrer to the complaint, whether the defendant was guilty of willful and wanton negligence in running its locomotive upon the plaintiff and injuring him, for which injury he claims damages. The complaint shows that a pathway crosses the track of defendant's road within the boundaries of the city of Medford, which is and has

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been used by the public for more than 10 years last past; and there-upon it proceeds as follows:

"That on the 5th day of October, 1908, the plaintiff, while crossing the railway track of the defendant at said crossing, was wantonly and willfully struck and knocked down by one of locomotives of the defendant, and his right foot and ankle and leg crushed, broken, and bruised, and divers other wounds and bruises inflicted upon the body of plaintiff through the willful and wanton negligence and carelessness of the defendant, its agents, servants, and employes, who wantonly and willfully, and with gross negligence, failed and omitted to keep any lookout from said locomotive or give any signal while approaching said crossing and the plaintiff, or warn the plaintiff by ringing a bell or blowing a whistle, or by flagman or otherwise, that it was dangerous or unsafe to cross by reason of the approach of said locomotive."

There are two ways in which willful and wanton injury may be made to appear: First, by an intentional act done with a purpose and design of doing the wrong or inflicting the injury ensuing. The doing of such an act the law denominates willful—that is, done knowingly and purposely, with the direct object in view of injuring another; and, second, by a reckless indifference or disregard of the natural consequence of doing an act or omitting to do an act, which is by some authorities denominated wanton negligence.

"In wanton negligence," it is said, "the party doing the act or failing to act is conscious of his conduct, and, without having the intent to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury." *Birmingham Railway & Electric Co. v. Bowers*, 110 Ala. 328, 20 South. 345.

Such negligence consists in a heedless and reckless disregard for another's rights, with the consciousness that the act or omission to act may result in injury to that other.

Now, if the present complaint be measured by these definitions, it will be found insufficient to charge willful and wanton negligence. However many times the words "willful" and "wanton" may be used, they do not legally characterize the acts of the defendant as willful and wanton unless the requisite facts are set forth in connection therewith to make them so in fact; otherwise, the charge amounts to no more than a legal conclusion. To say that defendant, its agents, servants, and employes, wantonly and willfully, and with gross negligence, failed and omitted to keep a lookout or to give a signal while approaching the crossing and plaintiff, or to warn plaintiff by ringing a bell or blowing a whistle, comes signally short of charging that defendant intentionally and purposely ran its engine upon plaintiff, or, being conscious that plaintiff might be injured, recklessly and heedlessly ran its engine upon the crossing regardless of results. The complaint is therefore insufficient upon this theory of the case. See *Birmingham Railway & Electric Co. v. Bowers*, *supra*; *Louisville & Nashville Railroad Co. v. Anchors*, Adm'r, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116; *Ivens v. Cincinnati, Wabash & Michigan Railway Company*, 103 Ind. 27, 2 N. E. 134; *Chicago & Eastern Illinois R. R. Co. v. Hedges*, Adm'x, 105 Ind. 398, 7 N. E. 801.

I am of the opinion, however, that the complaint does state facts sufficient to constitute simple negligence, and the demurrer will, for this reason, be overruled.

ERBAUGH v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 1, 1909.)

No. 3,053.

1. POST OFFICE (§ 35*)—FRAUDULENT USE OF MAILS—STATUTES—CONSTRUCTION—INTENT TO EFFECT SCHEME BY CORRESPONDENCE WITH ONE'S SELF NO OFFENSE.

One who devises a fraudulent scheme, to be effected by opening or intending to open a correspondence or communication with himself by means of the post office establishment of the United States, is guilty of no offense punishable under section 5480, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3696).

A fraudulent scheme, which the deviser intends to effect by either opening or intending to open a correspondence or communication with some other person by means of the post office establishment, or by inciting some other person to open communication with him, is essential to the offense.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

2. STATUTES (§ 241*)—CONSTRUCTION—PENAL STATUTE INCLUDES PARTIES WITHIN ITS EXPRESS TERMS ONLY.

A penal statute, which creates and prescribes the punishment for a new offense, must be strictly construed.

One who was not beyond reasonable doubt by the express terms of the statute within the class of those punishable thereunder may not be brought within it after the event by interpretation.

Ex post facto law by judicial construction is as pernicious as ex post facto legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 322-323; Dec. Dig. § 241.*]

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Colorado.

Charles O. Erbaugh was convicted of using the mails to defraud, and brings error. Reversed and remanded.

Caesar A. Roberts and Henry J. O'Bryan, for plaintiff in error.

Ralph Hartzell, Asst. U. S. Atty., and Thomas Ward, Jr., U. S. Atty.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. The complaint in this case is that the defendant below was convicted and sentenced for using the mails to defraud, in violation of section 5480 of the Revised Statutes (3 U. S. Comp. St. 1901, p. 3696, Act June 8, 1872, c. 335, 17 Stat. 323, as amended by Act March 2, 1889, c. 393, § 1, 25 Stat. 873).

There are many specifications of error, but the most serious one is that the defendant's motion for arrest of judgment upon the ground that the indictment charged no offense was denied, and he was sentenced for devising a fraudulent scheme to be effected by intending to open and opening a correspondence with himself by means of the post

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 173 F.—28

office establishment, when the only offense denounced by the statute is devising a fraudulent scheme to be effected, either by opening or intending to open correspondence with some other person by means of the post office establishment, or inciting such other person to open communication with him. The statute, so far as material here, reads:

"If any person having devised or intending to devise any scheme or artifice to defraud, * * * to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the post office establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do," mail any letter or receive any letter from the mail, he shall, upon conviction, be punishable by a fine or imprisonment, or both.

The gravamen of this offense is not the intended or perpetrated fraud, but the intended use of the post office establishment of the United States to perpetrate the fraud. The charge in the indictment was that the defendant had devised a scheme to defraud which he "intended to effect by opening correspondence with himself under an assumed and fictitious name by means of the post office establishment of the United States," and that he assumed a false name and caused letters to be written, to be signed by that name, to be sent to and received by himself through the post office establishment for the purpose of carrying out his scheme to defraud.

The act forbidden by the statute is not the deposit in or the receipt from the Post Office Department of the United States of a letter or circular for the purpose of executing a fraudulent scheme, as in section 215 of the Criminal Code (Act March 4, 1909, c. 321, § 215, 35 Stat. 1130). It is the intent to effect the scheme to defraud by either opening or intending to open correspondence or communication with any person by means of the mails, or by inciting such other person or any person to open communication with the schemer.

The obvious and common meaning of opening or intending to open correspondence with a person imports distance between him who opens or intends to open it and his intended correspondent, which renders the use of the mails convenient or necessary, and that his correspondent is some other person than himself, for one cannot open communication with himself by means of the post office establishment by writing and sending letters to himself through the mails, because the communication with himself in such a case must necessarily be opened and intended to be opened when the letter is written and before it is mailed. The clause in this section of the statute, "or by inciting such other person or any person to open communication with the persons so devising or intending," clearly indicates that the person mentioned in the preceding clause, with whom the deviser opens or intends to open correspondence, is to be such "other person" and not himself.

In 1894 in *Stokes v. United States*, 157 U. S. 187, 188, 15 Sup. Ct. 617, 618, 39 L. Ed. 667, the Supreme Court declared that there were three matters of fact which must be charged in the indictment and established by the evidence under this statute, and that the second of these was that the persons charged "must have intended to effect this

scheme by opening or intending to open correspondence with some other persons through the post office establishment, or by inciting such other persons to open communication with them," and this proposition has been sustained without dissent by the opinions and the practice of the courts. *United States v. Long* (D. C.) 68 Fed. 348, 349; *Milby v. United States*, 109 Fed. 638, 640, 641, 48 C. C. A. 574; *United States v. Post* (D. C.) 113 Fed. 852, 853; *Horman v. United States*, 116 Fed. 350, 351, 53 C. C. A. 570; *Stewart v. United States*, 119 Fed. 89, 93, 55 C. C. A. 641; *Ewing v. United States*, 136 Fed. 53, 54, 69 C. C. A. 61, 62; *Brown v. United States*, 74 C. C. A. 214, 216, 219, 143 Fed. 60, 62, 65; *Rumble v. United States*, 143 Fed. 772, 776, 75 C. C. A. 30; *United States v. Smith* (D. C.) 166 Fed. 958, 960.

Counsel for the United States, in support of their contention that the intent to effect the scheme by opening correspondence with one's self constitutes an offense within the meaning of this statute, cite *Weeber v. United States* (C. C.) 62 Fed. 740, 741, and *United States v. Ryan* (D. C.) 123 Fed. 634. The opinion in the latter case is founded upon the decision in the *Weeber Case*, and a perusal of the indictment in the *Weeber Case*, which does not appear in the report, has disclosed the fact that it expressly charged that the defendant intended to effect his scheme by opening correspondence and communication by means of the post office establishment with another person, and the opinion of Mr. Justice Brewer shows that the defendant was charged with using the post office establishment to open a correspondence with one Stevens, or to incite the latter to open a correspondence with him. The question presented in this case was not at issue in the *Weeber Case*, was not presented to the court that decided that case, and it was not suggested to the minds of the judges who participated in its consideration. The decision in that case neither rules nor purports to rule the question under consideration here.

The offense denounced by section 5480 was created by that statute, the punishment it prescribes is severe, and a penal statute which creates and denounces a new offense should be strictly construed. The definition of the offense and the classification of the offenders are legislative, not judicial, functions, and one who was not beyond reasonable doubt within the class declared punishable by the expressed will of Congress may not be brought within that class after the event by interpretation. Ex post facto law by judicial construction is as pernicious as ex post facto legislation. *United States v. Wiltberger*, 5 Wheat. 77, 96, 5 L. Ed. 37; *United States v. Germaine*, 99 U. S. 508, 510, 25 L. Ed. 482; *Martin v. United States* (C. C. A.) 168 Fed. 198, 202, 203; *Field v. United States*, 137 Fed. 6, 8, 69 C. C. A. 568, 570; *United States v. Clayton*, Fed. Cas. No. 14,814; *In re McDonough* (D. C.) 49 Fed. 360; *United States v. Lake* (D. C.) 129 Fed. 499.

At the time when the defendant is alleged to have committed the acts for which he was sentenced, the common and natural meaning of the terms of this section 5480, and the uniform judicial interpretation of it for many years, limited the class punishable under it to those who intended to effect their fraudulent schemes either by opening or by intending to open correspondence or communication with some

other person or persons by means of the post office establishment of the United States, or by inciting such other person or persons to open communication with them. This was the true interpretation of this law, and the averments in the indictment that the defendant intended to effect his scheme by opening correspondence or communication with himself by means of the post office establishment failed to bring his case within this statute and charged no offense against him.

The judgment below must accordingly be reversed, and the case must be remanded to the District Court, with directions to grant the motion in arrest of judgment, to set aside the verdict, to quash the indictment, and to discharge the defendant; and it is so ordered.

THE EDDA.

(Circuit Court of Appeals, First Circuit. October 21, 1909.)

No. 806.

1. COLLISION (§ 49*)—STEAM AND SAILING VESSELS—SUITS FOR DAMAGES—RULES OF EVIDENCE.

The rule of evidence applied, in cases of collision between sailing vessels, where the evidence is conflicting, that it is more probable that one vessel fell off from her course than that the other changed her course many points, applies with less force to a collision between a sailing vessel and a steamer.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 55; Dec. Dig. § 49.*]

2. COLLISION (§ 49*)—STEAMER AND SAILING VESSEL MEETING—EVIDENCE CONSIDERED.

A decree of the trial court affirmed which found that a collision in Vineyard Sound, on a clear evening, between a schooner and a steamer meeting, was due solely to the fault of the schooner in deviating from her course to one across that of the steamer.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 55; Dec. Dig. § 49.*]

Appeal from the District Court of the United States for the District of Massachusetts.

Suit by the Coastwise Transportation Company, as owner of a schooner, against the steamship Edda, Christopher P. Meidell, claimant, for collision. Decree for respondent, and libellant appeals. Affirmed.

Edward F. Blodgett (Blodgett, Jones & Burnham, on the brief), for appellant.

Edward S. Dodge and Benjamin Thompson, for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This is a question of collision in Vineyard Sound between a steamer and a sailing vessel, in the evening, clear, but yet, of course, such as to compel each vessel to rely on the lights within range. The testimony from each is directly contradictory,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

both as to the courses and the lights, without any clear proof from either where the collision occurred. The only two established propositions are that the steamer was running in a westerly direction, leaving the gas buoy near the eastern end of Hedge Fence on her port, and that the sailing vessel changed her course at Nobska Light, and from there steered in an easterly direction. With reference to everything else, any determination of the courses pro or con would not assist the determination of the bearings of the lights of the two colliding vessels. Neither would a determination of the latter assist a determination of the former. In other words, the proofs from each vessel involve inevitably questions of both courses and lights. The determination, with any accuracy, of the place of collision, might enable us to work back to the determination of the other issues; but the place of collision we cannot fix with any certainty.

The ultimate question is whether the sailing vessel held her course or swung around some five to six points, bringing her into collision with the steamer at almost right angles, or whether the change of course was on the part of the steamer. It would clearly have been on the part of the steamer, if she had voluntarily headed towards Squash Meadow, where she finally sunk; but her testimony is that she was brought up on Squash Meadow some time after the collision by the action of the wind and the currents. The parties have not solved the case, but have simply arrayed witnesses against each other. We find some circumstances which discredit the case of the steamer, and we find other circumstances, to some of which we will refer, which strengthen it, and the conclusion in her favor reached by the District Court.

The schooner urges anew on us, with persistency, the proposition that it is exceedingly improbable that she should have swung off from her course so many points as are involved in the claim that she was in fault. She calls our attention to the fact that we have several times observed on this, especially in *The Metamora*, 144 Fed. 936, 940, 75 C. C. A. 576, decided February 21, 1906. It is true we agree that, as between two sailing vessels, it is much more probable that one of them will fall off from her course than that the other will swing many points therefrom. Nevertheless, this is only one element, and it applies with less force to a collision between a steamer and a sailing vessel. In the case of a steamer there is no question of falling off; and the inherent improbability to be applied to the present case is quite as great with the one as with the other. We see nothing of this character sufficient to guide us safely between the parties here.

It is also claimed by the schooner that she was sailing with her booms well off on the starboard side, and that, if she had changed her course to starboard, as claimed by the steamer, her sails would have been taken aback and jibed over. They did jibe over, but whether before or after the collision cannot be ascertained from this record with any degree of certainty.

The counsel for the schooner also comment on the lack of qualification and the youth of the steamer's lookout, and call attention to the fact that he admits that he did not know the points of the compass.

The opposing counsel, as well as the learned judge of the District Court, commented on, and criticised as effectively, the schooner's lookout; and the criticism made of the latter might have been even more vigorous than it was. This lookout says that, when the steamer "made a dash across," he saw the red light, but that he did not see it until then. Yet the theory of the schooner was red to red all the time until the steamer made her alleged change of course. Probably, if the case of either vessel depended on the qualifications of the lookout, one would neutralize the other.

The schooner relies especially on a drawing made on a United States chart of the locality in question, from which she maintains that the courses claimed by the steamer were impossible. If these had been laid down by an expert, they might have given us some light; but a rule of thumb drawing like this is of no value in a case where a dispute about courses involves margins so narrow as those here.

Her counsel also comment on the proposition that the steamer was not navigating on the starboard side of the channel. Neither what is the channel, nor the relations thereto of either vessel, is sufficiently established to enable us to apply this proposition with any satisfaction.

Also, as to a claim that the steamer was at fault for attempting to cross the bow of the schooner, this is merely begging the whole case. If, on the other hand, the claim had been made in a suitable manner in the District Court that under the twenty-third article, or under the twenty-ninth article, the steamer, when, as she says, she saw the schooner swinging, should have slackened her speed, or stopped, or reversed, it may be that we would have held that the collision could thus have been avoided. We might, therefore, have held that there was mutual fault. But no such proposition is before us, or can arise on the record as made in the Circuit Court, or under the assignment of errors filed in connection with taking this appeal.

On the other hand, we think that the testimony of Capt. Cooper referred to by the District Court essentially determines the case in favor of the steamer. He was a skilled mariner, and on the night of the collision was second officer of the towboat Carlisle. The position of the Carlisle requires some explanation. A tow of three barges was heading easterly on the southerly side of the channel. The schooner was sailing easterly on a course parallel, or approximately so, to that of this tow. The Edda was, as she claims, heading westerly on a course which took her between the tow on the south and the schooner on the north. The Carlisle was heading easterly through the lane between the tow of three barges on her starboard and the steamer on her port. Cooper was on the watch at the window of her pilot house using his glasses. He was the only witness who had a correct perspective. In other words, he was like one who, at one end of a piece of highway, looks down through the center of the highway, and can thus arrange the order of what is approaching thereon. His testimony is clear and unshaken upon two points, either of which is important, and one of which is quite determinative. He saw the Edda coming down, contrary to the theory of the schooner, between the schooner on her starboard and the tow on her port, and he saw the

schooner swing on her course, with the collision immediately following. In view of what we have stated, aside from the testimony of Cooper, it would be impossible for us to satisfy ourselves that we could reach a conclusion which would approve itself to us better than that of the learned District Judge; and, with the testimony of Cooper, we feel that the burden preponderates in favor of the steamer.

The schooner appealed against a determination of a question of costs which was in accordance with our decision in *The City of Augusta*, 80 Fed. 297, 303, 304, 25 C. C. A. 430, an opinion passed down in 1897.

The decree of the District Court is affirmed, with interest and costs in both courts.

NOTE.—The following is the opinion of Dodge, District Judge. In the court below:

DODGE, District Judge. The libellant is owner of the four-masted schooner *Sagamore*, of Boston. It claims compensation for damage to her in a collision with the Norwegian steamship *Edda*, at about 8 o'clock in the evening of May 11, 1907, off East Chop, in Vineyard Sound. The schooner, loaded with coal, was bound eastward, for Boston. The steamer was bound westward, for Newark, N. J., with a cargo of plaster rock.

The *Edda* has, of course, the burden of showing why she did not keep clear of the schooner. She undertakes to show that she was prevented from doing so by failure on the schooner's part to hold her course.

The *Sagamore* was the larger vessel of the two. Her length over all was 225 to 230 feet, her breadth of beam 44 feet, her draft over 20 feet, and she was of 1,280 tons burden. The *Edda*'s dimensions were 241 feet length, 34 feet beam, she was drawing not over 16 feet, and her tonnage was 1,138 gross, 699 net. The *Sagamore* carried 10 men all told; the *Edda*, 14.

Notwithstanding that the *Edda* was a steam vessel, the *Sagamore* was moving at the greater speed. With nearly all sail set, she was heading, after passing Nobska, on her own evidence, southeast by east, having the wind on her port quarter, and her booms on her starboard side held off by boom tackles. The tide was running to the southward and eastward, and with her rather than against her. On her own evidence, the allegation of her libel that her speed was nine knots understates rather than overstates it. Most of her witnesses put it at between nine and ten knots. According to the *Edda*'s evidence her speed was from seven to eight knots, and in this particular there seems no attempt to controvert her evidence.

Both parties have regarded the place of collision as in a "narrow channel," and the *Edda* was required by article 25 of the sailing rules (U. S. Comp. St. 1901, p. 2891), to keep to the northern side of mid-channel, that being the side which lay on her starboard side in passing through. One charge of fault made against the *Edda* in the libel is that she was "not navigating on the starboard side of the channel" (article 3). According to the libel, the *Sagamore*'s course through the channel was southeast by east, and was "a little on the starboard side of the center of the channel"; the *Edda*, when first seen, and up to a time "when the vessels approached close to each other," was at all times on the schooner's port bow, showing the schooner her red light only; her green light was shown to the schooner for the first time when the vessels were close to each other; and she then ran directly across the schooner's bow. It is further alleged in the libel that by the collision which followed the schooner was thrown around toward the southern side of the channel, immediately anchored to avoid collision with a barge, and sank, while so at anchor, "nearly in mid-channel." There is no distinct allegation that the *Edda* was violating article 25 before she showed the schooner her green light, and the allegations referred to render it so difficult to suppose that she could have been much to the southward of mid-channel previous to that time that the charge of violating article 25 might be taken as referring only to her navigation afterward.

If the schooner's course was only a little to the southward of mid-channel, the Edda's original course must have been less so. If the schooner sank nearly in mid-channel, the place of collision could not have been further south than where she sank, and the Edda must have been further north than the place of collision before she showed the schooner her green light.

The channel referred to lies between Hedge Fence Shoal on the north and East Chop and Squash Meadow Shoal on the south. What should be regarded as its northern and southern limits, respectively, for the purposes of this case, is in dispute. There can be no dispute about the position in it of the schooner after she sank. It is fixed by a buoy afterward placed near the wreck and marked on the Coast Survey chart. It is somewhat to the southward of mid-channel, if the channel be regarded as including the whole distance between the buoy off East Chop and the nearest point of Hedge Fence Shoal as shown on the chart. It is, however, not further to the southward of mid-channel than I think the schooner must have gone in that direction after the collision, on the evidence relating to that question. The testimony from the Edda is that she entered the channel by passing to the northward of the gas buoy off the eastern end of Hedge Fence Shoal, and that she did so does not appear to be seriously questioned. If so, and if the place of collision was not south of mid-channel, as I think it could not have been, my conclusion must be that the Edda's course before the collision did not violate article 25, whatever be taken as the boundaries of the channel. As will appear, she admits having starboarded her helm to avoid the schooner. Whether she ought to have ported it instead, in view of article 25, or for any reason, is a different question.

The conflict upon which the case really turns is that which exists between the differing accounts of the approach of the two vessels given in the libel and in the answer. The libel, as has been stated, puts the Edda on the schooner's port bow, showing the red only of her two sidelights, until the vessels are at close quarters, and charges her with then bringing about collision by a sudden change of course to port under a starboard helm, such as to run her across the schooner's bow. According to the answer, the Edda had the schooner during this time on her starboard bow, and except for a short period after she was first sighted during which both her lights were visible, showing the green light only, and the vessels would have passed each other starboard to starboard, had not the schooner prevented it by swinging to starboard directly toward the Edda under a port helm, showing both lights, until she struck the Edda's starboard side somewhat aft of amidships. Both parties agree that the Edda's starboard side was struck by the schooner about amidships.

The conflict between these two accounts is irreconcilable. If the Edda bore over the Sagamore's port bow, and her red light only was there visible, she could not possibly have had the Sagamore over her own starboard bow showing a green light only. The acceptance of either account as true involves the conclusion that the witnesses who support the other are either falsifying or mistaken. According to the witnesses from the Edda, the vessels would have passed each other starboard to starboard, had not the schooner made her change of course to starboard, and according to the schooner's witnesses the vessels would have passed each other port to port without collision, but for the change of course to port by the Edda. A conflict of testimony of this type is not uncommon in collision cases, when the vessels have approached each other on nearly opposite parallel courses. In such cases the witnesses from each vessel are not infrequently found to locate the other over the bow of their own vessel opposite to that over which she must, in fact, have borne if the witnesses from on board the other are to be believed. It would seem that mistake in determining the true bearing of another vessel so approaching is easily possible without attentive care in observation.

The witnesses from the Sagamore include the entire watch on deck at the time; also the mate, who, though not on duty, says that he came on deck before the collision. The captain, whose watch it was from 6 to 8 o'clock, was on the quarter-deck, near the wheel. In his watch were the second mate, who was engaged in clewing down the mizzen topsail, and two colored seamen; one of them steering, the other on lookout forward. The man on lookout had partly lost the sight of one eye. The captain and both mates testified in per-

son at the trial. The lookout and man at the wheel gave their depositions out of court.

The man on lookout testified that he saw first the masthead light of the Edda, and next her red light, both bearing over the schooner's port bow. Some time after reporting the steamer's red light, he "saw her cut across our bow, we struck her, and as we were striking I lit off the forecastle head." The shock of collision knocked him down near the mainmast, on his way aft. The steamer's green light he never saw at all.

Evidently the green light must have been at some time shown, if the steamer "cut across the schooner's bow from a position in which her red light was the only side light visible, and on the schooner's port bow." There must, of necessity, have been a time when both side lights were visible on the schooner, and a further time during which the green light only was visible. But the lookout is not the only one of the schooner's witnesses who failed entirely to see these changes. No one on the schooner saw the green light at all until after the collision. The man at the wheel says he never saw any of the steamer's lights, except her masthead light. The captain, though he got up on the poop deck forward of the wheel to observe the steamer through his glasses, says he saw her masthead and red light a point and a half on the schooner's port bow, and felt sure she was going to pass clear of the schooner to windward until she had got close to the schooner, when he saw her keep right off toward the southern side of the channel, and in a few seconds—"just like a flash"—the vessels were together; but he never saw her green light at all until after the collision. The statements of the only other man in the watch, the second mate, are that he went forward after the steamer was first reported, saw her masthead and red light two points at most on the port bow, went aft again, and set to work clewing down the topsails, until the captain exclaimed, "She is crossing our bow." Dropping the clew line, he then ran forward to the forecastle head, and found the steamer right across the schooners' bow, not 25 feet from the jib boom. It was then that he saw the green light for the first time on the schooner's starboard bow. As to the first mate, he testifies to having seen the steamer's masthead light a point at most on the port bow, 20 minutes before the collision, after which he went below and stayed there until he heard the captain cautioning the man at the wheel: "Look out for your steering. There is a steamer that is acting queer." Jumping on deck, he saw the steamer's hull and masts nearly ahead, and saw her masthead light, but noticed no other light on her until after the collision.

There were other vessels in the vicinity at the time which may well be supposed to have been occupying some of the attention of those in charge of both the colliding vessels. The tug Paoli, towing four barges, was passing through the same channel, in the same direction with the schooner, and, like her, meeting the Edda, though her course and that of the barges was considerably nearer to the East Chop side of the channel than the course of either colliding vessel. Between each two vessels of this fleet there was at least 175 fathoms of hawser. The first barge after the tug was the Wayne, the Radnor came second, the Haverford third, and the Devon fourth and last. All these vessels had passed West Chop ahead of the schooner; but the wind had enabled her to gain upon them between there and East Chop, and at the time of the collision she had passed the Devon and reached a position opposite a point about half way between the Devon and the Haverford, next in line ahead. The master of the schooner admitted that he was watching the barges more closely than the steamer.

Failure on the part of the persons in charge of the schooner's navigation to observe the approaching steamer with proper care is therefore manifest upon their own evidence. It is, of course, true that, if the schooner held her course without change, the fact that she was not keeping a proper lookout does not constitute contributory fault on her part as against a steamer; but in determining which of the two conflicting accounts above referred to is the true one, or which of the two sets of witnesses is most likely to have mistaken the true bearing of the other in a case like this, the fact that the schooner's witnesses paid so little attention to the exact manner of the steamer's approach is a fact which must weigh strongly against her.

I do not think it can be said that the like want of care in observation of the

schooner appears from the evidence of the persons in charge of the steamer's navigation. Her watch on deck consisted of the chief officer and man at the wheel, both on the bridge, and of the man on lookout, on the forecastle head, about 120 feet forward of the bridge. They had been on duty since half past 7 by their time. When they came on duty, the Edda had passed Cross Rip, but had not yet reached the gas buoy. The captain was also on the bridge during the same period. The captain, chief officer, and lookout, all Norwegian, testified at the trial in English, which they spoke fairly well. Captain and first officer had been long enough engaged in making similar voyages to be familiar with navigation through this channel. The man at the wheel, also Norwegian, testified at the trial through an interpreter. He was only 17 years old, and only 5 feet 3 inches in height. Comment was made in argument upon his youth and presumed inexperience. It appeared that he had been 4 months on a school ship, 2½ years at sea, and was shipped as an ordinary seaman, at \$16 per month. His management of the helm at the time of the collision was under the immediate charge, and with the assistance, of the chief officer. It cannot be said that the wheel was obviously in incompetent hands.

The man at the wheel saw none of the lights on the approaching vessels. If the lookout and the two officers on the bridge are to be believed, the Paoli's towing lights were the first vessel's lights seen after the Edda passed the gas buoy. The tug was reported on the port bow, her lights and those of the barges were observed from the bridge, and it was recognized that a tug and barges were to be passed in the channel, port side to port side. The schooner was next reported on the Edda's opposite or starboard bow. Both her lights were visible. The captain and chief officer on the bridge made them about half a point on their starboard bow. The sails of the schooner, as well as her lights, were seen, according to the evidence; and, if the night was clear, it would seem that this may well have been the case. Sunset on May 11th was at 6:53 p. m., by the almanac, and the steamer was headed toward the western sky. From what was seen of the vessel or her lights, she was judged to bear on the starboard bow, and to be headed to pass to the northward of the Edda. The schooner's red light next disappeared, the green light alone remained visible on the Edda's starboard bow, and the vessels continued to approach in this manner for some minutes; the green light broadening on the Edda's starboard and no danger of collision with her appearing. The Edda, if these were the facts, was necessarily steering so as to pass between the tug and barges and the schooner. When the Edda had passed the Paoli, and was nearly opposite the first of the barges which were following her, the red light of the schooner began to appear again with the green. She was seen to be falling off toward the Edda, and at this the Edda's wheel was starboarded, so that she was kept off to port and headed for the last of the barges passing on her port hand. Notwithstanding alarm blasts twice given on the Edda's whistle, the schooner continued to swing toward her until she struck her starboard side, as has been described, at a considerable angle across the Edda's course, which had then been changed not more than two points from that which she had been steering while the green light had been the only one seen. When the schooner was seen to be keeping off, the signal for full speed astern had been rung to the engine room, but instantly countermanded before being acted on, so that the Edda was under full speed ahead at the collision. To have reversed the engine would have thrown the Edda's bow to starboard or toward the schooner. At no time was any sudden change of course made, placing the Edda directly across the schooner's course, as claimed by the witnesses from the schooner. Such, in substance, is the account of the collision given by the two officers and lookout of the Edda, the three witnesses from on board her who claim to have been observing it.

Careful consideration of their testimony reveals some discrepancies in it, the most important of which seems to me to be that, according to the captain, the Edda's wheel was first starboarded while both the schooner's lights were visible, before she shut out her red light, in order to give her abundant room. According to him there was a slight gradual change of the Edda's course toward the tug and barges as she got down into the schooner's vicinity, before the schooner was seen to be swinging off, not amounting to more than half a point, followed by a further change in the same direction when the first indi-

cations of the schooner's change were noticed. The chief officer mentions no starboarding until after it was noticed that the schooner was beginning to swing. Both agree, however, that the steamer was never headed further to port than to be pointing for the last barge in the tow, and, if so, the entire change of course by the Edda must at most have been comparatively small. It appeared that after the collision the captain had been the only man from the steamer to get aboard the schooner, where he declared that his vessel was sinking (as she in fact was), and attempted to lower one of the schooner's boats. It was argued from this fact, and from the facts that alarm blasts were twice sounded on the steamer's whistle, and the signal to the engine room instantly countermanded, that the captain must have been in a state of confusion or alarm sufficient to disturb his judgment, and some indications of nervous agitation given by him while on the stand were commented on. But, after giving to all such considerations the weight to which in view of all the circumstances they seem entitled, I am still of the opinion that on the whole the account given by the witnesses from the Edda is the one most likely to be reliable.

It is certainly the one which involves less improbability than the other. The schooner's account requires a very considerable change of course on the Edda's part, and requires it to be made so rapidly that the attention of no one on the schooner was attracted until it was made. The Edda's account requires a much less change of course on the schooner's part, and one occupying time enough to permit its beginning and progress to be observed on board the Edda, and alarm blasts to be twice sounded on her whistle in warning against it, before it was completed. The difficulty of understanding why the schooner should change her course, and change it toward the barges, over whichever bow she had the Edda, cannot be denied; but there is at least equal difficulty in understanding why the Edda should change her course in that direction in the manner claimed by the schooner, and the difficulty is particularly great if it be supposed that she was on the schooner's port bow at the time she made it. To convict her of crossing the schooner's bow, and placing herself directly across the channel course, toward the barges, sounding alarm blasts meanwhile, stronger evidence is needed, as it seems to me, than is furnished by the witnesses from the schooner, notwithstanding the presumption in that vessel's favor.

No direct reference has yet been made to a part of the evidence which consists of testimony from on board some of the barges in the Paoli's tow, and the Carlisle, a tug which was following the Paoli and her barges, and was not far astern of the barge Devon when the collision happened. The libellant called as witnesses the master of the barge Haverford, the master of the barge Devon, and his wife. The respondent called the master of the barge Radnor, the engineer of the barge Devon, and the master of the tug Carlisle. The case is one of the kind in which the court may well resort to and depend largely upon the testimony of witnesses not identified with either vessel, as in *The Annie J. Pardee* (D. C.) 25 Fed. 155, and *The Charles H. Trickey*, 66 Fed. 1020, 14 C. C. A. 225, for the purpose of determining which of sharply conflicting accounts given by the crews of the two vessels has the best claim to belief.

Taking the statements of these witnesses as given at the trial, and without regard to the question whether different statements had at any time been made by any of them, I am of opinion that the weight of their evidence decidedly tends to confirm the account of the collision given by the Edda's officers and lookout. Capt. McMahon of the Devon was below before and at the time of the collision, and his testimony relates to the position of the two vessels while they were together. His wife and the engineer were together in the Devon's pilot house. According to the engineer's testimony, which I must upon questions of this kind prefer to that of Mrs. McMahon tending to contradict it, the Edda, when abreast of the Paoli, was showing her green light to the schooner, or possibly both her lights. She was heading so as to pass about half way between the schooner and the barges, and there was plenty of room for her to pass between them. Hearing the alarm blasts from the Edda, he noticed that the schooner had changed her course and was heading for the tow. At the collision she had changed it apparently under a port

helm so far as to be heading "right south." He could see her hull "broadside to us." The steamer had deflected only a little from the course on which she appeared to be before the alarm whistles were sounded. The Devon was the nearest vessel to the collision. Capt. Nolan, of the Haverford, ahead of the Devon, says only that he did not see the schooner make any change of course. But neither did he see any change on the part of the Edda. Capt. Martinolich, of the Radnor, ahead of the Haverford, and Capt. Cooper, of the Carlisle, astern of the Devon, looking on from their different points of view, agree that the Edda before she whistled could safely have passed between the schooner and the tow if the schooner had held her course, that the schooner afterward swung rapidly toward the tow under a port helm, and that until she did this her course was to windward, or to northward of the course of the Edda. These are the important features of the testimony, and none of the criticism upon details of the evidence coming from the respective witnesses has seemed to me sufficient to qualify the general effect.

My conclusion must be that the schooner did change her course to starboard and thereby bring about the collision, notwithstanding the testimony of the man at her wheel that after the course southeast by east was given him it was never changed at all, that the schooner never varied from it more than one quarter of a point, that he did not leave the wheel until after the collision, and that at the collision southeast by east by the compass was the course he was on. This testimony and that of her first mate, that after he came on deck, and while the vessels were on the point of coming together, he stood by the wheel until the schooner's jib boom was right over the Edda and the vessels were within 30 or 40 feet of each other, that he then looked at her compass before running forward, and saw that the schooner's course was southeast by east, I should be obliged to regard with some suspicion, in any event, in view of all the circumstances which appear. It is outweighed, in my judgment, by the evidence tending to contradict it, upon which I have relied.

It is to be observed that, of the independent witnesses who have testified, Capt. Nolan, called by the libellant, agrees with Capts. Martinolich and Cooper called by the respondent, that the barges and the Carlisle were about in mid-channel. This tends strongly to support the conclusion already stated that the Edda's course was to the north of mid-channel and the further conclusion that the Sagamore's was still further to the northward.

The rule requiring a steamer to keep clear of a sailing vessel by a safe margin of safety cannot, of course, be applied to its full extent in a case like this, where so many vessels are obliged to pass each other at once, and all within narrow limits. If, as I think the conclusion must be, on the evidence, there was room enough for the Edda to pass between the schooner and the towing fleet in safety, had the schooner held her course, she cannot be condemned merely for making the attempt. She had the right, in attempting to keep clear of the schooner, to go on either side of her, unless some special danger forbade. To attempt to pass the schooner on the other side involved, on the facts as I find them, crossing ahead of the schooner at some distance, whether greater or less. The master of the Edda gave also as his reason for not doing so his desire to keep outside the sector within which Nobska Light shows red. The location of this sector was obviously for the purpose of warning vessels within it of their proximity to Hedge Fence Shoal. Without deciding that this sector forms the northern limit of the channel, or that a rule of navigation could be safely violated for the mere purpose of keeping outside it, I do not think the Edda's captain can be said, on the evidence, to have overestimated the danger of getting within it, or to have done anything for which he ought to be held in fault through fear of that danger.

If I am right in concluding that the account of the collision testified to by the Edda's witness is the true one, the evidence affords no ground for holding the Edda in fault. The libel against her must therefore be dismissed, with costs.

CATE et al. v. CONNELL et al.

(Circuit Court of Appeals, First Circuit. October 29, 1909.)

No. 833.

1. BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO ACT—NATURE OF CORPORATE BUSINESS.

Where the business of a corporation, as stated in its charter, included some pursuits which are within and others which are without the operation of the bankruptcy law, whether or not it is subject to the act depends on the principal business in which it was actually engaged at or about the time the petition was filed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 17; Dec. Dig. § 72.*]

What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.]

2. BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO ACT—NATURE OF CORPORATE BUSINESS—"MANUFACTURING PURSUIT."

The conducting by a corporation of a shop for the repairing of automobiles, which repairing consisted chiefly in the adjusting of parts purchased from other persons, was not a manufacturing pursuit, within the meaning of Bankr. Act 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), which subjected the corporation to proceedings in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 17; Dec. Dig. § 72.*]

Appeal from the District Court of the United States for the District of Massachusetts.

In the matter of the Concord Motor Car Company, bankrupt. From an order of adjudication, Martin L. Cate and others, creditors, appeal. Reversed.

Robert E. Goodwin (Carver, Wardner & Goodwin, on the brief), for appellants.

Robert A. Jordan, for appellees.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. On April 9, 1909, Connell and others filed a petition in involuntary bankruptcy against the Concord Motor Car Company, a corporation established under the laws of Massachusetts, "to manufacture, purchase, sell, hire, lease, and operate automobiles, motor boats, and motor engines, and, further, to act as general or special agent of any individual, company, or corporation now or hereafter engaged in the manufacture and sale of automobiles, motor boats, and motor engines." Cate and others, being creditors of the respondent, duly intervened to resist the petition, and among other defenses set up that the respondent was not at the time of filing the petition engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, within the meaning of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). The case was referred to the referee, under rule 12 of the General Orders in Bankruptcy (32 C. C. A. xvi, 89 Fed. vii), to ascertain the facts and report on the question of adjudication.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The referee found that the respondent corporation was organized in June, 1906, and from that time until January, 1908, was engaged in the business of buying and selling automobiles; that at about the last-mentioned date it added to its business a garage and a machine shop. Savell, the respondent's president and treasurer, testified that thereafter the respondent ceased the purchase and sale of automobiles, and this is implied in the referee's report, though not expressly stated. Savell also testified that from January 1, 1908, it carried on the business of a garage, and at the same time repaired automobiles and furnished them with supplies. These repairs and supplies were not confined to the automobiles regularly kept in the garage. The referee further found that at least 75 per cent. of the respondent's business was that of repairing and furnishing supplies. He was of the opinion that the respondent "was engaged, not only in manufacturing, but also as a trader and in a mercantile pursuit," and he recommended an adjudication of bankruptcy. The learned judge of the District Court agreed with the finding of the referee, and especially:

"That at least 75 per cent. of its [the respondent's] business consisted in repairing automobiles and furnishing supplies of all sorts for them, and that making such repairs and furnishing such supplies were its principal and foremost business."

He therefore decreed an adjudication.

The respondent's business, as stated in its charter, included some pursuits which are within and others which are without the operation of the bankruptcy act. We are here concerned, not with the broad limits of the respondent's charter, but with the nature of its business actually transacted at or about the time the petition in bankruptcy was filed. In *re Kingston Realty Co.*, 160 Fed. 445, 87 C. C. A. 406; In *re Quimby Co.* (D. C.) 121 Fed. 139, s. c. on appeal 126 Fed. 167, 61 C. C. A. 111. The petitioners do not contend that the operation of the garage, pure and simple, is a pursuit within the purview of section 4 of the bankruptcy act. The referee and the learned judge of the District Court have agreed in finding that repairs and supplies constituted at least 75 per cent. of the respondent's business. Neither of them discriminates by any finding concerning the respective proportions of these two kinds of business, and we find no evidence in the record which enables us to separate the two. The objecting creditors do not deny that the furnishing of supplies is a trading pursuit, and so within the purview of section 4; but, inasmuch as there is no evidence that the furnishing of supplies alone constituted the principal part of the defendant's business, the petitioners, in order to maintain their case, must show that the repairing, as well as the supplying of automobiles, as carried on by the respondent, is within the purview of the bankruptcy act. To support their contention the petitioners do not rely upon any word in section 4 except "manufacturing," and so the decision of the case is made to turn upon the answer to this question: Was the repairing of automobiles, as performed by the respondent, a manufacturing pursuit?

The words descriptive of the various pursuits which bring a corporation within the scope of the bankruptcy act are words in common use,

and are to be given their everyday meaning. *White Mountain Paper Co. v. Morse & Co.*, 127 Fed. 643, 62 C. C. A. 369. We do not think that the repairing of automobiles, as set out in the finding of the court below and in the evidence contained in the record, can fairly be described as a manufacturing pursuit. It seems to have been chiefly, if not altogether, the adjustment of automobile parts, bought from other persons, to existing automobiles. While no decided case is exactly in point, both the definitions of manufacture given by courts of authority and the decisions which those courts have rendered on particular facts are here persuasive against the petitioners. *Hall & Kaul Co. v. Friday*, 158 Fed. 593, 87 C. C. A. 23; *In re T. E. Hill Co.*, 148 Fed. 832, 78 C. C. A. 522; *In re Kingston Realty Co.*, 160 Fed. 447, 87 C. C. A. 406; *In re First Bank of Belle Fourche*, 152 Fed. 64, 81 C. C. A. 260. In so far forth, therefore, as the defendant's business was repairing, that business was outside the act. If this be true, there was no proof that the respondent's principal business was within the scope of the act. This conclusion makes unnecessary the consideration of the other questions presented at the argument. The decree of the District Court adjudicating the respondent a bankrupt must therefore be reversed.

The decree of the District Court is reversed, the case is remanded to that court, with instructions to dismiss the petition with costs, and the appellants recover their costs of appeal.

NOTE.—The following is the opinion of Dodge, District Judge, in the court below:

DODGE, District Judge. According to the petition in this case the alleged bankrupt is a corporation "engaged principally in manufacturing and trading automobiles." According to the answer which is filed, not by the alleged bankrupt, but by a firm which claims to be its creditor for insurance premiums, it was not at the filing of the petition a corporation engaged principally either in manufacturing, trading, or mercantile pursuits, and therefore not within section 4 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]).

The evidence is that on or about January 1, 1908, the corporation had practically ceased the purchase and sale of automobiles; an agency under which it had previously dealt in them having been wound up. From January 1, 1908, to the filing of the petition on April 9, 1909, it "operated a garage," by which is meant that it stored automobiles, cared for them, and furnished them with gasoline and oil. Had the mere storage and care of automobiles been the principal business carried on during the period referred to, the analogy of the decisions which hold livery and boarding stables not within section 4 would no doubt require me to hold this corporation not subject to adjudication. *Re H. J. Quinby Co.* (D. C.) 121 Fed. 139; *Id.*, 126 Fed. 167, 61 C. C. A. 111; *Gallagher v. De Lancey Co.* (D. C.) 158 Fed. 381. But the referee has found, and I see no reason in the evidence for disagreeing with him, that, besides operating a garage, the alleged bankrupt, during the same period, carried on a machine shop at its place of business; that at least 75 per cent. of its business consisted in repairing automobiles and furnishing supplies of all sorts for them; and that making such repairs and furnishing such supplies were its principal and foremost business. This, I think, is sufficient to bring it within section 4b.

The only act of bankruptcy charged is a general assignment. An instrument purporting to be a general assignment such as the petition describes was executed by J. E. Savell, the alleged bankrupt's president and treasurer, in its name, and was acknowledged by him to be its free act and deed. There had been a vote of the directors that this assignment be made, and Savell be authorized to sign the necessary papers as president and treasurer. The re-

spondent creditor objects that the directors' authority was insufficient for the purpose, and that a vote by the stockholders was necessary, so that the act of bankruptcy has not been committed, because the attempted general assignment is void. The general principle is that it lies within the powers of directors, as such, to make a general assignment of a corporation's property for its creditors' benefit. In *Re Bates Machine Company* (D. C.) 91 Fed. 625, upon which the objecting creditor relies, this is conceded (91 Fed. 628); but the court declined to infer from it that the directors had power, without the stockholders' assent, to admit the corporation's insolvency and its willingness to be adjudged bankrupt on that ground. This is a Massachusetts corporation, organized under St. 1903, p. 418, c. 437, which in section 19 assigns to directors "all of the powers of the corporation, except such as are conferred by law or by the by-laws of the corporation upon the stockholders." No provision of law is referred to which confers the power to make a general assignment upon the stockholders only, and the by-laws of the corporation have not been put in evidence. The vote of the directors and the execution of the assignment in pursuance of it having been shown, it seems to me that the general principle to which I have referred puts the burden upon the respondent creditor to show, by some provision of law or by some by-law of the company, that the directors did not possess the power which they undertook to exercise. There is no proof at present that the directors did not possess it. In the absence of such proof, I do not see how it can be said that the directors' action was wholly and absolutely void. It might have become valid by the ratification or acquiescence of the stockholders, and it appears from the evidence that Mr. Savell, who executed the general assignment, besides being president and treasurer, owned or controlled a majority of the stock. And, although a stockholder or a creditor might have the right to invalidate the assignment, it would not follow that it did not constitute an act of bankruptcy, under section 3 (4) of the bankruptcy act. The language of the act is not to be limited in its operation to assignments which are in all respects valid. *Griffin v. Dutton et al.*, 165 Fed. 626, 91 C. C. A. 614, decided by the Court of Appeals for this Circuit, December 16, 1908. I must also agree with the referee, therefore, in his finding that the act of bankruptcy has been committed.

Adjudication ordered.

PACIFIC COAST RY. CO. v. UNITED STATES.†

(Circuit Court of Appeals, Ninth Circuit. October 4, 1909.)

No. 1,658.

1. COMMERCE (§ 27*)—FEDERAL SAFETY APPLIANCE ACT—CONSTRUCTION AND SCOPE.

The federal safety appliance act of 1893 (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), applies to a railroad which takes part in the transportation of articles of interstate commerce on any part of the way to their point of final destination, although operated wholly within a single state, independently of connecting lines, and without any traffic arrangement with them.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 27.*]

2. COMMERCE (§ 27*)—FEDERAL SAFETY APPLIANCE ACT—CONSTRUCTION.

Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885), which in terms applies to "any common carrier engaged in interstate commerce by railroad," is not limited by the provisions of Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), which expressly apply only to carriers "under a common control, management, or arrangement for a continuous carriage or shipment"; the two acts, having entirely distinct pur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied.

poses and providing remedies for different evils, not being in pari materia in such sense that the provisions of one should control or limit the other. [Ed. Note.—For other cases, see Commerce, Dec. Dig. § 27.*]

In Error to the District Court of the United States for the Southern Division of the Southern District of California.

Proceeding by the United States against the Pacific Coast Railway Company for violation of the safety appliance act. Judgment for the United States, and defendant brings error. Affirmed.

The plaintiff in error is a common carrier, organized under the laws of the state of California, engaged in operating a narrow-gauge railway situate entirely within two counties of that state, Santa Barbara and San Luis Obispo counties. As such common carrier, it received at San Luis Obispo, from the Southern Pacific Company, freight consigned from points in Eastern states, and which was in some instances billed from the point of shipment to a station on the line of the road of the plaintiff in error, and in other instances was billed to San José, a terminal point of the Southern Pacific Company. In the latter case the goods were consigned to the order of the shipper, but thereafter, and before their arrival at San José, the shipper had arranged with the Southern Pacific Company that on and after their arrival the goods should be forwarded by that company to stations on the line of the road of the plaintiff in error, the places of their ultimate destination. For this the shipper would prepay to the Southern Pacific Company the additional freight to the point of destination. The road of the plaintiff in error being one of narrow gauge, no cars of the Southern Pacific Company ever passed over its line, and all goods consigned to points on its line were unloaded from the Southern Pacific cars at San Luis Obispo, and there reloaded upon the cars of the plaintiff in error. At San Luis Obispo the plaintiff in error would receive from and give its receipt to the Southern Pacific Company as the shipper of the property at that point. The plaintiff in error had no contractual relation with the original shipper, and no traffic arrangement with the Southern Pacific Company or any other carrier.

Gibson, Trask, Dunn & Crutcher and George W. Towle, for plaintiff in error.

Oscar Lawler, U. S. Atty., and A. I. McCormick, Asst. U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The principal question which the writ of error brings to our attention is whether or not the plaintiff in error has been engaged in interstate commerce by railroad, within the safety appliance act of Congress of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), and the amendment thereto of March 2, 1903 (32 Stat. 943, c. 976 [U. S. Comp. St. Supp. 1907, p. 885]). It is not denied that its trains and cars were not equipped as required by that act. The question is one in answer to which the Circuit Court of Appeals for the Sixth Circuit and that for the Eighth Circuit have in similar cases reached contrary conclusions. *United States v. Geddes*, 65 C. C. A. 320, 131 Fed. 452; *United States v. Colorado & N. W. R. Co.*, 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167.

In the *Geddes* Case a receiver was operating a narrow-gauge railroad which lay wholly within the state of Ohio, connecting at Bellaire with the Baltimore & Ohio Road, in that it received from that road

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freight from other states marked for points on its line and delivered to that road freight from points on its line marked for other states. There was no interchange or common use of cars; the gauges of the two roads being different. A transfer track ran from the main line of the Baltimore & Ohio to the terminal station of the defendant road, so that the freight cars of the two roads could be placed alongside adjoining platforms for the transfer of freight. No through bills of lading for the freight were issued by either road, and no through rate was fixed by mutual agreement, nor was there any conventional provision for a through freight charge. The Circuit Court of Appeals held that the narrow-gauge cars in question were not subject to the safety appliance act, and that a common carrier was not "engaged in interstate commerce by railroad," within the meaning of the act, unless it was "engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment," from one state to another. In other words, the court, in construing the safety appliance act, referred back to and was controlled by the definition of interstate commerce found in section 1 of the act of February 4, 1887 (24 Stat. 379, c. 104 [U. S. Comp. St. 1901, p. 3154]), known as the "Interstate Commerce Act," and held that that act defined the interstate commerce which Congress intended to regulate in the safety appliance act, and that the acts were, in a certain sense, in *pari materia*.

In *United States v. Colorado & N. W. R. Co.*, on the other hand, it was held that while the interstate commerce act was intended, as shown by its express terms, to regulate the conduct of those who conduct transportation with another or other carriers under a common control, management, or arrangement for a continuous carriage or shipment, the safety appliance act, containing no such words of limitation, but expressly applying "to any common carrier engaged in interstate commerce," was intended to be more broad and inclusive, and to extend to all classes of interstate commerce by railroads, and hence to include those who conducted such transportation alone or with other carriers, without any common control, management, or arrangement for such carriage or shipment. Upon the contention that the two acts were in *pari materia* the court said:

"The subject of the first act was the contracts, the rates of transportation of articles of interstate commerce; the subject of the safety appliance acts was the construction of the vehicles, the cars, and engines which carry that commerce. The evils the former was passed to remedy were discrimination and favoritism in contracts and rates of carriage; the evils the latter was enacted to diminish were injuries to the employes of carriers by the use of dangerous cars and engines. The remedy for the mischiefs which induced the passage of the former act was equality of contracts and rates of transportation; the remedy for the evils at which the latter act was leveled was the equipment of cars and engines with automatic couplers. Neither in their subjects, in the mischiefs they were enacted to remove, in the remedies required, nor in the remedies provided, do these acts relate to similar matters, and the rule that the words or terms of acts in *pari materia* should have similar interpretations ought not to govern their construction."

After a careful review of the authorities and the principles involved, we are inclined to the views expressed in Judge Sanborn's opinion in

the Colorado Case, which, in its exhaustive consideration of the question, leaves little, if anything, to be added to the discussion. There can be no question that the plaintiff in error was "a common carrier engaged in interstate commerce by railroad," as such commerce has been defined by the decisions of the Supreme Court. Said the court in the Daniel Ball Case, 10 Wall. 566, 19 L. Ed. 999:

"We are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states, when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated."

It is true that the interstate commerce act is expressly limited in its application to certain defined classes of interstate commerce. But we are unable to discover in that fact any reason for saying that the safety appliance act was intended to be similarly limited. If such was the intention of Congress, the reasonable inquiry is: Why was it not so expressed in terms? Instead of such an express limitation, we find in the act the broad declaration that it shall apply to all railroads engaged in interstate commerce. What warrant have we for holding that the act does not mean what it says? The omission to limit its application as the interstate commerce act was limited is persuasive evidence of the intention of Congress to make it more comprehensive than that act. In the nature of the legislation itself, there was no reason to make it less comprehensive than it was made. The evil intended to be remedied by the act existed in the operation of all railroads. The power of Congress to remedy it extended to all railroads engaged in interstate commerce, and it would be unreasonable to suppose that Congress intended to withhold the benefit of the remedy from the operatives of any road concerning which it had the power to legislate.

In *United States v. Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, the court, answering the objection that the Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) should not be held to apply to combinations between railroads, for the reason that, if Congress had intended to inhibit such combinations, it would have done so by amending the interstate commerce act, said:

"The statute [the interstate commerce act] does not cover all cases concerning transportation by railroad, and all contracts relating thereto. It does not purport to cover such an extensive field."

In *Johnson v. Southern Pacific Company*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, the court sustained the act, declaring that its object was not to be defeated by "inadmissible narrowness of construction," and held that, because the car in question in that case "was being regularly used in the movement of interstate traffic," it was within the law, and quoted with approval, as applicable to the construction of the act, the language of Mr. Justice Story, in *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740, as follows:

"I agree to that rule in its true and sober sense; and that is that penal statutes are not to be enlarged by implication or extended to cases not obviously

within their words and purport. But where the words are general, and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word."

The plaintiff in error argues that the decision of the court below rests upon the false premise that to render services to one who is engaged in interstate commerce is to engage in that commerce. But to our view it rests upon a broader basis than this. It rests upon the fact that the movement of the consigned goods to their ultimate destination from the point at which they were shipped in another state was in part conducted upon the road of the plaintiff in error, and that the interstate character of the shipment did not end until the transportation had reached its ultimate completion. The road of the plaintiff in error became a connecting carrier by virtue of the agreement between the consignor and the first carrier, whereby the latter undertook to deliver the goods at San José en route to their ultimate destination. Neither the fact that the consignor of goods originally consigned to San José directed the Southern Pacific Company, prior to their arrival there, to change the destination to a point on the road of the plaintiff in error, nor the fact that the road of the latter was so constructed as to make necessary the unloading and transfer of the goods to its cars, is sufficient to affect the interstate character of the transportation.

The contention is made that all the evidence which was offered in the court below to show that the freight alleged to have been transported by the plaintiff in error had been shipped from points without the state was hearsay. The evidence consisted of bills of lading, waybills, orders for and records of changes in destination, and receipts for freight. A stipulation was entered into between the parties in the court below that the several documents introduced in evidence "might be deemed genuine documents according to the purport thereof, and that, where the same marks or designations occur in different documents, they might be referred to for the purpose of identifying the things which they purported to relate to or describe." The evidence was that the bills of lading were made out at the time of shipment, that they accompanied the shipments, went with the car on which the goods were carried as they passed through the respective divisions, or from one railroad to another, and that sometimes the goods were rebilled and sometimes they just passed from one line to another on the original waybill. The only objection made to the introduction of these documents was that they were incompetent, irrelevant, and immaterial, and did not tend to show that the plaintiff in error at any time was engaged in the transportation of interstate traffic in any of its cars. In view of the stipulation of the parties and the nature of the objection which was made to the evidence, we think that the government was not required to call as witnesses the persons who had physical charge of the transportation in question, or to prove by them that in the course of their duties they had made records of the movements

of the respective cars on which the freight was carried. The documents so admitted under the stipulation may be regarded as entries made in the regular course of business, and in the absence of any offer to disprove their verity we are of the opinion that they were sufficient to sustain the judgment of the court below.

The judgment is affirmed.

NOTE.—The following is the opinion of Wellborn, District Judge, in the court below:

WELLBORN, District Judge. There being no conflict whatever in the evidence in this case, the parties have submitted motions, respectively, for peremptory instructions. Taking them up in the order in which they have been submitted, or in the order in which they were presented, the defendant asks the court to peremptorily instruct the jury to return a verdict for the defendant on all the counts in the complaint. The plaintiff asks that the court peremptorily instruct the jury to return a verdict in its favor on all the counts of the complaint except the eleventh and twenty-third. These two motions are the matters which call on me now for immediate disposition, and, of course, the disposition that I make of these motions will determine the case, because the jury will then be instructed to find or return a verdict in accordance with the conclusions which I announce. I may say, before taking up the merits of these motions, that it is obvious, not only to the court, but even to a casual observer of the progress of this trial, that counsel for both the plaintiff and the defendant have made their researches into the law of the case with great industry, and the presentation of their respective views has been marked by uncommon ability. If I had no jury in the box, and could take the case under advisement for the purpose of preparing an opinion, I should like to review these questions, for the reasons which I have just indicated; but this is impracticable, and I shall not undertake to do any more than to announce my conclusions, with such reference to the law and the facts in the case as may make the announcement intelligible.

The first safety appliance act was passed in 1893 (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), and this act, as amended April 1, 1896 (Act April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3175]) contains, among others, the following provisions, which are applicable to the case at bar. The first section of the original act reads as follows: "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine, in moving interstate traffic, unequipped with a power driving-wheel brake and appliances for operating a train-brake system, or to run any train in such traffic after said date, that has not a sufficient number of cars in it, so equipped with power driving-wheel brake, that the engineer from the locomotive drawing said train can control its speed without requiring the brakeman to use the common hand brake for that purpose." I am reading these various provisions, because I think it is well that the jury, as well as counsel, should understand the ruling I am going to make. The second section reads as follows: "Sec. 2. That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic, unequipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Section 6, as amended in 1896: "That any such common carrier using any locomotive engine running any train, or hauling, or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits, upon duly verified information being lodged with him of such violations having occurred, etc."

The act was further amended March 2, 1903 (Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), and this last amendment provided, among other things, in section 1 of the act, that the provisions and requirements of the act entitled "An act to promote the safety of employes and travelers upon railroads, by common carriers engaged in interstate commerce," approved March 2, 1893, and amended April, 1896, shall be held to apply to all common carriers by railroad in the territories and in the District of Columbia, and shall apply in all cases, whether or not the couplers operating together are of the same kind, make, or type; and the provisions and requirements hereof, and said act, relating to train brakes, automatic couplers, grab irons, and height of drawbars, shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles, used in connection therewith, excepting those trains, cars, and locomotives excepted by the provisions of section 6 of said act of March 2, 1893, as amended by the act of April 1, 1896, and which are used upon street railways.

I am of opinion that that part of the amendatory act of 1896 which provides, "And the provisions and requirements hereof and the said act relating to train brakes, automatic couplers, grab irons, and the height of drawbars, shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars, and similar vehicles, used in connection therewith," broadens the original act of 1893, so as to make its requirements concerning train brakes, automatic couplers, grab irons, and height of drawbars, apply not only to trains, locomotives, tenders, and cars employed in the movement of interstate traffic, but to all trains, locomotives, tenders, and cars used on any railroad engaged in interstate commerce. In other words, for the government to recover under the amendatory act of 1896, it is not necessary, as it was under the original act of 1893, to show that the car with the defective equipment was employed in interstate movement at the time this defect was discovered; but it is only necessary to show that said car was hauled over the line or used by a railroad engaged in interstate commerce. *U. S. v. Chicago, M. & St. P. Ry. Co.* (D. C.) 149 Fed. 486. The case just cited is the case which was read by Judge Gibson, and which had not been called to my attention previously; but the views which I have announced are in complete accord with the views expressed by Judge McPherson in the case which I have just cited. Unless the amendatory act is so construed, those parts of it last quoted are entirely without effect and useless.

To further illustrate the effect of this amendatory act I will read the following statement by a member of the House of Representatives, while that body had the act under consideration: "Mr. Wanger: Mr. Speaker, the purpose of this act is to make more efficient the provisions of the act of March 2, 1893, for the promotion of the safety of employes upon railways. It has been held by some courts that the tender of a locomotive is not a car, and is therefore not affected by the provisions of the act. It has also been held that the act only applies to cars in interstate movement, and cars are very frequently, although generally designed for and used in the movement of interstate traffic, in use which is not interstate movement that requires the services of operatives upon them. Whenever an action for damages is brought by reason of the death or injury of a railroad employe, of course, every defense is made; and although the car may not be equipped as directed by the Act of Congress, yet that direction, as it stands, only applies when the car is being used in the movement of interstate commerce. Therefore the burden is on the plaintiff in every such action to establish that fact, and is frequently an impossibility, because frequently the injury or death does not happen when the car is so engaged in interstate commerce. It is therefore of the highest importance to make the act of Congress, as everybody supposed it would be, effective, so far as we have the power and authority, for the protection of employes, by requiring the equipment referred to in the act on all cars used on railroads engaged in interstate commerce. That is the purpose of the first section of the bill." The purpose of the second section is to require a more general and uniform use of air and air brakes, so as to have less need for the

operation of hand brakes. The present act, as I recollect it, is that there must be sufficient air-braking apparatus used to enable the engineer to control the train. That, of course, differs, perhaps, in the judgment of every engineer. Therefore it seems appropriate that there should be a certain percentage of the cars of every train required to be operated by air brakes, whether it is actually essential for the proper control of the train or not."

To the same effect, the Interstate Commerce Commission in its Seventeenth Annual Report, at page 84, after the act had become a law: "The necessity of showing that a car was engaged in interstate commerce was another difficulty in the way of enforcing the law. It was necessary to get at the billing showing destination of cars, and to prove in each case that the car complained of was actually moving or used in interstate commerce at the time its defect was discovered. The amendment in question has obviated this difficulty. The law now applies to all equipment on the lines of carriers engaged in interstate commerce, without regard to the service in which it is used."

I am of the opinion that, under said acts as above explained, there were only three things which the government must prove in order to recover: (1) That the defendant, at the times mentioned in the complaint, was a common carrier by railroad, engaged in interstate commerce; (2) that it hauled, or permitted to be hauled, over its lines, the locomotives, trains, and cars mentioned in the several counts of the complaint; (3) that said trains, locomotives, and cars were not provided with the equipment required by said act. There is no controversy as to the existence of the second and third ingredients of the plaintiff's causes of action; nor is there any controversy that the defendant was and is a common carrier by railroad. The only issue between the defendant and the plaintiff is as to whether or not the proof shows that it was engaged, at the times mentioned in the complaint, in interstate commerce.

There is no conflict whatever in the evidence relating to this issue, and from such evidence, following the principles declared in *United States v. Colorado & Northwestern R. R. Co.*, 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, some of which had been previously enunciated in the *Daniel Ball Case*, 10 Wall. 557, 19 L. Ed. 999, I am satisfied that the defendant was engaged, at the said times, in interstate commerce. The letter of January 25th, of the consignor, the National Tube Company, to the general freight agent of the Southern Pacific Company, asking that the destination of the shipments therein named be changed on their arrival at the place to which they were originally consigned, and the direction contained in the letter or traingram signed "J. M. Brewer," of date January 29th, written more than a month before either of said shipments arrived at San Jose, and some time before they had even reached California, clearly distinguishes the case from *Gulf, Colorado & Santa Fé R. R. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540. I may say here that, of course, the actual physical diversion of the shipments was not, and could not have been, made until the arrival of the cars at San Jose, or Los Angeles, or Mojave, whichever may have been the destination; but the agreement between the National Tube Company, the consignor, and the Southern Pacific Company, as evidenced by the letters which I have just referred to—and the Southern Pacific Company was one of the carriers who were parties to the contract for the interstate shipment—this agreement between the consignor and the Southern Pacific Company was consummated when the traingram was sent by the Southern Pacific Company, pursuant to the request of the National Tube Company, the consignor, to the local agent of the Southern Pacific Company at San Jose. After that order had been sent to the agent at San Jose, it was as though the original contract had read that Careaga, or whatever was the point to which it was to be diverted, was the ultimate destination. In other words, the original contract was so changed as to substitute Careaga, or the other points on the defendant's local line, for the points on the Southern Pacific given in the waybill as it was originally executed. I might say that there is another fact that adds some strength, probably, to this conclusion, although the conclusion would have been reached without it—that the testimony of Mr. Garrett, I think it is, showed that the National Tube Company furnished and provided the local agent at San Jose with money to prepay the transportation beyond that point to the new destination under the diversion order.

Recurring now to the case of Gulf, Colorado & Santa Fé Railroad Company v. Texas, 204 U. S. 403, at page 412, 27 Sup. Ct. 360, at page 362, 51 L. Ed. 540, the court said, among other things: "In other words, the transportation which was contracted for, and which was not changed by any act of the parties, was transportation of the corn from Hudson to Texarkana; that is, an interstate shipment. * * * Neither the Harroun nor the Hardin Company changed, or offered to change, the contract of shipment or the place of delivery. * * * No new arrangement having been made for transportation, the corn was delivered to the Hardin Company at Texarkana. Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial, so far as the completed transportation was concerned." It is a fair inference from this quotation that if the original contract of shipment had been changed by the parties, so as to substitute Goldthwaite for Texarkana, the decision of the court would have been different; and I am of opinion that the changes of destination shown in the case at bar by the letters above mentioned are the situations which, it is to be inferred from the language of the Supreme Court in the case last cited, would have made the transportation there involved an interstate matter, and, in my opinion, bring the case at bar fully within United States v. Colorado & Northwestern R. R. Co., supra.

From the views above expressed as to the law of the case, there being no conflict in the evidence relating to the facts, it follows that the defendant's motion must be denied, and the plaintiff's motion for peremptory instructions must be allowed; and orders to that effect will be accordingly entered.

ATCHISON, T. & S. F. RY. CO. v. SULLIVAN, County Treasurer, et al.

(Circuit Court of Appeals, Eighth Circuit. September 23, 1909.)

1. TAXATION (§ 608*)—SYSTEMATIC OMISSION OR UNDERVALUATION—SUIT TO ENJOIN ILLEGAL TAX BASED THEREON.

A systematic, intentional, continuing omission or undervaluation of other taxable property, in violation of the Constitution or statute, by the taxing officers of a state or county, pursuant to a rule or practice adopted by them, the inevitable effect of which is an unjust discrimination in taxation against the property of complainant, and against other property similarly situated, will sustain a bill in equity in a national court to enjoin the collection of the tax based on the illegal discrimination.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1234; Dec. Dig. § 608.*]

2. TAXATION (§ 608*)—ILLEGAL TAX—"ADEQUATE REMEDY AT LAW"—ACTION AT LAW NOT AS ADEQUATE AS SUIT IN EQUITY.

The adequate remedy at law, which will deprive a court of equity of jurisdiction, must be as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity.

And in a case of this nature the payment of the illegal portion of the tax and the prosecution of an action at law to recover it back is neither as prompt, certain, complete, nor efficient a remedy as a suit for an injunction against its collection.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1238; Dec. Dig. § 608.*]

For other definitions, see Words and Phrases, vol. 1, pp. 182-183.]

3. TAXATION (§ 608*)—ACTUAL INTENT TO DISCRIMINATE NOT ESSENTIAL—LAW PRESUMES IT FROM EFFECT OF ACTS.

The law presumes that every man intends the natural and inevitable effect of his deeds, and that taxing officers who intentionally omit or undervalue other taxable property in violation of the Constitution or the statute, so that an undue share of the burden of taxation is necessarily

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

thrown upon the property of complainant, intended to discriminate against its property. It is not necessary to its cause of action that the officers should have had any such actual intention, for their acts were as injurious and as remediable without as with that intention.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1234; Dec. Dig. § 608.*]

4. TAXATION (§ 611*)—ESTOPPEL—ADMISSION THAT ASSESSMENT IS ERRONEOUS ESTOPS FROM INVOKING CONTRARY PRESUMPTION.

Parties to a suit who admit in their pleadings that the actual value of property was far in excess of its assessed value are estopped from invoking, to sustain the assessment, the rule that where the determination of an issue of fact, like the valuation of property for taxation, is intrusted by statute to the judgment of an officer or a board, his or its decision raises more than a presumption of fact, and may not be overthrown by the testimony of two or three witnesses.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1252; Dec. Dig. § 611.*]

5. EVIDENCE (§ 215*)—REPORT FOR TAXATION COMPETENT EVIDENCE AGAINST MAKER IN SUIT TO ENJOIN TAX—REPORT TO INTERSTATE COMMERCE COMMISSION FOR OTHER PURPOSES INCOMPETENT.

A report made by a railway company to taxing officers in pursuance of the requirement of a state statute, for the purpose of aiding the officers in properly assessing its property, is competent evidence against it of the facts stated therein, in a suit by it to enjoin the collection of taxes levied upon an assessment based upon the report.

But a report of the company to the Interstate Commerce Commission, covering a period of time other than that on which the statute required the assessment to be based, and not made for taxation, is not competent evidence against it in such a suit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 754-759; Dec. Dig. § 215.*]

6. EVIDENCE (§§ 241, 246*)—ADMISSIONS OF AGENTS AND ATTORNEYS IN ONE SUIT NOT COMPETENT EVIDENCE AGAINST PRINCIPALS IN ANOTHER INVOLVING DIFFERENT ISSUES.

The admissions of agents and attorneys authorized to act in a suit or legal proceeding estop their principals therein; but they are not competent evidence against the latter in another suit or legal proceeding in which different issues are involved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 887, 945, 946; Dec. Dig. §§ 241, 246.*]

7. TAXATION (§ 390*)—MARKET VALUE OF BONDS AND STOCK, AND GROSS EARNINGS AND NET EARNINGS, MORE PERSUASIVE EVIDENCE OF VALUE OF RAILROAD PROPERTY THAN COST OF PRODUCTION OF TANGIBLE PROPERTY.

Where the basis of assessing the property of a railroad company in a state for taxation prescribed by statute and followed is to ascertain the value of its corporate plant used or convenient for operating its railroad, wherever situated, excluding its property not necessary or convenient for that purpose which is otherwise assessed, and then to take such a portion of that value as the number of miles of its main track in the state bears to the number of miles of its entire main track, the current cash value of all the obligations which constitute its funded debt, and of all its outstanding shares of stock, are competent evidence of the value of its corporate plant, and, in connection with its entire mileage and its mileage in the state, more persuasive evidence of the value of that part of its corporate plant in the state, than the cost of reproduction of its tangible property therein.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 653; Dec. Dig. § 390.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. TAXATION (§ 390*)—PRESUMPTION IS THAT ALL PROPERTY OF RAILROAD COMPANY IS HELD FOR RAILROAD USE, AND THAT VALUE IS DISTRIBUTED THROUGHOUT MILEAGE—EVIDENCE TO CONTRARY COMPETENT.

Evidence of the value of property not necessary for railroad purposes, and that parts of the corporate plant of a railroad company, including its various terminals, are of exceptional value, is competent, and, when offered, must be given effect by the assessing board and by the court in ascertaining the value of its corporate plant in the state.

But in the absence of such evidence the presumption is that all its property is part of its corporate plant, and that its tangible and intangible property are equally distributed throughout its mileage.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 653; Dec. Dig. § 390.*]

9. TAXATION (§ 390*)—VALUATION OF RAILROAD—INTANGIBLE PROPERTY COMBINED WITH AND DISTRIBUTED TO EVERY PART OF TANGIBLE PLANT.

The intangible property of an operating railroad company, its franchises, contracts, privileges, and good will, are presumptively combined unavoidably and inextricably with, automatically distributed to, and they enhance the value of, every part of its tangible corporate plant.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 653; Dec. Dig. § 390.*]

10. TAXATION (§ 608*)—RESULTING LEGAL INJURY ESSENTIAL TO RELIEF FROM UNDERASSESSMENT.

Where the property of the complainant and of others whose property is subject to a like levy for taxation is illegally underassessed to substantially the same extent, the complainant is entitled to no relief. Resulting legal injury, continuing or threatening, is as essential to relief in equity as causal wrong.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1233, 1234; Dec. Dig. § 608.*]

11. TAXATION (§ 100*)—LIVE STOCK—CONSTRUCTION OF SECTION 3927t, COLORADO STATUTES.

Under section 3927t, Mills' Ann. St. Rev. Supp. Colo., live stock brought into a county between September 1st and December 31st of one year, and shipped out between January 1st and April 1st of the succeeding year, is taxable in that county for the latter year.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 201; Dec. Dig. § 100.*]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Colorado.

Bill by the Atchison, Topeka & Santa Fé Railway Company against John R. Sullivan, Treasurer of Bent County, Colo., and others. From a decree dismissing the bill, complainant appeals. Reversed.

Henry T. Rogers and Gardiner Lathrop (Daniel B. Ellis, Lewis B. Johnson, Pierpont Fuller, and George A. H. Fraser, on the brief), for appellant.

Jesse G. Northcutt and Allen M. Lambright (A. Watson McHendrie, on the brief), for appellees.

Before SANBORN, Circuit Judge, and CARLAND and POLLOCK, District Judges.

SANBORN, Circuit Judge. This is an appeal from a decree which dismissed a bill in equity, exhibited to prevent the treasurer of Bent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

county, in the state of Colorado, from collecting of the complainant taxes which it alleged were illegal and excessive. The Constitution of that state required taxes to be uniform upon the same class of subjects (article 10, § 3), and the statutes required all taxable property to be assessed at its full cash value. The State Board of Equalization was required to assess the railroad property of each railroad company in the state as a unit and to apportion the assessment to the counties of the state on a mileage basis, the assessor of each county was required to assess other taxable property in his county, and these two assessments were placed upon the tax lists and subjected to the same levies. Mills' Ann. St. Rev. Supp. §§ 3764, 3895, 3918, 3920.

The gravamen of the bill was (1) that while the complainant's property in Bent county in 1905 was not worth more than \$25,000 per mile and the State Board assessed it \$14,800 per mile, or 55 per cent. of its value, the assessor of Bent county assessed other taxable property in that county at not more than 25 per cent. of its actual value; that this assessor omitted from his assessment all credits, all watches, clocks, and jewelry, and much other property taxable in that county, with the knowledge and consent of the other county officials; that he did so pursuant to a rule adopted by the county officers, and did so systematically and intentionally, in order to make the complainant pay a larger tax in proportion to the value of its property than others who had taxable property in that county would pay; and (2) that the State Board transmitted to the county an assessed value of \$14,800 per mile of complainant's railroad, when the proportion of the assessed value of its property in the state which the board was required by the statutes to certify to that county was \$14,385.28 per mile.

The treasurer of the county admitted by his answer that the assessed value certified to the county by the State Board was excessive to the amount of \$414.72 per mile, as averred in the second complaint recited above, and the effect of this admission was that the complainant's tax was excessive on this account to the amount of \$676.78. The treasurer denied that the assessor of Bent county knowingly or willfully omitted to assess credits, watches, jewelry, and other property; but he did not deny, and hence he admitted, that the assessor did omit to assess them. He denied that the assessor assessed the property in his county "so low as 25 per cent. of its actual cash value," and hence he admitted that the assessor did assess it as low as 26 per cent. of its actual value. He denied that the assessor made the omissions and the low assessment in collusion with the county commissioners, or systematically, or with intent to impose an undue burden of taxation upon the complainant, and he averred that the county officers discharged their duties in good faith to the best of their judgment and ability. He admitted that the State Board assessed the complainant's property in Bent county at \$14,800 per mile, but denied that it was assessed any higher in proportion to its actual value than other property in Bent county was.

The complainant introduced evidence which tended to prove systematic omissions and undervaluations by the assessor, and to avoid the effect of that evidence the treasurer invoked the rule that where

the determination of an issue of fact, or of mixed law and fact, like that relative to the valuation of property for taxation, is intrusted by law to the judgment of an officer or board, his or its decision raises something more than the mere presumption of fact, and it may not be overthrown without more than the testimony of two or three witnesses to the contrary. *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus*, 154 U. S. 421, 435, 436, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Adams Express Company v. Ohio State Auditor*, 165 U. S. 194, 229, 17 Sup. Ct. 305, 41 L. Ed. 683. The treasurer introduced evidence which tended to show that the actual value of complainant's property in Bent county was more than \$25,000 per mile, and to avoid the effect of that evidence the complainant invoked the same rule; but each party was estopped by his pleading from availing himself of the benefit of this rule in the case in hand. The treasurer could not rely upon it to sustain the assessment of the county assessor, because he had admitted in his pleading that his assessment was only 26 per cent. of the actual value of the property. The complainant could not invoke it successfully to sustain the assessment of its property in Bent county at only \$14,800 per mile by the board, because it had admitted in its complaint that the actual value of its property was \$25,000 per mile. The rule is inapplicable to this case, and its consideration is here dismissed.

Counsel for the complainant argue that the treasurer admitted by his answer that the board assessed its property at its actual cash value; but a careful analysis of the answer has convinced that the fair and true construction of it is that the treasurer admitted that the board assessed that property \$14,800 per mile, but averred that it was worth more than \$25,000 per mile, and that it was not assessed higher in proportion to its actual value than was the other taxable property in the county.

The statutes required the board to assess the railroad property, and they required the assessor to assess the other taxable property in the county, at its actual value. They were required to assess the property within their respective jurisdictions independently, without conference or consultation with each other, at times when they could not know that either had made or would make an assessment on any other than the lawful basis, the basis of the actual value of the property. The only safeguard against injustice, the only surety for impartiality and uniformity, at this point in the taxing proceedings, was assessments at the actual value of the property. For, if either the board or the assessor varied from this standard, the assessments could seldom fail to be partial and unjust. In the absence of all evidence, the pleadings alone establish the facts that the assessor disregarded this law and assessed the taxable property subject to his jurisdiction at 26 per cent. of its actual value, and that the board disregarded the law and assessed the property within its jurisdiction at less than 60 per cent. of its actual value. In this state of the law and of the pleadings, the assessments, though competent, were not even persuasive, evidence of the actual value of any of the property, nor of uniformity of assessment, and these issues were open to proof by the preponderance of other evidence.

The evidence relative to these matters is voluminous, and a digest or review of it here would be useless. Suffice it to say that it satisfactorily establishes these facts: The assessor of Bent county omitted to assess watches, clocks, jewelry, credits, and more than 100,000 sheep taxable in his county. He assessed the taxable property which he did list at between 25 per cent. and $33\frac{1}{3}$ per cent. of its actual value. The evidence does not disclose more accurately the exact per cent. which his assessment was of the real value of the property he assessed. The county commissioners of the county of Bent knew that he had made his assessment at about $33\frac{1}{3}$ per cent. of the actual value of the property he listed, and that he had omitted some of the taxable property, and they silently acquiesced in this course. It was, and had been for many years, the rule and the settled policy and practice of these local taxing officers to violate the law and assess the taxable property in that county within their jurisdiction at about one-third of its actual value. The assessor actually intended to assess the property he listed upon that basis. He testified, however, and the truth of this statement must be conceded, that he did not have any actual intent or purpose to impose an undue burden upon the complainant or upon railroad property. His acts, nevertheless, were in violation of the statute, their natural and inevitable effect was to diminish the burden of taxation upon the property within his jurisdiction and to increase it upon the railroad property, and, however innocent in actual intent he may have been, his acts were as injurious to the owners of railroad property as if he had actually intended to discriminate against them, and the law conclusively presumes that he intended the natural and inevitable effect of his deeds. It was not necessary to the complainant's cause of action that the assessor or the county commissioners should have had any actual intention to increase unduly the complainant's share of the burden of taxation. It was sufficient to sustain its cause that they intended to disregard the law, and that the natural and inevitable effect of that violation was the increase of its share of the burden. *Taylor v. Louisville & N. R. Co.*, 31 C. C. A. 537, 559, 88 Fed. 350, 372.

These facts leave no doubt that the taxing officers of Bent county adopted a rule pursuant to which they systematically and intentionally grossly underassessed the property of that county within their jurisdiction, with the legal intent unlawfully to diminish the burden of taxation upon property in that county other than railroad property, and to increase the burden of taxation upon railroad property; and if this were the whole case the complainant would be entitled to relief from the unlawful portion of this burden. A systematic and intentional under or over assessment of one or more classes of property in violation of the law, whereby one or more classes of property is to be made to bear an undue proportion of the burden of taxation, presents a good cause of action for relief from the payment of the unjust part of the proposed tax. *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 372, 31 C. C. A. 537, 559; *Cummings v. National Bank*, 101 U. S. 153, 158, 25 L. Ed. 903; *Raymond v. Chicago Traction Co.*, 207 U. S. 20, 37, 38, 28 Sup. Ct. 7, 52 L. Ed. 78; *Pittsburgh, Cincinnati, Chicago & St. Louis R. Co. v. Backus*, 154 U. S. 421, 425, 435, 14 Sup. Ct. 1114, 38 L. Ed. 1031.

But the treasurer alleged, and the court below found, that while the property in Bent county other than the railroad property was grossly undervalued, the property of the railroad company was also underassessed in substantially the same proportion, so that the complainant suffered no real injury by the former undervaluation. This finding is assailed by counsel for the railway company on the grounds: (a) That the defendant admitted in his answer that the \$14,800 per mile at which the board assessed its property was its actual value; (b) that the legal presumption that the board's assessment was according to law establishes the fact that \$14,800 per mile was its actual value; and (c) that there was no competent and no sufficient evidence that its value was more than this amount. The first two grounds have been considered and held untenable—the first because the true construction of the answer does not disclose the admission claimed, and the second because the admission in the bill that the complainant's property was worth \$25,000, when the board assessed it at \$14,800, estopped the complainant from asserting that the board assessed its property at its actual value, and opened the issue of that value to proof by any competent evidence.

Was there any competent evidence that the value of this property was more than \$25,000 per mile? The statutes of Colorado required the Board of Equalization to assess the property in that state of a railroad company held for railroad purposes, excluding its property not necessary or convenient for those purposes which was otherwise assessed, on the basis of the unit of use, to determine the true value of its corporate plant or profit-producing unit, whether a part or all of it was situated in that state, to ascertain the total number of miles of its railroad track wherever situated, the total number of miles in the state and in each county in the state, and then, after giving due consideration to the relative values of different portions of the corporate plant and of the franchises appurtenant thereto, and all other competent evidence and just considerations relative to the value of the plant and its various parts, to ascertain the value of the part of the corporate plant in Colorado, and in each county in that state, in the light of all these considerations and all this evidence, upon the theory that, in the absence of countervailing considerations or evidence, the value of that part of the company's profit-producing unit in the state would be that proportion of the value of its entire corporate plant which the number of miles of its railroad in the state bore to its entire mileage, and that the value of that part of its railroad property in each county would be that proportion of the value of its corporate plant in the state that its number of miles in the county bore to its number of miles in the state. Sections 3918 and 3920. This method of assessment has been repeatedly sustained by the Supreme Court. *Pittsburg, C., C. & St. L. R. R. Co. v. Backus*, 154 U. S. 421, 428, 429, 430, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 185, 220, 221, 222, 224, 17 Sup. Ct. 604, 41 L. Ed. 965; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 197, 221, 17 Sup. Ct. 305, 41 L. Ed. 683.

The statutes required as a basis for this assessment that each railway company owning, controlling, or operating any railroad in the state

should furnish the board and should file with its clerk a statement, verified by one of its general officers, showing for the year ending December 31st preceding—in this case, for the year ending December 31, 1904—among other things, (1) the whole number of miles of main track operated or controlled by the company, as well that without as within the state; (2) the whole number of miles of such track within the state; and (3) the amount of money and other cash items, the number of shares of the capital stock of the corporation outstanding and the average market value thereof during the year for which the statement is made, the total amount and market value of mortgage bonds or other incumbrance upon the property of such corporation and the rate of interest, and the gross earnings and the net earnings of the corporation during the year. Section 3907. The complainant made and filed such a statement with the board a short time before the assessment of this property was made, and this statement was introduced in evidence at the hearing below. It was competent evidence of the value of the property of the complainant, because it was the complainant's admission against interest, made pursuant to the requirement of the statute, for the purpose of enabling the taxing officers to ascertain the true value of its property.

We lay out of consideration here a report of the complainant to the Interstate Commerce Commission for the year ending June 30, 1905, which was introduced in evidence by the defendant, because there is no proof that the assistant to the president and the assistant general auditor, who appear to have made that report, were empowered by the railway company to make any statement or admission on its behalf in the matter of the taxation of its property, and the statements of agents and attorneys authorized to act and admit for their principals in one suit, litigation, or legal proceeding are not admissible against their principals in another such suit or proceeding, in which different issues are involved, without proof of their authority to act and admit in the latter suit or proceeding (*Miller v. United States*, 66 C. C. A. 399, 413, 133 Fed. 337, 351; *Stone v. Bank of Commerce*, 174 U. S. 412, 421, 19 Sup. Ct. 747, 43 L. Ed. 1028; *Horseshoe Mining Company v. Miners' Ore Sampling Co.*, 77 C. C. A. 213, 214, 147 Fed. 517, 518; *New York Life Ins. Co. v. Rankin*, 162 Fed. 103, 108, 89 C. C. A. 103), and because this report does not cover the period of time upon which the valuation for taxation was required to be based, and it was not made for that purpose in pursuance of any statute or otherwise.

The report of the complainant to the State Board for the purpose of its taxation shows that the whole number of miles of railroad owned by it on July 1, 1904, was 8,119.04, and that the average funded debt upon these 8,119.04 miles was \$29,175.92 per mile. There is undisputed testimony in the record before us to the effect that during the year 1904 the average market value of the preferred stock of the company was above its par value, and that the market value of its common stock was from \$75 to \$90 per share. The report shows that there were 1,020,000 shares of common stock and 1,141,195 shares of preferred stock outstanding. Reckoning the common stock at \$75 per share, its market value was \$76,500,000, and reckoning the value of the pre-

ferred stock at par, it was worth \$114,199,530, and the total market value of the preferred and the common stock was \$190,699,530, or \$23,488 per mile, subject to the funded debt of \$29,175.99 per mile. Upon this basis the value of the railroad was \$52,663.92 per mile. The report of the complainant to the board also shows that its earnings for the year ending June 30, 1904, from operation, were sufficient to pay the expenses of operation, taxes, interest on its entire funded debt, and a dividend of 5 per cent. on its preferred stock and 4 per cent. on its common stock, and to leave a surplus of more than \$1,000,000. To all this evidence counsel for the company urge many objections. They say that the valuation of the railroad upon this basis includes the value of three railroads other than that owned by the complainant. But the entire 8,119.04 miles were reported by the complainant to be owned by it, and they were operated by it and were a part of its profit-producing plant, which the state lawfully makes the basis of valuation, although there may have been other railroad companies than the complainant which were owned or controlled by it and were engaged in the operation.

They complain because the market value of the stock and bonds includes the value of the franchises of the company and of its right to conduct interstate commerce. The right to carry on interstate commerce is exercised by the company within as well as without the state of Colorado, and is appurtenant to each mile of its railroad wherever situated, and the tax levied upon the assessment made upon the mileage basis is not a tax upon interstate commerce; but it is a tax upon the property of the company in the state. *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 688, 697, 698, 15 Sup. Ct. 268, 360, 39 L. Ed. 311; *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 195, 220, 226, 17 Sup. Ct. 305, 41 L. Ed. 683. It is true that the current cash value of the whole funded debt and of the entire stock of a railroad company shows what, in the opinion of those who own and deal in its securities and who are perhaps best able to judge, the value of all the property of the company is, and that this value includes all the tangible and all the intangible property of the company, all its corporate franchises, all its privileges and contracts, and all its good will. *State Railroad Tax Cases*, 92 U. S. 575, 605, 23 L. Ed. 663; *Pittsburg, Cincinnati, Chicago & St. Louis R. Co. v. Backus*, 154 U. S. 421, 429, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Adams Express Company v. Ohio State Auditor*, 166 U. S. 185, 221, 222, 17 Sup. Ct. 604, 41 L. Ed. 965. But all the tangible property convenient for railroad purposes, the roadbed, the rails, the ties, the station houses, is combined unavoidably and inextricably with the intangible property, with the franchises, privileges, and contracts of the corporation into a single corporate plant, a single profit-producing unit used for railroad purposes. This intangible property unavoidably and automatically distributes itself wherever the tangible property is, and it enhances the value of every part of it. There are 26 miles of the complainant's railroad in Bent county. There is uncontradicted evidence that this part of the railroad, excluding rolling stock and shop machinery, could be reproduced for from \$20,000 to \$21,000 per mile; but this part of

the complainant's railroad, separate from the system or from the operating unit of which it is a component portion, would be worth far less than it now is, because the franchise of the complainant to be, its franchise to do, its privilege to carry on, interstate commerce, all its franchises and privileges and its good will, are appurtenant to this portion of its railroad, are exercised to operate it, and become a part of its value. *Adams Express Company v. Ohio State Auditor*, 166 U. S. 185, 221, 222, 223, 224, 17 Sup. Ct. 604, 41 L. Ed. 965.

Counsel for the company insist that the current cash value of the stock and bonds is an erroneous and misleading fact from which to deduce the value of the company's railroad property in Colorado, because the portions of its railroad in some more populous states are of greater value per mile than the part of its railroad in Colorado. It is undoubtedly a fact that there must be this difference in value of the separate parts of the railroad. But this difference in value exists in the case of every other corporation which has been or is assessed upon the mileage basis according to the rule of the unit of use, and notwithstanding this fact that rule probably presents the best, and it certainly presents a lawful, method of ascertaining the value of such property for assessment, when the board or court which is finding the value gives due consideration and effect to considerations and evidence relative to the value of the entire corporate plant, relative to the value of that part of the company's property not included within the plant, which must be deducted from the value of its entire property, and to considerations and evidence relative to the value of different parts of the corporate plant and of the franchises appurtenant thereto; and in view of this fact the market value of the stock and bonds must be competent and persuasive evidence from which to ascertain the value of the railroad in the state of Colorado, or in any other state.

Counsel contend that the market value of the stock and bonds is a misleading fact from which to deduce the value of the railroad property in Colorado, because the complainant has other property than that used for railroad purposes, the value of which should be deducted from the market value of the stock and bonds, and because the company has more valuable terminals at Chicago, Kansas City, Galveston, Los Angeles, and San Francisco than it has in the state of Colorado; but there is no competent evidence in the record of the amount and value of the property which the complainant owned in the year 1904 that was not a part of the profit-producing unit, nor of the value of complainant's terminals outside of Colorado or within that state. The company was called upon in accordance with the statute to make a return of its corporate plant as a basis for the assessment of its property. It made that return, and it has been introduced in evidence in this case. The presumption is, in the absence of evidence to the contrary, that a railroad company holds all its property for railroad uses, and that the value of the stock and bonds stated in the return indicates the value of the complainant's property held for those purposes. If it had accumulated property that it was not using or holding for such purposes, or if its case was one of those exceptional cases wherein some parts of its railroad in other states were of extraordinary value,

it would have been competent for it to have proved that fact at the hearing below. In the absence of any such proof, the legal presumption must prevail, and the market value of its stock and bonds, divided by the number of the miles of its railroad, must be substantial evidence of the value of its railroad per mile in the state of Colorado and in the county of Bent. *Adams Express Company v. Ohio State Auditor*, 165 U. S. 194, 227, 17 Sup. Ct. 305, 41 L. Ed. 683; *Adams Express Company v. Ohio State Auditor*, 166 U. S. 185, 222, 223, 17 Sup. Ct. 604, 41 L. Ed. 965; *Pittsburg, Cincinnati, Chicago & St. Louis R. Co. v. Backus*, 154 U. S. 421, 430, 14 Sup. Ct. 1114, 38 L. Ed. 1031.

The result is that this record contains the evidence of two witnesses that the cost of reproduction of that part of the complainant's railroad in Colorado in 1904, exclusive of rolling stock and shop machinery, would have been about \$20,000 per mile on the one hand, and on the other hand evidence of the gross earnings and of the net earnings of the entire corporate plant of the company for the year ending June 30, 1904, and of the current cash value of the obligations evidencing the funded debt, and of the stock of the company during that year, to the effect that the value of the complainant's corporate plant or profit-producing unit; and hence, under the statutory and legal rule for its assessment for taxation on a mileage basis, the value of that part of its plant in Colorado was about \$52,663.92 per mile. The assessment made by the board, \$14,500 per mile, was 28 per cent. of this value. The gross and net earnings and the current cash value of the obligations which evidence the funded debt and of the stocks of a railroad company are neither exclusive nor conclusive evidence of the value of its railroad property, or of the part of its profit-producing unit in any state. But they are competent and more persuasive evidence of such value than the mere cost of reproducing the tangible property which constitutes the railroad, or any part of it, because this cost of reproduction excludes the value of the intangible property of the company, of its good will, its franchises, its privileges, and its contracts, which is sometimes greater than the value of its tangible property (*Adams Express Company v. Ohio State Auditor*, 165 U. S. 194, 220, 221, 223, 224, 17 Sup. Ct. 305, 41 L. Ed. 683), and because those who actually buy, sell, and own the stocks and bonds of a railroad company are generally better qualified than strangers to form correct opinions of the value of its property, and the current market value of all these securities is very persuasive proof of their estimate of the value of the property of the company (*State Railroad Tax Cases*, 92 U. S. 575, 605, 23 L. Ed. 663; *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031).

When to these facts are added the presumptions that, in the absence of countervailing evidence, all the property of a railroad company is held by it for railroad uses, and that the value of one part of it may be fairly estimated by taking that part of the value of its corporate plant which is measured by the proportion of the length of the particular part to that of the whole railroad (*Adams Express Company v. Ohio State Auditor*, 166 U. S. 185, 223, 17 Sup. Ct. 604, 41 L. Ed. 965; *State Railroad Tax Cases*, 92 U. S. 575, 611, 23 L. Ed. 663;

Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, 154 U. S. 421, 430, 14 Sup. Ct. 1114, 38 L. Ed. 1031), and the fact that the gross and net earnings of the corporate plant for a considerable time preceding the date of the valuation were ample, after paying expenses of maintenance, operation, and reasonable betterments, to pay reasonable interest on the current cash value of all the outstanding stock and of all the bonds and other obligations of the company, this evidence becomes too persuasive to be overcome by testimony of the mere cost of reproducing the tangible structure, consisting of right of way, roadbed, ties, rails, station houses, and other improvements which form a part of the railroad.

The evidence is then convincing that the Board of Equalization assessed the property of the complainant in Bent county at about 28 per cent. of its cash value, and that the other taxable property in that county which was assessed at all was assessed at about the same per cent. of its value. It fails to sustain the claim of the complainant that its property was assessed at a higher proportion of its value than was the other property which was assessed in that county. The complainant, therefore, has suffered and can suffer no injustice, it has sustained and can sustain no injury, by the gross underassessment by the assessor of Bent county of the property within his jurisdiction, and it is entitled to no relief on that account. Courts of equity may not right wrongs at the suit of those who have not suffered from them. Resulting legal injury, continuing or threatening, is as essential to relief in equity as causal wrong. *Darragh v. H. Wetter Mfg. Co.*, 23 C. C. A. 609, 619, 78 Fed. 7, 16; *People's United States Bank v. Gilson*, 88 C. C. A. 332, 338, 161 Fed. 286, 292.

After the assessments had been made, the complainant filed a petition for an equalization of them, and it complains, and the defendant denies, that the Board of Equalization unlawfully refused to give it a hearing and confirmed the assessments as they were originally made. As, however, these assessments were substantially uniform, and as the complainant can suffer no injustice or injury on account of the basis upon which they were made, this issue has become immaterial, and it is here dismissed.

There remain for consideration the omissions by the assessor of taxable property from his assessment. The evidence is conclusive that he omitted all watches, clocks, and jewelry, all credits, and all fat sheep and cattle, that the average bank deposits in that county during the year 1905 amounted to \$230,000, and the weight of the evidence is that there were about 131,755 fat sheep in the county between January 1, 1905, and April 1, 1905, a small part of which remained in the county on and after the latter date. The general rule was that, except as otherwise provided, personal property should be assessed in the county where it was on the 1st day of April in each year. Section 3873. But it was provided by section 3927t: (a) That it should be lawful for the assessor to assess cattle, sheep, and horses as of any date between the 1st day of January and the 31st day of December of the year in which the assessment was made—in this case of the year 1905; (b) that when any live stock was driven into the county, for the purpose of grazing

therein, it should be liable to be assessed for all taxes leviable for the year in which it was driven into the county; (c) that any stock brought into the state between April 1st and September 1st in each year, and removed from the county to which it was brought before one year had elapsed, should be subject to taxation for the year in which it was brought into the state, but that stock brought in between those dates and kept in the county more than a year should be exempt from taxation for the year in which it was introduced into the state, and should be subject to taxation thereafter; and (d) that all stock brought into the state after September 1st and before December 31st of the same year should be exempt from taxation for that year. The omitted sheep, with perhaps a few exceptions, were brought into the county between the 1st of September and the 31st of December of the year 1904. This assessment was for the year 1905.

Clauses "b," "c," and "d," above, so far as they concern the assessment of these sheep, relate exclusively to their assessment for the year 1904, the year in which they were introduced into the county, and they have no relevancy to their assessment in 1905, except that they clearly show that it was the purpose and policy of the state to assess live stock brought into a county to be fed when it was removed therefrom within a year thereafter, although it did not happen to be in the county on the 1st day of April in any year. Thus under (a) live stock driven into the county for grazing is presumably introduced after April 1st, but it is taxable for that year nevertheless. Under (b) stock brought in after April 1st and before September 1st and shipped out before the succeeding April is taxable for the year of its introduction. But under (d) stock brought in after September 1st is not taxable for that year. This stock, therefore, was not taxable for the year 1904. Unless it was assessed for the year 1905, it would escape taxation in that county altogether. The statute expressly empowered the assessor to assess these sheep as of any date between January 1 and April 1, 1905, and in view of the policy of the state exhibited by these statutes to assess all live stock brought into a county, whether it was there on April 1st or not, the grant of this power must be deemed to have imposed upon the assessor a corresponding duty to make the assessment. The Constitution of the state required this property to be assessed, and it required taxes to be levied, under general laws (article 10, § 3), and the Legislature never intended that the assessment and taxation of this property should be left discretionary with the assessor. The statute required him to assess these sheep.

The evidence is conclusive that he so understood his duty, but that he and the other county officers intentionally omitted this property from the assessment pursuant to a rule and practice of the assessors and county commissioners of that county which had long prevailed to assess and tax no fat stock therein, because they wished to encourage the industry of feeding this stock in their county in order to provide a market for hay and to make general business prosperous in their community. The injustice of this rule and practice to the railroad company is demonstrated by the fact that the whole number of fat sheep in the county in the spring of 1905 was about 131,755, and their value at

the rate applied by the assessor to other property for the purposes of assessment would have been about \$223,983.50, while the whole number of sheep he actually assessed was only 25,515, at a valuation of \$43,416, and if these fat sheep had been assessed at the valuation above stated the complainant's tax would have been reduced about \$3,000.

Counsel for the defendant argue that the complainant is estopped from claiming any reduction of its tax on account of the omission of these sheep, because at some prior time the county attorney had a conversation with the vice president of the railway company, and he testified, "Just what was said I don't remember, but we came away with the impression that it would be very satisfactory to his department to omit them from taxation in order to encourage the industry," and because the number and the value of the taxable sheep omitted were much less than those stated. The alleged estoppel was not established, because there was no proof that the vice president of the company had any authority from it to consent that the assessor should disregard the law, and the testimony was too indefinite to satisfy that he ever gave any such consent.

The testimony does not prove the number and value of the taxable sheep omitted beyond a reasonable doubt; but it establishes their number and their value by a fair preponderance of the evidence. Moreover, there is conclusive evidence that there were deposits in the banks to the amount of \$230,000, there is evidence that not more than half of the credits thus evidenced could probably have been offset by debts of the depositors, there must have been other credits besides bank deposits, and there must have been watches and clocks that were taxable in this county. In view of all these facts, and of the admitted fact that the complainant is entitled to a reduction from its tax of \$676.78 on account of the excessive assessment certified to the county by the Board of Equalization, it is certain that no injustice will be done to the county by a reduction of the tax of the complainant in the sum of \$3,580, and that in justice and in equity the complainant is entitled to a reduction of at least that amount.

Finally, counsel for the defendant invoke the conceded rule that some recognized ground of equity jurisdiction, and the fact that the complainant has no adequate remedy at law, in addition to the fact that the tax is excessive and illegal, are essential to the maintenance of a suit in equity for injunctive relief, and they insist that no such foundation for this suit has been laid by the proof. *Dows v. City of Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Hannewinkle v. Georgetown*, 15 Wall. 547, 21 L. Ed. 231; *Union Pacific Railway Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098; *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; *State Railroad Tax Cases*, 92 U. S. 575, 613, 614, 23 L. Ed. 663; *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 661, 11 Sup. Ct. 682, 35 L. Ed. 303; *Pacific Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; *Ogden City v. Armstrong*, 168 U. S. 224, 236, 18 Sup. Ct. 98, 42 L. Ed. 444; *Albuquerque Bank v. Perea*, 147 U. S. 87, 13 Sup. Ct. 194, 37 L. Ed. 91; *Coulter v. Louisville & Nashville Ry. Co.*, 196 U. S.

599, 609, 25 Sup. Ct. 342, 49 L. Ed. 615; *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 356, 31 C. C. A. 537. Fraud and mistake are ancient heads of equity jurisdiction. The Board of Equalization made a plain mistake, demonstrable by the mere division of their assessment of the corporate plant of the company in the state by the number of miles of railroad they found the company controlled therein, when it certified to the county of Bent its overassessment of the company's property in that county. The systematic and intentional omission of watches, clocks, and jewelry, credits, and fat stock by the county assessor from the assessment of the property within his jurisdiction, however innocent in actual intention, was either an intentional fraud upon the complainant or such a gross mistake that it was a fraud in law.

Counsel cite the statute of Colorado, which provides that the board of county commissioners shall refund all taxes paid by any person which are afterwards found to be erroneous or illegal (Laws Colo. 1902 [Ex. Sess.] p. 146, c. 3, § 202), and contend that the complainant has an adequate remedy by an action at law based upon this statute. Conceding, without deciding, that it might maintain such an action to recover back the illegal portion of the tax against its property, is that remedy as adequate as the injunction of the court below? The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity. *Williams v. Neely*, 134 Fed. 1, 10, 67 C. C. A. 171, 180, 69 L. R. A. 232; *Boyce v. Grundy*, 3 Pet. 210, 215, 217, 7 L. Ed. 655; *Springfield Milling Co. v. Barnard & Leas Mfg. Co.*, 81 Fed. 261, 265, 26 C. C. A. 389, 393; *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125. The facts and the law of this case have been ably presented to and carefully considered by two courts, and all the material issues in it have been determined. The complainant now has and it is entitled to keep the \$3,580 requisite to pay the illegal portion of its tax. An injunction in this suit will enable it to retain it, and will end this controversy here. In order to obtain any adequate relief at law, it must pay over this \$3,580 to the defendant, must bring, try, and prosecute to judgment an action at law against the county to recover it back, must possibly, it may be probably, come again to this court for review of that trial, and then possibly, perhaps probably, prosecute a petition for a mandamus to compel the levy of taxes to pay the judgment it shall recover, and after all this it will never secure more than a part of the actual expenses it will necessarily incur in prosecuting its action at law. This proposed remedy is neither as prompt, nor as certain, nor as complete, as the relief which may be granted through this suit in equity.

Not only this, but the omission of the fat stock and the credits had been repeated by the officials of this county year after year. It was their habitual practice to omit them, and this practice threatened to continue. It had grown into a rule, and yet it was a violation of the Constitution of the state, which requires that "all taxes * * * shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property real and personal" (article 10, § 3), and of the statute, which

required all personal property not exempt to be assessed. It was systematic, intentional, and continuing, and where there is a systematic, intentional, continuing omission or undervaluation of other taxable property by the taxing officers of a state or county, in violation of the Constitution or law, which inevitably effects an unjust discrimination in taxation against the property of the complainant and against other property similarly situated, a bill in equity will lie to enjoin the collection of that portion of the tax which resulted from the illegal discrimination. *Cummings v. National Bank*, 101 U. S. 153, 158, 25 L. Ed. 903; *Raymond v. Chicago Traction Company*, 207 U. S. 20, 36, 37, 28 Sup. Ct. 7, 52 L. Ed. 78; *Railroad and Telephone Companies v. State Board of Equalizers* (C. C.) 85 Fed. 302, 307, 318; *Fargo v. Hart*, 193 U. S. 490, 503, 24 Sup. Ct. 498, 48 L. Ed. 761; *Reagan v. Farmers' Loan & Trust Company*, 154 U. S. 362, 391, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Nashville, C. & St. L. Ry. v. Taylor* (C. C.) 86 Fed. 168, 184; *Louisville Trust Co. v. Stone*, 107 Fed. 305, 46 C. C. A. 299.

The facts of this case bring it under this rule, and the decree below must be reversed. The complainant may recover one-half of its costs in this court. The case must be remanded to the court below, with instructions to cause the costs of the parties in that court to be taxed and equally divided between the complainant and the defendants, and to enter a decree to the effect that, upon condition that the complainant pay within 60 days after the entry of the decree all the taxes in controversy and the interest thereon, except \$3,580 and the interest thereon, or such part of said taxes, less said \$3,580, and interest, as shall remain due from it after crediting to it the balance, if any, due to it on account of the costs which are to be taxed, the defendants be perpetually enjoined from collecting the said sum of \$3,580 and interest, or any part thereof, on account of the tax in controversy or the proceedings thereunder; and it is so ordered.

AMERICAN TRUST CO. v. W. & A. FLETCHER CO.

BERWIND-WHITE COAL MINING CO. v. SAME.

(Circuit Court of Appeals, First Circuit. August 18, 1909.)

Nos. 821, 822.

1. MARITIME LIENS (§§ 60, 74*)—JURISDICTION—FEDERAL AND STATE COURTS.

(1) For foreign repairs and supplies for a vessel there arises a lien, apart from statute, enforceable in rem in a court of admiralty, and not so enforceable in the state courts. (2) For domestic repairs and supplies there is no lien, apart from statute, except a possessory lien; but a state statute may give a maritime lien for them, enforceable in rem in a court of admiralty, and not so enforceable in the state courts. (3) For construction there is no lien apart from statute; but a state statute may give a lien, not ordinarily enforceable, in rem or otherwise, in a court of admiralty, but enforceable in the state courts by proceedings which are undistinguishable from proceedings in rem, and also enforceable under certain conditions in federal courts.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 98, 111; Dec. Dig. §§ 60, 74.*]

Liens created by state laws, see note to *The Electron*, 21 C. C. A. 21.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. SHIPPING (§ 32*)—MORTGAGE OF VESSELS—AFTER-ACQUIRED PROPERTY CLAUSE.

A mortgage given by a steamship company, covering all the vessels it then owned and all it should afterwards acquire, cannot bind after-acquired vessels, as against liens given by statute for their construction.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 105, 106; Dec. Dig. § 32.*]

3. MARITIME LIENS (§ 71*)—STATUTORY LIENS—SCOPE AND MODE OF ENFORCEMENT.

Gen. St. N. J. 1895, p. 1960 (Act March 20, 1857 [P. L. p. 382]; Act March 20, 1878 [P. L. p. 158]; Act April 24, 1884 [P. L. p. 248]), which provides that a debt contracted for the building, repairing, fitting, furnishing, or equipping of a vessel "shall be a lien upon such ship or vessel * * * and continue to be a lien on the same until paid," as construed by the courts of the state, creates a positive lien, enforceable in any court of equity by appropriate proceedings; the procedure prescribed therein not being exclusive.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 109; Dec. Dig. § 71.*]

4. MARITIME LIENS (§§ 17, 74*)—STATUTORY LIENS—CONSTRUCTION OF VESSEL—ENFORCEMENT OF LIEN.

Gen. St. N. J. 1895, p. 1960 (Act March 20, 1857 [P. L. p. 382]; Act March 20, 1878 [P. L. p. 158]; Act April 24, 1884 [P. L. p. 248]), which makes a debt contracted for the building of a vessel a lien thereon, which shall continue a lien until paid, is constitutional and valid, and applies to vessels owned outside of the state, but the unfinished hulls of which were brought therein for completion by equipment with machinery, and gives the builder a right of property in such vessels, which follows them into another jurisdiction, and is there enforceable according to the rules of the chancery courts, where the statute is not in conflict with the public policy of the state in which it is so sought to enforce it.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 22, 111; Dec. Dig. §§ 17, 74.*]

Appeals from the Circuit Court of the United States for the District of Maine.

For opinion below, see 166 Fed. 782.

Avery F. Cushman (Elmer P. Howe and William A. Sargent, on the brief), for appellant American Trust Co.

Alfred H. Strickland, for appellant Berwind-White Coal Mining Co.

Harrington Putnam and Edward S. Dodge, for appellee W. & A. Fletcher Co.

Brandeis, Dunbar & Nutter and Robinson, Biddle & Benedict, amici curiæ.

Before COLT and LOWELL, Circuit Judges, and BROWN, District Judge.

LOWELL, Circuit Judge. The Steamship Company, a Maine corporation, being concerned in the operation of steamships, on May 16, 1905, mortgaged its property to the Trust Company, a corporation of Massachusetts. This mortgage was stated to cover after-acquired property. It was recorded in the custom house at Bath, Me. At some time in 1905 or 1906 the Steamship Company contracted for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the building of the steamers Yale and Harvard. The hulls were constructed in Pennsylvania, and were afterwards brought at different times to the Fletcher Company's yard at Hoboken, N. J., where, under contract between the Steamship Company and the Fletcher Company, they were supplied with engines and other machinery and fittings. Before they were completed they were enrolled in Bath, Me.; the Yale on May 23, 1907, and the Harvard on August 12th. On May 25, 1907, the Yale was expressly conveyed by the Steamship Company to the Trust Company by an instrument making it subject to the mortgage of 1905. This instrument was immediately recorded at Bath. The Harvard was conveyed by a like conveyance, likewise recorded. The steamers were thereafter fitted up and employed in navigation, but there remained a balance for work done upon them, due from the Steamship Company to the Fletcher Company. A creditors' bill was filed against the Steamship Company January 29, 1908, in the Circuit Court for the district of Maine, and a receiver was appointed by that court. Ancillary proceedings were had in Massachusetts and in the Southern district of New York. The receiver took possession of the Yale and Harvard, which were then laid up at Boston, Mass., for the winter of 1907-08. In the summer and autumn of 1908 they were run by the receiver between Boston and New York. The Fletcher Company brought a petition in the Circuit Court for Maine to enforce a lien alleged to arise in its favor upon the Yale and Harvard under the statutes of New Jersey. In that proceeding the Trust Company intervened, as claiming rights in the steamers superior to those of the Fletcher Company. The Fletcher Company's petition was thus resisted, both by the mortgage creditor and by unsecured creditors. The Circuit Court granted the prayer of the petition, and the Trust Company brought the case here by way of appeal.

The case before us is concerned with an alleged lien upon vessels. At the risk of declaring commonplaces, we start from first principles. At common law the builder or repairer, like other mechanics, had a possessory lien upon the ship. "A shipwright, indeed, who has taken a ship into his own possession to repair it, is not bound to part with the possession until he is paid for the repairs, any more than any other artificer. But if he has once parted with the possession, or has worked upon it without taking possession, he is not deemed a privileged creditor, having any claim upon the ship itself." The General Smith, 4 Wheat. 438, 443, 4 L. Ed. 609. The objection supposed to lie against secret liens is not applicable to these possessory liens. They are not secret, as they are advertised by the lienor's possession. The purchaser of the chattel takes title subject to them. By the maritime law, on the other hand, a lien existed for the construction, supply, and repair of a vessel having an application more extended. It was not possessory. Indeed, the maritime lien was deemed to be given in order that a vessel might go on its way unembarrassed by the lienor's attempt to obtain immediate payment. The origin of this lien we need not investigate. Where it exists, it prevails over the rights of a bona fide purchaser for value. It follows the ship apart from possession. It is not divested by a subsequent sale. It may prevail even over a

prior sale or mortgage, and it has a fixed order of preference in payment as compared with other maritime liens, such as those for seamen's wages, general average or collision. It has the inconvenience of a secret lien, but the policy of the law deems the inconvenience less important than the advantage which the lien secures to navigation.

The general maritime lien for construction, repairs, and supplies has been recognized very imperfectly by the law of England, and even by that of the United States. In the English courts questions of jurisdiction were long confused with questions of substantive law, until all difference was lost sight of. Even the courts of the United States, though having a broader knowledge of the admiralty law, did not emerge at once from English limitations and inconsistencies. See the historical remarks in *The Underwriter* (D. C.) 119 Fed. 713. All refinements of the Anglo-American doctrine being laid aside, the lien is held to exist here only for supplies furnished in a foreign port, those which we may call for convenience foreign repairs and supplies. In respect of these, the lien has the incidents of the maritime lien above described.

The convenience and justice of a lien for the construction of a vessel and for its domestic repair and supply have been so generally recognized, however, that many of the states, by statute, have given a lien to the builder and to the domestic repairer and supply man. *Stimson's American Statute Law*, § 4643. These statutes vary considerably in the nature and rank of the lien given. Many of them require some record in order that the lien may be preserved. Ordinarily the work must be done within the state (*McDonald v. The Nimbus*, 137 Mass. 360); but not always (*Ward v. Willson*, 3 Mich. 1). In all cases, however, the lien exists apart from possession. The effect given by the federal courts to state statutes, fixing liens upon a vessel, is anomalous. The contract for domestic repairs and supplies is said to be maritime, though of itself it creates no maritime lien. The state statute, operating on the maritime contract, is held to create a maritime lien, enforceable in a court of admiralty by its peculiar process, and of equal rank with the strictly maritime lien for foreign supply and repairs given by the admiralty law. *Jones on Liens*, § 1772. Like the latter, it is unconnected with possession, enforceable without regard to the locality of the court, and indestructible by private sale. It imports a tacit hypothecation of the vessel, it is a *jus in re*, it accompanies the property into the hands of a bona fide purchaser, and it is enforceable in a court of admiralty by process in rem. Whatever be the provisions of the state statute, they cannot be made effective to give a state court jurisdiction to enforce this lien by proceedings of this sort. A proceeding by way of attachment, summons to the owner, if known, and sale of the vessel thereunder, has been held to be thus excluded from the state courts in the enforcement of a lien for domestic repairs and supplies. "The form of proceeding against the vessel, provided for in the statute of Massachusetts, now in question, is clearly in the nature of admiralty process in rem, and is undistinguishable from the proceedings, provided for in statutes of other states, which have been held by this court

to be exclusively within the admiralty jurisdiction of the courts of the United States. The lien upon the vessel is created as soon as the money is due for labor performed or materials furnished, and continues until the debt is satisfied, unless the lien is dissolved by failure to record a statement of the claim, as required by statute. The petition is to be served by an attachment of the vessel, and a summons to the owners, if known. A dissolution of the attachment does not dissolve the lien, and any number of persons having such liens upon the same vessel may join in one petition to enforce them." *The Glide*, 167 U. S. 606, 623, 17 Sup. Ct. 930, 936, 42 L. Ed. 296.

The cause of the want of jurisdiction in the state courts to enforce by process in rem the lien for domestic supplies should be noted. That a state statute cannot provide for this enforcement in a state court arises, not from any general infirmity in the statute, but solely because of the exclusive gift to the federal courts of judicial power in "all cases of admiralty and maritime jurisdiction." Where this exclusive federal jurisdiction exists, it necessarily ousts the jurisdiction which would have otherwise been enjoyed by the state courts. Jurisdiction in the state courts is excluded only so far as the federal Constitution gives it exclusively to the federal courts. *Knapp v. McCaffrey*, 177 U. S. 638, 648, 20 Sup. Ct. 824, 44 L. Ed. 921. Where exclusive jurisdiction does not exist in the federal courts, it may exist in the courts of a state. Thus the contract for domestic supplies may be enforced in the state courts by an ordinary action for breach of contract, and, theoretically, the lien which the statute causes to arise out of the contract may also be enforced in the state courts by proceedings not in rem. But the method of enforcing the lien in a court of admiralty is so much more effective than the method allowed to the state courts that the former has become practically exclusive.

Concerning the statutory lien for the construction of a vessel, the federal courts have reached a different conclusion from that reached concerning the statutory lien for domestic repairs and supplies. The contract itself is not deemed to be maritime, and so neither the lien nor the contract is ordinarily enforceable in an admiralty court. *Edwards v. Elliott*, 21 Wall. 532, 22 L. Ed. 487. But the statutory lien for construction is nevertheless valid. As the federal court of admiralty is here without jurisdiction, it follows that, upon the principles above stated, the lien is enforceable in the state courts. This enforcement may be by a proceeding so closely resembling a process in rem that the state courts are excluded from a like remedy in the enforcement of a lien for domestic repairs and supplies given by the same state statute as that which gives a lien for construction. Where exclusive federal jurisdiction does not exist, a state statute may give jurisdiction of a like remedy to a state court.

To recapitulate: (1) For foreign repairs and supplies there arises a lien, apart from statute, enforceable in rem in a court of admiralty, and not so enforceable in the state courts, whether expressly given by statute or otherwise. (2) For domestic repairs and supplies there is no lien, apart from statute (except the possessory lien); but a state statute may give a maritime lien for them, enforceable in rem in a

court of admiralty, and not so enforceable in the state courts. (3) For construction there is no lien, apart from statute; but a state statute may give a lien, not ordinarily enforceable, in rem or otherwise, in a court of admiralty, but enforceable in the state courts by proceedings which are undistinguishable from proceedings in rem. Even a federal court is not altogether excluded from the enforcement of a statutory lien for the construction of a vessel. If the vessel has been libeled, and sold by a court of admiralty in the enforcement of a maritime claim, the surplus, after satisfying the maritime claim, will be handed over to the person entitled thereto. In the distribution of this surplus the court recognizes claims and liens other than maritime, such as pledges, mortgages, and statutory liens for construction. The Guiding Star (D. C.) 9 Fed. 521, s. c. on appeal (C. C.) 18 Fed. 263; The Maud Carter, 29 Fed. 156. On the ground of diversity of citizenship, a suit to enforce the statutory lien for construction may be brought in the Circuit Court or removed thereto. The Winnebago, 141 Fed. 945, 73 C. C. A. 295; *Id.*, 142 Mich. 84, 105 N. W. 527, 113 Am. St. Rep. 566; *Id.*, 205 U. S. 354, 27 Sup. Ct. 509, 51 L. Ed. 836.

A lien for the construction of a vessel, given by a statute of New Jersey, may therefore be enforceable, not only in the state courts of New Jersey, but, under some conditions, in federal courts sitting within that state. We have here to consider the effect, the enforceability, and the rank of such a lien in other jurisdictions.

Before considering these questions, however, we will deal with certain preliminary matters in the case at bar, insisted on by one side or the other. The Trust Company contended that before the Fletcher Company's lien arose the vessels were covered, as they came into existence, by the mortgage of 1905, which mentioned after-acquired property. Without asserting that this would help the Trust Company here, even if true, we may observe shortly that the contention is not supported by the facts. The vessels came into existence already subject to a lien for their construction. Work had been done in their construction, indeed, before the Fletcher Company's work was applied; but for their existence as vessels the Yale and Harvard required not only hulls, but also machinery and other fittings, and, as that machinery was supplied them, the lien of the Fletcher Company attached. The work and material thus supplied by the Fletcher Company were needed "to bring her [the vessel] into existence as a complete entity." The Victorian, 24 Or. 121, 132, 32 Pac. 1040, 1042, 41 Am. St. Rep. 838. The after-acquired property, which the mortgage was expressed to cover, came into existence, and therefore into acquisition affected with a lien. Even if the provision in the mortgage was effectual for any purpose, it was not effectual to obtain priority over the Fletcher Company's lien.

There was discussion at the argument of the scope and intent of the New Jersey statute giving the lien. Gen. St. N. J. 1895, p. 1960 (Act March 20, 1857 [P. L. p. 382]; Act March 20, 1878 [P. L. p. 158]; Act April 24, 1884 [P. L. p. 248]). The Trust Company urged that these statutes were not intended to create a lien, properly so

called, but only a method of attachment by mesne process. But the statute first declares the existence of the lien as such, and its duration and rank. Only after this has been done is a remedy for its enforcement provided in later sections of the statute. Again, section 39 shows that the lien has validity apart from the statutory provisions for its enforcement. The limitations upon enforcement are not to "be construed to impair the validity of any liens created by this act, the payment of which shall be decreed in any court of the United States." Some liens created by the New Jersey statute, and for which a method of enforcement is provided therein, are yet enforceable by proceedings other than those according to the statute. This is certainly true of liens for supplies furnished in New Jersey to vessels of New Jersey. These liens are enforceable in a court of admiralty by its peculiar process, without regard to the remedy given by the statute. The remedy given by the statute is, therefore, not exclusive. Even a court of admiralty itself, in exceptional circumstances, as we have seen, may proceed to enforce the lien for construction here in question.

That the statutory method of enforcing the lien is not exclusive has been decided by the courts of New Jersey. In *Russell v. Myers*, 67 Atl. 1016, the Court of Chancery of New Jersey recognized the lien for supplies given by this statute as binding a fund in the hands of its receivers. The fund arose from the sale of the vessel by order of the court of admiralty sitting in New York, and it is manifest that the New Jersey Court of Chancery enforced the lien without recourse to the elaborate proceedings provided by the statute. The lien was "enforceable [in the Court of Chancery] in all other ways in which a court of equity can act in regard to such matters." Page 1018. And it is described as "a property right which all courts, both state and federal, must recognize." As the lien for construction and that for supplies are given by the same clause of the New Jersey statute, their character is the same. No case has been found in New Jersey which in any way contradicts this exposition of the statute. So far as the Legislature of New Jersey can bring about the result, it has given to the Fletcher Company a lien upon the Yale and Harvard, which is enforceable in the Circuit Court for the district of Maine. We agree with both the reasoning and the conclusion of the learned judge of the Circuit Court in holding that this lien has not been waived or lost by the lienor's laches. The Trust Company alleged knowledge by the Fletcher Company of the Trust Company's rights; but the knowledge, if there was any, did not precede the lien.

We come, then, to answer the question stated above: Is this statutory lien enforceable in the Circuit Court for the district of Maine as the court of a jurisdiction foreign to that of New Jersey? Would it be enforceable in the state courts of Maine?

As the vessels were in New Jersey when the lien arose by virtue of the New Jersey statute, we agree with the New Jersey court that a right of property therein was created by the Legislature of New Jersey, that the Legislature intended to create this right, we have shown already, and that the Legislature was not forbidden by the Constitution of the United States to create this right of property, we

regard as settled by the decisions of the Supreme Court. Jurisdiction to enforce the nonmaritime lien for construction by a state court is held to be analogous to jurisdiction to enforce a maritime lien for supplies by a federal court of admiralty.

The owner of the Yale and Harvard, it is true, was a Maine corporation, and for some purposes the domicile of the owner draws to it the situs of personal property. But we are of opinion that this fiction is inapplicable in the case at bar. The fiction is controlled by the right of the jurisdiction within which the personal property is situated to determine the effect of those acts of the parties which transfer or affect its ownership. From the standpoint of a court sitting in Maine, this is not the case of a lien which arose upon a domestic, as distinguished from a lien which arose upon a foreign, vessel. The lien first attached in New Jersey to something which was not then a vessel, though it subsequently became one.

The right of property arising in New Jersey from a lien given by its statutes is not divested by removal of the property from New Jersey. The lien thus attaching is not limited in its application or enforcement to the state which created it. *Dacey on Conflict of Laws*, p. 530. Rights which have once validly attached to personal property, so as to qualify its ownership, do not ordinarily disappear, either temporarily or permanently, when the property is removed to another jurisdiction. *Hornthall v. Burwell*, 109 N. C. 10, 13 S. E. 721, 13 L. R. A. 740, 26 Am. St. Rep. 556. A mortgage is still a mortgage, a lien is still a lien, though the property has been removed from New Jersey to Maine. *The Maud Carter* (D. C.) 29 Fed. 156.

As the lien became valid at its origin in New Jersey, because of the control of New Jersey over property within its limits, so a like control by another state over personal property removed thither may subordinate or modify the effect of a property right arising in the first state. As to the effect of transactions occurring in the second state after removal of the property thereto, its law ordinarily controls. Thus, in *Walworth v. Harris*, 129 U. S. 355, 9 Sup. Ct. 340, 32 L. Ed. 712, the Supreme Court held that a lien created by the statutes of Arkansas upon personal property there situated was afterwards subordinated to a lien created by the laws of Louisiana, into which latter state the property had been removed. This pre-eminence of the Louisiana law was recognized, it seems, even by a federal court sitting in Arkansas.

In *The Roanoke*, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770, the Supreme Court held unconstitutional a state statute which purported to give a lien upon a foreign ship for supplies furnished to a contractor, because the statute was an unconstitutional interference with interstate commerce. But the lien here in question did not arise in the course of the commercial life of the vessel. It came into existence before the structure which is now a vessel had become an instrument of commerce. As we shall hereafter observe, we have here before us no conflict between this statutory lien and such a maritime lien as may be deemed an incident of commerce within the federal control. The Supreme Court has held a lien like that here in ques-

tion to be valid, and we are now considering, not the admitted validity of the lien, but its extent and application. In *The Katie*, Fed. Cas. No. 14,342, the Circuit Court for the district of Louisiana held, indeed, that a statutory lien for construction is postponed to a subsequent mortgage duly recorded under Rev. St. § 4192 (U. S. Comp. St. 1901, p. 2809). In so far as the state statute would subordinate the mortgage to the lien, it was held an unconstitutional interference with the congressional regulation of interstate commerce. Apparently the lien was deemed valid; but the mortgage was deemed a lien of higher rank. With the latter proposition we find ourselves unable to agree. The federal statute cited was not, in our opinion, intended to cut off rights of property existing in the vessel at the time of the mortgage, or to give the mortgagee greater rights than those of the mortgagor. It is to be observed that the case cited would subordinate the lien to a mortgage in a court of New Jersey as well as in a court of Maine. The federal statute concerning the mortgage of vessels engaged in interstate commerce is as effective in the state of their situs and ownership as elsewhere. In *Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431, a lien both statutory and expressly contracted for had attached to property while in Kentucky. The property was removed into Alabama, and the Alabama court held that the statutory lien of Kentucky was outranked by a subsequent lien arising in Alabama. The same court, however, held that the lien arising in Kentucky by the express terms of the contract made there created an equitable mortgage, which was held superior to the subsequent lien arising in Alabama. The decision appears to overlook the fact that the lien in the case at bar, though given by statute, yet arises out of the contract, and could not exist without it. *Fuller v. Nickerson*, 69 Me. 228, 236; *Mehan v. Thompson*, 71 Me. 492. The contract of construction was made with reference to the statute, and a verbal incorporation of the statute into the terms of the contract, expressing in the language of the parties that which the Legislature has declared to be the law, must be an empty formality.

We hold, therefore, that the lien here in question was enforceable by the Circuit Court sitting for the district of Maine. In so holding, we would guard ourselves from certain conclusions which have been supposed to follow from the result we have reached.

We do not decide that the New Jersey lien would be enforceable in the courts of Maine, if the policy of the lien were in conflict with the public policy of the state, as declared by statute or judicial decisions. In some cases a state may recognize, or refuse to recognize, at its option, a statutory right created elsewhere. *Texas & Pac. R. R. v. Cox*, 145 U. S. 593, 605, 12 Sup. Ct. 905, 36 L. Ed. 829. The statute of Maine, which gives a lien for the construction of a vessel, differs indeed from the New Jersey statute before this court; but the lien given by the Maine statute, though more narrowly limited in respect of its endurance and requiring other forms for its validity, is yet a lien of the same general sort, based upon a similar idea of public policy. In Maine, as in New Jersey, the lien for the construction of a

vessel has priority over a mortgage. *Perkins v. Pike*, 42 Me. 141, 66 Am. Dec. 267.

We do not decide that this lien for construction, which we here recognize, is to be deemed superior or even equal to maritime liens. Whatever the statutes of New Jersey might provide, we do not suggest that they could give a lien for construction which would be of rank equal or superior to the maritime lien given for repairs and supplies. No conflict between these two kinds of lien arises in the present case.

The Trust Company contended that the recognition of the statutory lien would work great hardship to a mortgagee; but this hardship is not so great as that which arises everywhere out of maritime liens, which undoubtedly outrank either a prior or a subsequent mortgage. These maritime liens may arise in any port at which the vessel has touched, and the utmost diligence may often fail to discover them. The lien for construction can arise only where the vessel is built, and the building is seldom extended over more than two places, or three at the most, where the lien for construction is easily discovered.

In each case, the decree of the Circuit Court is affirmed, and the appellee recovers its costs of appeal.

In re AMERICAN KNIT GOODS MFG. CO.

(Circuit Court of Appeals, Second Circuit. July 2, 1909.)

No. 232.

1. SALES (§ 104*)—RESCISSION—RETURN OF BENEFITS.

A seller is only required to return benefits as a condition precedent to a rescission of the sale for misrepresentations, in an action at law when the rescission is the act of the seller; no such return being required where the rescission is asked of a court of equity, since in that case all equities will be protected by the decree.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 271-273; Dec. Dig. § 104.*]

2. SALES (§ 43*)—RESCISSION—MISREPRESENTATION—INTENT.

Misrepresentation of a material fact on which a seller relies in making a sale is ground for rescission, though the misrepresentation was innocent.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 87; Dec. Dig. § 43.*]

3. SALES (§ 46*)—RESCISSION—FINANCIAL STATEMENT—"QUICK ASSETS."

Where a corporation credit statement recited that the present mortgages did not cover any of the "quick assets" of the company, amounting to \$635,165.35 in cash, merchandise, accounts receivable, etc., which, together with equities in real estate and machinery of \$194,775.01, made the total assets \$829,940.36, the term "quick assets" was used merely to distinguish liquid assets from those permanently invested in the business, like real estate and machinery, and included amounts charged against officers for return of part of salaries paid them in a previous year, in accordance with the agreement of employment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 95; Dec. Dig. § 46.*]

Misrepresentation and concealment by vendee of goods as to financial condition as affecting validity of contract of sale, see note to *William Openhym & Sons v. Blake*, 87 C. C. A. 126.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. SALES (§ 52*)—RESCISSION—BURDEN OF PROOF.

In a proceeding against a bankrupt's estate to recover merchandise on rescission of a contract of sale for alleged misrepresentation in a financial statement of the bankrupt's assets, the burden was on petitioner to show that the statement contained a material misrepresentation of fact on which petitioner relied.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 123; Dec. Dig. § 52.*]

5. SALES (§ 52*)—RESCISSION—FINANCIAL STATEMENT—FALSITY.

A court could not infer that a bankrupt's financial statement used as a basis for credit was false on February 28, 1905, because the bankrupt's assets realized very much less than the amounts called for in the statement when they came into the possession of the receiver in bankruptcy in August following.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 144; Dec. Dig. § 52.*]

Petition to Review and Appeal from Order of the District Court of the United States for the Eastern District of New York.

In the matter of the American Knit Goods Manufacturing Company, a bankrupt. On petition of Harding, Whitman & Co. for rescission of certain contracts of sale, and for the return of merchandise delivered to the bankrupts thereunder. The District Court denied the relief prayed (155 Fed. 906), and petitioner filed a petition to review, and appealed. Affirmed.

Hyman & Campbell (Thomas Thacher, of counsel), for appellants.
James, Schell & Elkus (Robert P. Levis, of counsel), for trustee respondent.

Einstein, Townsend & Guiterman, for bankrupt respondent.

Before LACOMBE, COXE and WARD, Circuit Judges.

WARD, Circuit Judge. This is a reclamation proceeding in bankruptcy. November 19, 1904, Harding, Whitman & Co., the petitioners, contracted to deliver to the American Knit Goods Manufacturing Company, the bankrupt, 150,000 pounds of worsted yarns in certain quantities in certain months. The yarn could not be spun until the Knit Goods Company furnished the necessary specifications. April 11, 1905, they made another contract for delivery of Oxford cotton yarn, and May 3d a third contract for delivery of B.B. cotton yarn. In February, 1905, the Knit Goods Company began negotiations for a reduction of the quantity of yarn to be delivered under the contract of November 19th. Harding & Co. took the position that the Knit Goods Company, because of failure to furnish the necessary specifications for the delivery of the amounts agreed on, was in default. During the pendency of these negotiations the Knit Goods Company, finding a readjustment of its affairs necessary, issued a statement to its creditors dated March 17, 1905, of its financial condition as of February 28th, and Katzenburg, one of its officers, handed it to Harding & Co.'s credit manager, accompanied by a memorandum of explanation. The statement showed as to assets an equity in real estate and machinery of \$194,775.01 and other assets aggregating \$635,165.35. The memorandum which accompanied the statement contained the following clause:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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"The present mortgages do not cover any of the quick assets of the company amounting to \$635,165.35 in cash, merchandise, accounts receivable, etc., which together with its equities in the real estate and machinery of \$194,775.01 makes a total asset of \$829,940.36."

These two papers were discussed by Harding & Co.'s credit manager and Katzenburg, in relation to the proposed modification of the contract of November 19, 1904. April 3, 1905, in reliance upon the statement of March 17, 1905, Harding & Co. agreed to modify the contract of November 19th, so as to reduce the quantity of yarn to be delivered to 75,000 pounds and made the other two contracts for delivery of cotton yarn dated April 11th and May 3d. August 7, 1905, a petition in bankruptcy was filed against the Knit Goods Company and it was adjudicated a bankrupt October 3d. All the worsted yarn delivered under the contract of November 19, 1904, prior to its modification April 3, 1905, had been paid for. Subsequent to the latter date yarn of the invoice value of \$13,974.88 was delivered on which there was due a balance of \$10,788.68. All the yarn on the contract of April 11th was delivered and paid for except the sum of \$50.26. On the cotton yarn contract of May 3d there was due for cotton yarn delivered a balance of \$4,441.27.

There was found in the hands of the receiver yarn delivered under these three contracts which had not been paid for as follows:

Worsted yarn under the contract of November 19, of the invoice value of.....	\$8,358.69
Cotton yarn under the contract of April 11 of the invoice value of....	50.26
Cotton yarn under the contract of May 3 of the invoice value of.....	4,441.27

The petitioners instituted these proceedings to have the three contracts rescinded, the unpaid-for yarn in the hands of the receiver returned to them, the balance of their claim for yarn unpaid for to be proved against the estate. The trustee objects that the petitioners are not entitled to rescission because they have not returned or offered to return what they have received from the bankrupt. This would be true in an action at law where the rescission was the act of the party, but it is not so in equity where rescission is asked for of the court. In the latter case all equities will be protected in the decree. *Allerton v. Allerton*, 50 N. Y. 670; *Vail v. Reynolds*, 118 N. Y. 297, 302, 23 N. E. 301.

The trustee also claims that the petitioners are not entitled to rescission because there is no evidence of any intentional misrepresentation by the bankrupt or its officers. This at least in equity is not necessary. The misrepresentation of a material fact upon which the other party relies, even if innocent, is good ground for rescission. *Hammond v. Pennock*, 61 N. Y. 145; *Carr v. National Bank & Loan Co.*, 167 N. Y. 379, 60 N. E. 649, 82 Am. St. Rep. 725; *Smith v. Richards*, 13 Pet. 26, 36, 10 L. Ed. 42; *Doggett v. Emerson*, 3 Story, 700, Fed. Cas. No. 3,960; *Kell v. Trenchard*, 142 Fed. 16, 23, 73 C. C. A. 202.

We have accordingly to inquire whether there was in the statement of March 17th any misrepresentation of a material fact as to the financial condition of the Knit Goods Company of February 28th. The petitioners insist strenuously that the description in the memorandum accompanying the statement of March 17, 1905, of assets other than

the equity in real estate as "quick," amounts to a representation that these assets could be promptly realized at the stated amounts. The trustee, on the other hand, claims that the word "quick" was used merely to distinguish liquid assets from those permanently invested in the business, like real estate and machinery. Katzenburg, who prepared the statement and handed it to and discussed it with the petitioners' credit manager, says that is what he meant by the expression. We adopt this construction of the word as more reasonable than the construction contended for by the petitioners.

The petitioners further strenuously contend that, because the master in one of his findings stated that there was no "sufficient conclusive evidence" that the value of the merchandise on hand was not as stated in the statement, he required them to prove their case beyond a reasonable doubt, or with such completeness as would compel a trial judge to direct a verdict in their favor. The phrase was not a happy one, but it is clear to us that the master meant by it only that the evidence offered by the petitioners was not sufficient to convince him that there was a material error. This appears expressly in his second conclusion of law, in which he says:

"Much testimony has been introduced tending to raise doubts as to the accuracy as to the items of merchandise and stock on hand and so on in the financial statement of March, 1905, but it seems to me that the petitioners have failed to prove by a preponderance of evidence that said item was materially false, nor that they have shown the falsity of any other item in the statement except as set forth in the findings of fact."

The master found that some of the assets mentioned in the statement and described in the memorandum accompanying it as "quick" were not quick, and also that the amounts charged against the officers on the books for return of part of the salaries paid them in the first year in accordance with the agreement of employment were not assets. We differ with him in these particulars, regarding the assets as being quick in the sense that they were not permanent investments like plant and machinery, and thinking that the claims against the officers for return of a proportion of their first year's salaries were assets.

In other respects we agree with the master and the court below that the petitioners have not sustained the burden of proof lying upon them to show that the statement of the bankrupt's financial condition as of February 28, 1905, contained any material misrepresentation of fact. The assets which came into the possession of the receiver August 7th realized very much less than the amounts called for as of February 28th, but we cannot infer from that circumstance that the statement was false.

Decree affirmed.

REMMERS v. MERCHANTS'-LACLEDE NAT. BANK OF ST. LOUIS

(Circuit Court of Appeals, Eighth Circuit, October 9, 1909.)

No. 3,000.

1. BANKRUPTCY (§ 408*)—PROCEEDINGS IN OPPOSITION TO DISCHARGE—SPECIFICATIONS OF OBJECTION.

A specification of objection to the discharge of a bankrupt on the ground that he made a false oath to his schedules is sufficient, where it alleged that such schedules contained no mention of certain stocks, or of any interest therein or claim against any third person on account of the same, but that shortly after the adjudication the bankrupt commenced a suit to recover such stocks from one to whom he alleged that he had pledged the same and claiming to be their owner; and proof of such allegations and of the bankrupt's ownership of the stocks subject to the rights of the alleged pledgee is sufficient to bar his right to a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 733; Dec. Dig. § 408.*]

2. BANKRUPTCY (§ 414*)—PROCEEDINGS IN OPPOSITION TO DISCHARGE—MEASURE OF PROOF.

To justify the denial of a bankrupt's discharge on the ground that he made a false oath to his schedules, the evidence must be of sufficiently clear and convincing character to overcome the presumption of his honesty; but it is not required to be of the high degree necessary to sustain a conviction for perjury.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 722; Dec. Dig. § 414.*]

3. BANKRUPTCY (§ 408*)—GROUNDS FOR REFUSAL OF DISCHARGE—FALSE OATH.

To justify the omission by a bankrupt of property from his schedule on the ground that he acted on advice of counsel, it must be shown that he fully and fairly stated the facts to his counsel, and acted on his opinion on a matter of law only.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 733; Dec. Dig. § 408.*]

Appeal from the District Court of the United States for the Eastern District of Missouri.

In the matter of Harry J. Remmers, bankrupt. On appeal from order refusing discharge. Affirmed.

Benjamin J. Klene, for appellant.

Charles M. Polk, for appellee.

Before SANBORN, Circuit Judge, and CARLAND and POLLOCK, District Judges.

POLLOCK, District Judge. This is an appeal from an order denying the application of appellant, Harry J. Remmers, a bankrupt, a discharge in bankruptcy. The facts are these:

Appellant was duly adjudged a bankrupt in an involuntary proceeding on April 25, 1903. On May 4th thereafter he made oath to his schedules of assets and liabilities, as provided by law, which were duly filed in the proceedings. Thereafter, in due time, the bankrupt filed his petition for discharge. To this petition appellee filed two written specifications of objections, namely: First, that the bankrupt, within four months next preceding the filing of a petition in bank-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ruptcy, had transferred, removed, and concealed some of his property and assets with intent to hinder, delay, or defraud his creditors, specifically setting forth the character of the assets and the time, manner, and form in which such act of the bankrupt was charged to have been committed. The second specification of objection, as amended, reads as follows:

"The undersigned charges, as a further reason why applicant's petition for a discharge should not be granted, that such applicant, on the 5th day of May, 1903, filed in this proceeding the schedules of his assets and liabilities required by law, said schedules being verified by the oath of the applicant as by law required; that said schedules do not contain any mention of 50 shares of the capital stock of the Goesse & Remmers Building & Contracting Company (a corporation), of the par value of \$100 per share, or of 29 shares of the capital stock of the Carthage Marble & White Lime Company (a corporation), of the par value of \$100 per share, or of any claim or chose in action against any parties with reference to said stock; that thereafter, and on, to wit, the 20th day of February, 1905, said applicant filed a suit to the April term, 1905, of the circuit court of the city of St. Louis, against Frederick J. Remmers, Otto Kulage, Joseph J. Kulage, and College Hill Press Brick Works, said cause being No. 36,269, and being now pending on appeal in the Supreme Court of Missouri, and said applicant alleges in his petition filed in said suit, and in his amended petition subsequently filed therein, that on the 19th day of July, 1902, he was the owner of the above-mentioned stocks, and that on said day and subsequent thereto said defendants conspired to cheat and defraud plaintiff of said stock; that said stock was transferred to defendant Otto Kulage as a pledge or hypothecation to secure the repayment of a loan of \$8,000 and future advancements to be made, but that said defendants claimed that said transfer was a sale of said stock, and not a mere pledge thereof; that thereafter, and during the pendency of this proceeding in bankruptcy, a motion was filed by Messrs. Hey & Stewart, John B. Satterfield, and other creditors of applicant, praying that George D. Harris, Esq., trustee in bankruptcy herein, be removed; and that on the taking of testimony in said motion before Hon. Walter D. Coles, special master, on to wit, the 8th and 9th days of February, 1905, said applicant testified upon his oath that at the time of his adjudication in bankruptcy and of his filing said schedules, he was the owner of the above-mentioned stocks, or of some interest in same, or of some chose in action with reference thereto. Wherefore the undersigned charges that at the time of the making of his said inventory and schedules in this proceeding said applicant was the owner of some interest in said shares of stock, or of some chose in action with reference thereto, and that said applicant knowingly and with fraudulent intent made a false oath to his said inventory and schedules, in that he failed therein to make any mention of his ownership of or interest in or to the aforementioned shares of stock, or of some chose in action with reference thereto. Wherefore the undersigned prays that said applicant's petition for a discharge be denied."

To the sufficiency of these specifications of objections the bankrupt interposed no exceptions, but joined issue thereon by filing a general denial thereto. The referee in bankruptcy, as special master, took, read, and considered the proofs on issue so joined, and reported to the court, recommending the petition for discharge be denied on both specifications of objections made. On a hearing before the court on exceptions to this report, the exceptions were overruled, the recommendation of the master followed, and an order entered denying the petition on both grounds of objections made by the bank. From this order the bankrupt appeals.

The ground of error claimed by the bankrupt, in so far as the first specification of objection is concerned, challenges the sufficiency of

the proofs adduced to sustain the order made. A consideration of this branch of the case has compelled an examination of all the proofs found in the record touching the same; but, from the view we have taken of the entire case it becomes unnecessary to express an opinion on this branch. However, as said by Judge Philips (*In re Stout* [D. C.] 109 Fed. 794):

"It is the recognized rule of the federal courts—and especially in matters of bankruptcy—that on review of the decision of a referee, based upon his conclusions on questions of fact, the court will not reverse his findings, unless the same are so manifestly erroneous as to invoke the sense of justice of the court. *In re Waxelbaum* (D. C.) 101 Fed. 228. This rule must, of necessity, be observed by the courts, where the findings and conclusions of the referee are based upon conflicting testimony. He sees and hears the witnesses, and his vantage ground is much better than that of the court for determining the credibility of the witnesses and the weight of their testimony."

See, also, *In re Noyes Bros.*, 127 Fed. 286, 62 C. C. A. 218.

Passing, then, to the errors assigned on the ruling of the court sustaining the second specification of objection, it is first insisted this specification is insufficient in form and substance to sustain the order made by the court. For this reason the specification is above set forth *in hæc verba*. From an examination of the language of this specification, it is seen the verification of the schedule by the bankrupt as required by law is charged. It is further charged 50 shares of the capital stock of the Goesse & Remmers Building & Contracting Company, of the par value of \$100 per share, and 29 shares of the capital stock of the Carthage Marble & White Lime Company, of the par value of \$100 per share, in which the bankrupt had an interest, were omitted from the schedules. Wherefore it is specifically charged appellant knowingly and with fraudulent intent made a false oath in verifying his schedules, from which all mention of these shares of stock or appellant's interest therein is omitted.

It seems to us this is entirely sufficient. It fully advises appellant of the nature of the charge preferred against his conduct, and informs the court of the precise nature of the issue to be tried. True, in addition to what has been stated, the objection contains statements of the source from which the objector obtained its knowledge, and other evidential facts; but this does not detract from the force of the charge made against the bankrupt's act. It has been held to be error, in specifying objections in opposition to a bankrupt's application for discharge, to merely follow the language of the act. The rule is the facts relied on to prevent a discharge must be pleaded with sufficient certainty of detail as to apprise the bankrupt of the charge he has to meet and to enable the court to understand the issue to be examined and determined by it. *In re Matthew McNamara*, 2 Am. Bankr. Rep. 566; *In re Milgramm* (D. C.) 12 Am. Bankr. Rep. 306, 129 Fed. 827; *In re Thomas* (D. C.) 1 Am. Bankr. Rep. 515, 92 Fed. 912; *In re Holman* (D. C.) 1 Am. Bankr. Rep. 600, 92 Fed. 512.

Again, as has been seen from the statement made, the bankrupt did not except to the form of this objection for the purpose of testing its sufficiency in law, but joined issue thereon and proceeded to the trial, treating the objection made as sufficient in the trial court.

It is further contended by appellant the charge made, if sufficient in law, was not sustained by the proofs adduced in its support; it being the contention of the bankrupt the charge made must be supported by that high degree of certainty of proof required to support a conviction for the crime of perjury. The case of *State v. Hunter*, 181 Mo. 338, 80 S. W. 955, is cited as declaring the correct degree of proof required in such case. From an examination of the record it appears beyond controversy the bankrupt had, prior to the institution of the proceedings against him, owned the shares of corporate stock charged in the second specification of objection; that he had pledged these shares to one Otto Kulage by bill of sale to secure the repayment of the sum of \$8,000 borrowed money and any further advances, none of which were made; that, subject to the rights of Kulage, he owned these shares at the date he verified his schedules, and in such schedules he neither mentioned such shares nor his interest therein. That he knew of his interest in the shares at the time this verification was made, and believed the value of the shares to be some \$40,000 above the amount they were pledged to secure, is shown by his own testimony given on the hearing of an application to remove his trustee in bankruptcy, and from the fact that he thereafter brought his action in the circuit court of the city of St. Louis against Kulage and others, in which he asserted his ownership of the shares, subject to the lien of the pledge at the date he verified his schedules. That his omission to schedule the shares and state his interest therein was not an oversight or unintentional mistake on the part of the bankrupt is attested by the fact that he defended against the adjudication in bankruptcy on the ground that he was not insolvent, admitted indebtedness against himself of some \$10,000 or \$12,000, claimed assets of only about the same value, and at that time made no mention whatever of his ownership of or interest in the shares. From all of which it must be held the charge made in the second specification of objection, that he knowingly and with fraudulent intent made a false oath in scheduling his assets in violation of the statute, is sustained. *In re Breiner* (D. C.) 11 Am. Bankr. Rep. 684, 129 Fed. 155; *In re Gailey*, 11 Am. Bankr. Rep. 539, 127 Fed. 538, 62 C. C. A. 336.

The contention made by appellant that the same high degree of proof is here required to sustain the objection to his discharge on the ground of making a false oath to his schedules that would be required to support a conviction against him on a charge of perjury for such false swearing is not sound. The hearing of the bankrupt's application for a discharge from his unpaid liabilities, on objection made thereto, was in no sense a criminal proceeding, to be followed in the event of his conviction by a forfeiture of either his liberty or property by way of punishment. The sole injurious consequence resulting to the bankrupt on sustaining such objections was to deny him a discharge from further liability of his just debts dischargeable by the law. True, the disclosures made by the proofs on such hearing might reflect injuriously on the conduct of the bankrupt. So might the evidence taken in the trial of any cause or proceeding. The presumption is that men are honest; that their acts were prompted by an honest purpose.

He who charges to the contrary, in order to prevail, must offer such clear and convincing proofs as will overcome this presumption and the proofs offered to refute the charge made, and thus satisfy reasonable minds of the truth of the charge. *Troeder v. Lorsch et al.*, 150 Fed. 710, 80 C. C. A. 376; *In re Howden* (D. C.) 111 Fed. 723; *In re Leslie* (D. C.) 9 Am. Bankr. Rep. 565, 119 Fed. 406. This, we think, was done in this case.

Finally, it is contended by appellant his failure to schedule the shares in question and set forth fully and truthfully his interest therein was due to the advice of his counsel. This contention we dismiss from further consideration, for the reason we are not convinced from a reading of the record that appellant fully and frankly disclosed the facts within his knowledge relating to these shares to his counsel at the time or before his schedules were prepared and verified, and received and acted on his opinion as a matter of law, as must be done before the advice of counsel may be pleaded in justification or excuse of the charge made. *In re H. D. Berner*, 4 Am. Bankr. Rep. 395; *In re Breitling*, 13 Am. Bankr. Rep. 129, 133 Fed. 146, 66 C. C. A. 212.

By the omission of appellant to schedule the shares of stock in question, property of large value was lost to the trustee as representative of his creditors. That such omission must have been prompted by a desire on the part of appellant to avail himself of the proceeds, to the exclusion of his creditors, from a consideration of the entire case, becomes almost conclusive.

It follows the order of the trial court denying the discharge in bankruptcy prayed on the second amended specification of objection interposed by the bank was right, and must be affirmed.

It is so ordered.

JOHNSON v. WILLAPA LUMBER CO.

(Circuit Court of Appeals, Ninth Circuit. October 18, 1909.)

No. 1,685.

APPEAL AND ERROR (§§ 691, 702*)—QUESTIONS PRESENTED FOR REVIEW—LIMITATION BY OMISSIONS FROM RECORD.

Assignments of error relating to the admission of evidence or the instructions to the jury cannot be considered, where the record contains only a portion of the evidence and the charge of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2900-2904, 2936-2938; Dec. Dig. §§ 691, 702.*]

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

Action by the Willapa Lumber Company against J. J. Johnson. Judgment for plaintiff, and defendant brings error. Affirmed.

W. H. Abel, for plaintiff in error.

Chas. E. Miller, Ralph Woods, George H. Whipple, and Chickering & Gregory, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

MORROW, Circuit Judge. This was an action at law, brought by the defendant in error, Willapa Lumber Company, a corporation organized and carrying on business under and by virtue of the laws of the state of Iowa, against J. J. Johnson, plaintiff in error, a citizen of the state of Washington, to recover damages for breach of contract to deliver to the defendant in error at its mill boom 5,000,000 feet of fir logs at \$5.75 per 1,000. The plaintiff in error having delivered 2,172,318 feet, the suit was to recover the damages for his failure to deliver the quantity of logs provided in the contract. The trial of the case before a jury resulted in a verdict and judgment in favor of the defendant in error for the sum of \$10,603.80. The assignments of error relate to the admission of evidence and instructions to the jury.

It is recited in the bill of exceptions that the testimony contained in the record "is only a portion of the testimony adduced upon said trial relating to the matters mentioned therein by the defendant." It is further recited that:

"In the general charge and instructions of the court to the jury, delivered after all arguments of counsel had been made, the following language was used by the court, the same being only a small fraction of what was said by the court in that behalf: 'There was a breach of the contract, and the court instructs you that the plaintiff is entitled to have a verdict for at least nominal damages.'"

In the absence of the testimony introduced upon the trial of the case in the court below, and the instructions of the court to the jury, there is no record upon which this court can review the action of the court with respect to the matters assigned as error.

The judgment of the Circuit Court is affirmed.

FICHTEL et al. v. BARTHEL et al.

(Circuit Court, S. D. New York. October 26, 1909.)

1. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—SUFFICIENCY OF BILL.

A bill for infringement of a patent need not allege that the invention had not been abandoned before the granting of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-513; Dec. Dig. § 310.*]

2. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—PLEADING—PROPERT OF PATENT.

An insufficient averment of the formal requisites of a patent in a bill for its infringement is cured by propret of the patent, which makes it a part of the bill for purposes of a demurrer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 515; Dec. Dig. § 310.*]

3. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—SUFFICIENCY OF BILL.

A bill for infringement of a patent is not bad because it alleges on information and belief only matters which are not required to be alleged at all.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 310.*]

4. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—SUFFICIENCY OF BILL.

An allegation of infringement in a bill for infringement of a patent *held* sufficient.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 511; Dec. Dig. § 310.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. PATENTS (§§ 289, 310*)—SUIT FOR INFRINGEMENT—DEFENSES—LACHES.

In a suit for infringement of a patent, laches is a defense, and cannot be raised by demurrer, unless it affirmatively appears on the face of the bill.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 468; Dec. Dig. §§ 289, 310.*]

Laches as defense in suit for infringement, see notes to *Taylor v. Sawyer*, Spindle Co., 22 C. C. A. 211; *Richardson v. D. M. Osborne & Co.*, 36 C. C. A. 613.]

6. COURTS (§ 347*)—PLEADING—FORMAL REQUISITES OF BILL.

A bill in equity in a federal court is not demurrable because not signed or verified by complainant, neither being required by the rules.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 347.*]

7. PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—MULTIFARIOUSNESS OF BILL.

A bill for infringement of a patent against two or more defendants, who are charged with infringement severally, is multifarious.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 518; Dec. Dig. § 310.*]

In Equity. Suit by Karl Fichtel and Ernst Sachs, partners as Fichtel & Sachs, against Christiana Barthel and Edward F. Daly, partners as Barthel & Daly, and Albert F. Miller. Demurrer to bill sustained.

John H. Hazleton, for complainants.
Kenyon & Kenyon, for defendants.

WARD, Circuit Judge. The defendants demur to a bill for infringement of letters patent, first, because the bill fails to aver that the invention had not been abandoned before letters granted. The bill must aver everything that is made a condition precedent, in section 4886, U. S. Rev. St. (U. S. Comp. St. 1901, p. 3382), to the right to letters. It provides, inter alia, that an inventor may obtain a patent for his invention, if it has not been "in public use or on sale in this country for more than two years prior to his application unless the same is proved to have been abandoned." Abandonment is a defense, and I do not think it lies upon the inventor to prove in the first instance that he has not abandoned his invention.

The next objection is that the bill is defective on its face because it merely states that the patent was "signed and countersigned by the proper officers of the Department of the Interior and the Patent Office, respectively." If this were all, the objection would be good; but the complainants have made proof of the patent in their bill. This makes it a part of the bill, and subject to a demurrer (*International Co. v. Maurer* [C. C.] 44 Fed. 618; *Fowler v. City of New York*, 121 Fed. 747, 58 C. C. A. 113), and an examination shows that it was signed as required by law.

The next objection is that the complainants allege on advice and belief matters that must be within their personal knowledge. I think the complaint can be read without connecting the expression "they are advised and believe" with the other statements in article 6, of some of which they must have personal knowledge; e. g., general acquies-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cence in their rights. But this is not a necessary averment, and the entire omission of it would not prevent their right to a final injunction or to an accounting. *Wirt v. Hicks* (C. C.) 46 Fed. 71. The same remark is true as to the statement that the defendants are making profits.

It is next suggested that there is no averment that the defendants threaten to continue their infringement, and that the demurrer should be sustained under Judge Lacombe's decision in *Wyckoff v. Wagner Typewriter Co.* (C. C.) 88 Fed. 515. In that case the bill simply stated:

"Said defendant did, as your orator is informed and believes, without a license, etc., in infringement of the aforesaid letters patent, make and vend the said invention."

In this case, however, the bill states:

"And your orators further show unto your honors upon information and belief that the said defendants," etc.

I regard this as equivalent to a statement that they aver on information and belief.

The defendants next object that, the bill alleging infringement since the date of the patent, April 18, 1895, and prior to the filing of the complaint, May 4, 1909, a period of 14 years, there is nothing to show either that the infringement was not continuous, or that it did not all occur more than 6 years before the filing of the bill. It is argued that on the former hypothesis the complainants are not entitled to an injunction because of laches, and on the latter that they are not entitled to an accounting. Laches is a matter of defense, and a bill is not demurrable unless it clearly shows, which it does not, that the complainants have been guilty of laches. The statute of limitations must be pleaded.

The bill is also objected to because it does not appear on its face that it was subscribed to by the complainants, or either of them, and because the notary has not stated that the affirmant had conscientious scruples against taking an oath. I have never seen an affirmation in which the notary did make such a statement. At all events, these objections are frivolous, because the equity rules do not require a bill to be signed or to be verified by the parties (rule 24; 16 Cyc. 366); the only consequence of not verifying the bill being that it cannot be used as an affidavit, e. g., on a motion for a preliminary injunction (*Black v. Henry G. Allen Co.* [C. C.] 42 Fed. 618, 623, 9 L. R. A. 433).

Among so many frivolous and technical objections I find one that seems to me substantial, namely, that the complainants, by charging the defendants as joint and several infringers, have combined distinct and independent causes of action which do not affect all the defendants. In other words, they cannot prove in the same case that the defendants Barthel and Daly, who are copartners, and Albert F. Miller, the other defendant, have been guilty of separate and independent acts of infringement.

For this reason the demurrer is sustained, with costs, but with leave to the complainants to amend within 10 days, or in default thereof the bill will be dismissed.

In re EVERYBODY'S GROCERY & MEAT MARKET.

(District Court, D. Oklahoma. July, 1908.)

1. BANKRUPTCY (§ 81*)—INVOLUNTARY PROCEEDINGS—PARTNERSHIP—REQUISITES OF PETITION.

In a petition in involuntary bankruptcy against a partnership only, it is not necessary to allege the insolvency of the individual partners, nor that the solvent partners, if any, consent to the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 81.*]

2. BANKRUPTCY (§ 69*)—PARTNERSHIP—"PERSON."

A partnership is a "person" in the sense in which that term is used in the federal bankruptcy act (Act Cong. July 1, 1898, c. 541, § 1, subd. 15, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3419]).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 69.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5322-5335, vol. 8, p. 7752.]

In the matter of Everybody's Grocery & Meat Market, alleged bankrupt. On demurrer to petition. Demurrer overruled.

F. L. McCain, for creditors.

N. A. Gibson, for defendant.

CAMPBELL, District Judge. The bankrupt demurs to the petition in involuntary bankruptcy filed herein, for the reason, first, that it does not state facts sufficient to give this court jurisdiction of this cause; and, second, because it does not state facts sufficient to constitute a cause of action. It is urged in argument that the petition is fatally defective in that it does not state that the individual partners of the alleged bankrupt are also insolvent, or that such of the members as are solvent consent to the adjudication of the partnership as a bankrupt.

The acts of bankruptcy charged in the petition are, first, that they did on the 1st day of June, 1908, while insolvent, pay to the Hale-Halsell Grocery Company the sum of \$100, with intent to prefer said grocery company over their other creditors; and, second, that on the 7th day of June, 1908, the bankrupt transferred and conveyed all of its assets to one W. F. Vandever, with intent to hinder and delay its creditors. It is further alleged that said Everybody's Grocery & Meat Market is insolvent.

The first act of bankruptcy alleged comes within subdivision 2 of section 3 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]); the second act alleged comes within subdivision 1 of said section 3. If the bankrupt were an individual, it seems clear the allegations of the petition would be sufficient. Being a partnership, is it necessary that the petition should also state that each individual partner is insolvent? Since the case of *In re Bertenshaw*, 19 Am. Bankr. Rep. 589, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, decided by the Circuit Court of Appeals for this circuit, it is established as the law of this circuit that a partnership is insolvent if the partnership property is insufficient to pay the partner-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ship debts, because it is a "person" in the sense in which that term is used in the act, and because any "person" is insolvent, in contemplation of the bankruptcy act, whose property, at a fair valuation is insufficient to pay his debts. The partnership is considered as an entity, separate and distinct from the individual members composing it, and as said by the court in the Bertenshaw Case:

"The only test was that declared by the act itself, the insufficiency of the property of the person, the partnership, to pay the persons, the partnership's debts."

The adjudication of the partnership and the administration of the partnership property in bankruptcy in no way affects the remedy which partnership creditors have against the individual partners for so much of the firm indebtedness as exceeds partnership assets. As said by the Circuit Court of Appeals in the Bertenshaw Case:

"Under this act, the partnership may make an assignment or commit some other act of bankruptcy and be adjudged a bankrupt, while many of its members are solvent and cannot be so adjudged. * * * The creditors of the partnership may subject the individual property of the unadjudicated partners to the payment of their debts before, during, or after the bankruptcy proceedings, by actions at law, by suits in equity, or other proceedings, just as they may the property of indorsers upon the commercial paper of the firm, or the property of sureties, for its obligations."

It was not, therefore, necessary for the petitioning creditors in this case to allege the insolvency of the individual partners.

Is it necessary that the petition should allege that the solvent partners of said concern, if any, consent to the adjudication? Section 5h of the bankruptcy act provides:

"In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudicated bankrupt; but such partner or partners not adjudicated bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for interest of the partner or partners adjudicated bankrupt."

In the Bertenshaw Case, *supra*, the court say, in reference to the foregoing clause:

"The interpretation of this clause, therefore, is that where a partnership has committed an act of bankruptcy, and where it has been adjudged bankrupt, as well as where it has not, and one or more but not all of its members have been adjudged bankrupts, the partnership may not be administered in bankruptcy without the consent of the partner or partners who were not adjudged bankrupts."

It will be seen that, as viewed by the court in the case cited, this clause has reference to cases where one or more but not all of the members of a partnership are adjudged bankrupts, either with or without the adjudication of the partnership. It further appears that it is the administration of the partnership assets, rather than the adjudication, that is made to depend upon the consent of the solvent members of the partnership.

In this case it is sought only to adjudge the partnership a bankrupt, and no proceedings are instituted against any of the individual members of the partnership. It is held that it is not necessary that the con-

sent of the solvent members of the partnership, if any, in this case should be alleged in the petition as a prerequisite to adjudication.

It follows that the demurrer must be overruled, and it is so ordered.

WALSH v. NEW YORK, N. H. & H. R. CO.

(Circuit Court, D. Massachusetts. October 26, 1909.)

No. 605.

1. MASTER AND SERVANT (§ 87*)—RAILROADS—FEDERAL EMPLOYER'S LIABILITY ACT—CONSTITUTIONALITY.

The federal employer's liability act of April 22, 1908 (35 Stat. 65, c. 149), which makes every interstate carrier by railroad liable in damages for the injury or death of any employé while employed in such commerce through the negligence of any officer, agent, or employé of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, etc., is constitutional.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 138; Dec. Dig. § 87.*]

2. COURTS (§ 363*)—STATE STATUTE AS DETERMINING SURVIVAL OF CAUSE OF ACTION.

Recourse cannot be had to a state statute to determine whether or not a cause of action given by a federal statute survives.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 939; Dec. Dig. § 363.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

3. DEATH (§ 10*)—FEDERAL EMPLOYER'S LIABILITY ACT—SURVIVAL OF CAUSE OF ACTION FOR INJURY.

The cause of action for an injury to an employé of an interstate carrier by railroad, given by section 1 of the federal employer's liability act of April 22, 1908 (35 Stat. 65, c. 149), does not survive the death of the person injured, and damages for his conscious suffering are not recoverable in an action for his death.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 10.*]

At Law. Action by Mary Agnes Walsh, administratrix, against the New York, New Haven & Hartford Railroad Company. On demurrer to declaration. Demurrer sustained as to counts 1, 3, 4, and 6, and overruled as to counts 2 and 5.

Saltonstall, Dodge & Carter and Endicott P. Saltonstall, for plaintiff.
Choate, Hall & Stewart, for defendant.

LOWELL, Circuit Judge. The employé's administratrix has filed a declaration in eight counts. The first six are based upon the federal act of April 22, 1908 (35 Stat. 65, c. 149). All allege the existence of the employé's widow and children. The first count alleges the employé's suffering, caused by the negligence of the defendant and its agents; the second, the employé's death from the same cause; the third, both suffering and death from the same cause; the fourth, the employé's suffering, caused by the defendant's defective machinery, etc.; the fifth, the employé's death from the same cause; the sixth,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

both suffering and death from the same cause. To summarize, the first three counts charge the defendant's negligence in the language of the statute; the next three counts charge defective machinery, etc.; the first and fourth counts allege conscious suffering only; the second and fifth counts, death only; the third and sixth counts each allege both conscious suffering and death. The seventh and eighth counts were demurred to; but as to them the demurrer has been waived, and they need not be considered here.

Section 1 of the act reads as follows:

"Every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The defendant's first ground of demurrer is the alleged unconstitutionality of the statute as a whole. Without reasoning the question thus raised, this court may well leave it for the decision of a higher court, and may formally hold that the first section of the act is constitutional. With this result agrees the only decided case. *Watson v. St. Louis, etc., R. R.* (C. C.) 169 Fed. 942.

The defendant has further demurred to counts 1 and 4, contending that the employé's cause of action to recover for his conscious suffering did not survive to his administratrix, although the existence of some of the statutory relatives was alleged. As the cause of action is given by a federal statute, this court cannot have recourse to a state statute in order to determine whether the cause of action survives or not. *Schreiber v. Sharpless*, 110 U. S. 76, 80, 3 Sup. Ct. 423, 28 L. Ed. 65; *B. & O. R. R. v. Joy*, 173 U. S. 226, 230, 19 Sup. Ct. 387, 43 L. Ed. 677; *U. S. v. De Goer* (D. C.) 38 Fed. 80; *U. S. v. Riley* (D. C.) 104 Fed. 275. Rev. St. § 955 (U. S. Comp. St. 1901, p. 697) provides that:

"When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment."

This section does not itself provide what causes of action shall survive, but, in the absence of other controlling statute, leaves the matter to the common law. In the case at bar, therefore, the state statutes are inapplicable, there is no general federal statute, and the particular statute in question, the act of 1908, says nothing about survival.

Thus remitted to the common law, at which survival is out of the question, we must here hold that the cause of action did not survive, and so that counts 1 and 4 are demurrable. *Fulham v. Midland Valley*

Co. (C. C.) 167 Fed. 660. As the statute is in many respects loosely drawn and ambiguous, so that the intent of Congress does not always appear clearly, the court is justified in saying that this result has been reached with reluctance. The maxim, "*Actio personalis moritur cum persona*," has not always commended itself. Pollock on Torts (Webb's Ed.) p. 71. The survival of the cause of action in this case is allowed by the statutes of many states. That one who has suffered in body and in purse by the fault of another, and so has a cause of action against the wrongdoer, should, as to his own estate, be deprived of this remedy by the delays of the law, or, without such delay, by his death, before or after action brought, whether connected or unconnected with his first injury, seems to me; as to Sir Frederick Pollock, a barbarous rule. The intent or the oversight of the Legislature has established the rule in this case.

The defendant has further demurred to counts 3 and 6, contending that each of these counts has improperly joined liability for conscious suffering to liability for the employé's death. For the reasons above stated, these counts are bad, at least in part, and that which is good in them is unobjectionably stated in counts 2 and 5. As to counts 3 and 6 the defendant's demurrer is therefore sustained.

The demurrer to the first, third, fourth, and sixth counts is sustained. The demurrer to the second and fifth counts is overruled. The seventh and eighth counts are not now objected to.

HOULIHAN v. CORPORATION OF ST. ANTHONY IN NEW BEDFORD.

(Circuit Court, D. Massachusetts. November 2, 1909.)

No. 123.

1. COSTS (§ 57*)—EXPENSES OF AUDITORSHIP—MASSACHUSETTS PRACTICE.

Where an auditor was appointed by a federal court in Massachusetts, in conformity with the state practice, by consent of parties, it is within the discretion of the court to tax the fees of the auditor and of the stenographer employed at the hearing before him to the losing party.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 57.*]

2. COSTS (§ 153*)—TAXABLE COSTS—EXPENSES OF AUDITORSHIP.

Where, in an action on a building contract to recover a balance due, an auditor was appointed by consent of parties, who took a large amount of testimony, not only on plaintiff's claim, but also on a set-off claimed by defendant, which was wholly disallowed, and plaintiff recovered on a jury trial, although only a part of the amount claimed, he was entitled to have the fees of the auditor and stenographer on the hearing before him taxed as costs.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 153.*]

Action by Michael J. Houlihan against the Corporation of St. Anthony in New Bedford. On appeal from clerk's taxation of costs. Appeal sustained.

See, also, 165 Fed. 511.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Gardner, Pirce & Thornley, Rathbone Gardner, Williams & Cope-land, and Hallowell & Hammond, for plaintiff.

James E. Cotter, Joseph T. Kenney, and Asa P. French, for defendant.

LOWELL, Circuit Judge. The plaintiff brought an action of contract to recover the balance of the price alleged to be due for building a church. Before jury trial the following rule was entered:

"And now, to wit, February 12, 1906, by agreement of parties, it is ordered by the court that Clarence H. Cooper, Esq., be, and he hereby is, appointed auditor in the above-named action, to hear the parties, state the facts, and report the questions of law and fact relating thereto, which either party may request."

The accounts were complicated, and the hearings numerous, extending over two years or more. Some time after the hearings began, the defendant filed by leave of court a declaration in set-off, claiming therein \$52,772.05, the hearing on which proceeded before the auditor conjointly with the hearing on the plaintiff's original claim. The evidence on both claims was taken stenographically, and filled about 2,600 pages. The auditor's labor in preparing his final report was very considerable. From time to time the fees of the auditor and stenographer were paid in equal shares by the two parties. The auditor found against the defendant's claim, and in favor of the plaintiff in the original suit in the sum of \$34,082.08. The defendant did not pursue further its proceeding in set-off.

Thereafter the plaintiff's original case was tried to a jury, and a verdict was rendered in his favor for \$4,000, with interest from December 15, 1904. Final judgment has been entered. The clerk's taxation of costs disallowed the half payment which had been made by the plaintiff to the auditor and the stenographer. From this disallowance the plaintiff has appealed to the court.

In *Primrose v. Fenno*, 113 Fed. 375, s. c. on appeal 119 Fed. 801, 56 C. C. A. 313, this court and the Circuit Court of Appeals held that where the reference to an auditor was by direction of the court, without request or agreement of parties, the payment of the auditor's fee was in the discretion of the court, and might be allowed to fall one-half on each party. In the opinions rendered it was intimated that the argument for taxation of the auditor's fee in the costs of the case would be stronger if he were appointed by agreement of parties, or at the request of either party. From the language of the two opinions, I am satisfied that in the case at bar I have at least a discretion to tax the auditor's fee wholly against the defendant.

There seems no reason why this should not be done, except that the plaintiff originally claimed some \$36,000, while he recovered only \$4,000 and interest. If it be true that the auditor's fee is taxable in the court's discretion, like the fee of a master in chancery, then an unreasonable claim on the plaintiff's part might induce the court to discriminate against him in the taxation of his costs. Here, however, the defendant resisted the plaintiff's just demand, and, in addition, made a large claim against him which was shown to be unfounded.

The state practice and its necessarily limited application in this court were explained fully in *Fenno v. Primrose*.

The stenographer's fee appears to me to stand on all fours with the auditor's. A hearing before an auditor, especially a long hearing such as the one under consideration, like most auditor's hearings involving complicated accounts, cannot be conducted without a stenographic report of the testimony. A conscientious auditor would ordinarily refuse to sit without a stenographer. This was not always true; but the court should take notice of modern conditions. In this district the stenographer's fee cannot be taxed in an ordinary jury trial without agreement of parties; but the two cases are not analogous. A jury is not allowed, speaking generally, to have access to the stenographer's report, and it is rather a practical necessity of counsel in taking exceptions during the trial and in suing out a writ of error thereupon. Thus it is possible, and not unusual, to try a case to a jury without a stenographer, if the parties are prepared to abide by the verdict. Considering modern usage and modern necessities, I hold that the stenographer's fee follows the auditor's, and that both should be taxed as costs.

THE MEDEA.

(District Court, N. D. California. June 30, 1909.)

No. 13,727.

1. SHIPPING (§ 132*)—DAMAGE TO CARGO—SEAWORTHINESS OF VESSEL—EVIDENCE.

Evidence considered in an action to recover for damage by sea water to a cargo of cement on a voyage from Sweden to San Francisco around Cape Horn, and *held* not to sustain the claim of libellant that the ship was rendered unseaworthy by improper stowage, but to sustain the contention of claimant that the damage was caused by perils of the sea, within the exception in the bill of lading.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 132.*]

Loss by perils of the sea, see notes to *The Dunbritton*, 19 C. C. A. 465; *Southerland-Innes Co. v. Thynas*, 64 C. C. A. 118.]

2. EVIDENCE (§ 574*)—OPINIONS—WEIGHT.

The testimony of credible witnesses, who were on the ship, that she did not in fact behave as a stiff ship during her voyage, is entitled to more weight than the opinions of expert witnesses to the contrary, based upon the manner in which the vessel's cargo was stowed.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 574.*]

In Admiralty. Action by Henry Lund and others against the bark *Medea* to recover for damage to cargo. Libel dismissed.

McClanahan & Derby, for libelants.

Frank & Mansfield, for respondent.

DE HAVEN, District Judge. This is a libel against the Swedish bark *Medea*, to recover damages alleged to have been sustained by reason of damage received by a cargo of cement carried by that vessel, for libelants, on a voyage from the port of Linham, Sweden, to San

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Francisco, via Cape Horn. The libel alleges that the damage resulted from "the unseaworthiness of said vessel and/or from the improper and bad stowage of said cargo of merchandise" on board the said vessel, and in this connection the libel further alleges that said merchandise was so stowed "that the decks of said bark were opened, and leaked, and that salt water came through said decks onto the said merchandise," thus causing the damage sued for. The allegations of the libel are put in issue by the answer, and in addition thereto it is alleged in the answer that the damage complained of "was caused by the perils of the sea," for which the ship, under the bill of lading, would not be liable.

1. The only question for decision upon the evidence is whether or not the cargo, carried by the *Medea*, was distributed in such a manner as to make her seaworthy; the contention of the libelants being that it was not, and that by reason thereof the vessel was rendered stiff and unable to easily ride the seas which she might have been reasonably expected to encounter, and which she in fact did encounter, upon the voyage. The evidence shows that the cargo, carried by the *Medea*, consisted of cement, having a total weight of 1,446 tons and a fraction; that besides this there were 343 tons and a fraction of iron, 853 tons and a fraction of cement, and the remainder, 230 tons and a fraction, consisted of bottles, sardines, and other miscellaneous cargo. The iron was stowed in the lower hold, and all of the cement, except about 160 tons, stowed between-decks. There is some conflict in the evidence as to the weight of the cargo stowed between-decks. The captain of the *Medea* estimated the weight there stowed at 300 tons, and the evidence of the stevedores, who loaded her, was that there were 334 tons. The witnesses for libelant varied in their estimates from 226 to 266 tons in the between-decks.

The argument, upon the part of the libelant, is that the weather encountered by the *Medea* upon the voyage was not unusually severe; that it was not such as would have caused the seams of the decks to leak if the cargo had been properly distributed; and in support of the claim that the vessel was rendered unseaworthy by improper stowage the libelant produced a number of expert witnesses, who testified in substance that she was rendered stiff by the manner in which she was stowed, and as a consequence could not roll easily in the sea, and that her rolling would necessarily be sharp and jerky, thus increasing the strain upon her decks. One of the witnesses gave it as his opinion that at least 23 per cent. of the cargo in weight should have been stowed between-decks, another 25 per cent., and another 30 per cent.; but most of them expressed the opinion that one-third of her cargo in weight should have been stowed between-decks. On the other hand, the evidence of the master and mate was to the effect that the *Medea* was a very tender ship, and this fact is not disputed; and they further testified that upon the voyage in question she rolled easily at all times, and did not behave as a stiff ship.

The master of the *Medea* has had an experience of 19 years as master, and for 10 or 11 years as mate, and he testified to the effect that the *Medea* was loaded under his supervision, and that in his judgment the stowage was proper. The evidence shows that the *Medea*

left Linham, Sweden, on the 31st of January; that she proceeded on her voyage for about one month, during which time she encountered heavy storms and shipped more or less water upon her decks, and then returned to a port in Norway for the purpose of setting up her rigging, which had become slack. She had met with heavy storms, but had shown no stiffness, and no change was made in her stowage when she reached Norway. After leaving Norway she again proceeded upon her voyage, meeting with no unusually bad weather until near Staten Island, where she ran into heavy gales in rounding Cape Horn. She was about five weeks in rounding that cape, and made during that time not to exceed 200 miles. During these heavy storms the ship rolled a great deal, and shipped a large amount of water.

In my opinion the storms encountered by the *Medea* were of sufficient violence to strain the decks of a seaworthy ship, and after a careful consideration of all the evidence my conclusion is that the vessel was not unseaworthy when she entered upon her voyage, and the leakage of water through her decks, and the consequent damage to her cargo, should be regarded as caused by perils of the sea. The only evidence tending to show unseaworthiness of the vessel is that of the expert witnesses, to the effect that in their opinion she did not have sufficient weight of cargo between decks, that as stowed she was necessarily stiff, and that in this condition there was undue strain upon the decks, causing them to leak. Opposed to the opinion of these witnesses there is the undisputed fact that the *Medea* was a tender ship, and the direct testimony of the master and mate that she did not behave as a stiff ship during the voyage. Whether a ship is in fact stiff—that is, whether or not she behaves as a stiff ship—in a heavy sea, or whether she rolls easily, like a vessel properly trimmed, is a pure question of fact; and in my judgment the testimony of credible witnesses, who know how the *Medea* in fact behaved upon the voyage in question, is entitled to greater weight than that of witnesses who simply give their opinion that the cargo was so distributed that she must have acted like a stiff ship. If she had been in fact stiff, her master must have known it before the vessel returned to Norway, and it is not to be supposed that in that event he would have failed to have some of the cargo removed from the lower hold to between-decks, so as to give the vessel a better trim, before starting upon a long voyage around Cape Horn, a voyage upon which it was reasonable to expect the vessel would encounter severe storms and heavy seas.

The libel will be dismissed, with costs.

UNITED STATES v. VILLET.

(Circuit Court, S. D. New York. October 28, 1909.)

ALIENS (§ 59*)—IMPORTATION OF WOMEN FOR PURPOSE OF PROSTITUTION—CRIMINAL PROSECUTION—DEFENSES.

In a prosecution for the importation of an alien woman for the purpose of prostitution, in violation of Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1907, p. 392), it is not a defense that such woman

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

had previously been domiciled for a time in the United States and had departed therefrom with the intention of returning.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 59.*]

Claude Villet was found guilty by a jury of a violation of the immigration law. On motion in arrest of judgment. Motion overruled.

Henry A. Wise, U. S. Atty., and Addison S. Pratt, Asst. U. S. Atty. W. L. Cummings, for defendant.

HOLT, District Judge. I think that the earlier decisions, under the earlier immigration acts, holding that alien residents, who have gone abroad with the intention of returning, are not immigrants within the meaning of the immigration acts, have been modified and substantially reversed by the later decisions under the later immigration acts. *Re Moses* (C. C.) 83 Fed. 995; *Re Kleib* (C. C.) 128 Fed. 656; *U. S. ex rel. Funaro v. Watchhorn* (C. C.) 164 Fed. 152; *Ex parte Crawford* (D. C.) 165 Fed. 830; *U. S. ex rel. White v. Hook* (D. C.) 166 Fed. 1007; *Ex parte Petterson* (D. C.) 166 Fed. 536; *Lem Moon Sing v. U. S.*, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082. The result of these cases is that, at least in the case of the importation of women for immoral purposes, the fact that they have resided in this country for a certain period and then gone abroad does not prevent the operation of the act, in the case of persons who import them back into this country for immoral purposes.

The language of the act of 1907 is specific, and prohibits the importation of any alien woman or girl for any immoral purpose. Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1907, p. 392). Moreover, I think that the provisions in all the immigration acts in regard to such importation are specific. The original immigration act prohibited the importation of women for an immoral purpose. This obviously applied to any women. The provision in the act of 1907 prohibiting the importation of alien women cannot be held to modify the general terms of the previous act, except so far as to make it apply to alien women only.

My conclusion is that the motion in arrest of judgment should be denied.

UNITED STATES v. VIOLON.

(Circuit Court, S. D. New York. August 6, 1909.)

CRIMINAL LAW (§ 627½*)—IMPEACHMENT OF INDICTMENT—RIGHT TO INSPECT MINUTES OF GRAND JURY.

A defendant, indicted by a grand jury, is not entitled to an inspection of its minutes to ascertain the sufficiency of the evidence on which the indictment was based, since, if insufficient, the court has no power to grant redress.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1431; Dec. Dig. § 627½.*]

Indictment of Emile Violon for violation of Immigration Act Feb. 20, 1907, c. 1134, § 3, 34 Stat. 899 (U. S. Comp. St. Supp. 1907, p.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

392). On motion for inspection of minutes of grand jury. Motion denied.

Henry A. Wise, U. S. Atty., and Daniel D. Walton, Jr., Asst. U. S. Atty.

Ernest H. Wallace, for defendant.

HAND, District Judge. I cannot satisfactorily speculate upon the evidence which must have been before the grand jury, nor will I either myself inspect, or permit another to inspect, its minutes. The grand jury is designed to protect the citizen from baseless accusation; but he has no other protection than its proper action. If it has been moved by insufficient evidence, or has failed to consider all the evidence, it is an injustice which the court cannot, and should not seek to, redress. There is no precedent, so far as I can find, for such control of the grand jury, and I am the last who would initiate it. The institution must stand, as the conscience of the citizens called to it dictates. The case in 16 Federal Reporter (United States v. Kilpatrick [D. C.] 16 Fed. 765) I am not disposed to follow. Of course, a case of misconduct within the grand jury room, as the use of liquors, or the like, might raise a very different question.

Motion denied.

RISLEY et al. v. CITY OF UTICA et al.

(Circuit Court, N. D. New York. October 23, 1909.)

1. EQUITY (§ 105*)—PARTIES—JOINDER OF COMPLAINANTS.

Several property owners may join in a bill in equity on behalf of themselves and all others similarly situated to enjoin the collection of an illegal tax, which affects all of the complainants alike; their interests being common, if not joint.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 268-270; Dec. Dig. § 105.*]

2. EQUITY (§ 148*)—PLEADING—MULTIFARIOUSNESS.

A bill to enjoin the collection of illegal taxes is not multifarious, because it includes taxes levied for different purposes, where all are subject to the same infirmity, and the bill has a single purpose, which is to have all such taxes adjudged illegal.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.*]

3. TAXATION (§ 25*)—NATURE OF POWER.

The power to determine what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and whether exercised by the Legislature itself, or delegated to a municipal corporation, is strictly a legislative power.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 25; Dec. Dig. § 25.*]

4. CONSTITUTIONAL LAW (§§ 209, 251*)—"DUE PROCESS OF LAW"—SCOPE OF CONSTITUTIONAL GUARANTY.

The provisions of the fourteenth constitutional amendment, that no state shall deprive any person of life, liberty, or property without "due process of law," nor deny to any person the equal protection of the laws, refer to and include all the instrumentalities of the state, to its legislative, judicial, and executive authorities; and whoever by virtue of public

position under the state deprives another of any right protected by that amendment violates its inhibition, and his act is that of the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 678, 732; Dec. Dig. §§ 209, 251.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227–2256; vol. 8, p. 7644.]

5. COURTS (§ 282*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

The exercise by a city council of the taxing power delegated to it by the Legislature is the act of the state, within the fourteenth constitutional amendment, and a person who is thereby deprived of property without due process of law may invoke the jurisdiction of a federal court on the ground of a violation of such amendment; but, where such action is without the authority of or contrary to state law, no question arises under the Constitution which gives such court jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820–824; Dec. Dig. § 282.*]

Jurisdiction in cases involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.]

6. COURTS (§ 282*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

Where a city is vested with authority to levy taxes generally for municipal purposes, in exercising such power in a manner or for a purpose not expressly prohibited by statute, it acts as an instrumentality of the state, and its action must be deemed to have been taken with the sanction of the state; and, if it deprives a person of property without due process of law, a suit by him to protect his rights is one arising under the Constitution, and within the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820–824; Dec. Dig. § 282.*]

7. TAXATION (§ 608*)—JURISDICTION—LACK OF ADEQUATE REMEDY AT LAW.

A bill for an injunction to restrain the collection of an alleged illegal tax, which alleges that a sale of real estate is threatened, and shows that there is no adequate remedy at law, states a case of equitable cognizance.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. § 608.*]

In Equity. Bill by Edwin H. Risley and others against the City of Utica and others. On demurrer to bill. Demurrer overruled.

See, also, 168 Fed. 737.

Risley & Love and John D. Kernan, for complainants.

Jones, Townsend & Rudd, for defendant Consolidated Water Company of Utica.

RAY, District Judge. Seven grounds of demurrer are alleged, viz.:

"(1) That the complaint does not state facts sufficient to constitute a cause of action against this defendant.

"(2) That the bill of complaint on its face shows no jurisdiction in this court, the amount involved being less than \$2,000.

"(3) That it shows no question arising under the Constitution of the United States of America, or any act of Congress, and that no federal question is involved.

"(4) The complaint on its face shows a want of equity in the complainant's alleged case.

"(5) The complaint shows that the complainants have a whole, complete, and adequate remedy at law.

"(6) That said bill of complaint is multifarious, in that it is exhibited against these defendants and several other defendants in the bill for several distinct

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and independent matters and causes which have no relation to each other, in which the defendant is in no way interested, and ought not to be entertained.

"(7) That persons are united as complainants who have no joint or common interest in obtaining the same relief."

The parties to this suit are all citizens and residents of the state of New York; hence there is no diversity of citizenship. The complainants allege that they, respectively, are the owners of real estate situated in the city of Utica, N. Y., liable to taxation; that such property has been and is being taxed; that the taxes imposed, and being imposed, and threatened to be imposed and collected, are illegal, and assessed and levied by the officials of the city of Utica under a void act of the Legislature, if it authorizes a certain contract hereafter referred to, and without any warrant of law whatever, if such act of the Legislature does not authorize the contract; that such taxes are a lien on and that such property has been levied upon and is subject to be sold to pay such taxes, and a cloud on title is thereby created; and that their property is being taken in violation of the Constitution of the United States, in that they are deprived of the equal protection of the laws, and are being deprived of their property by the imposition of such tax and its collection without due process of law by the state of New York, and that their property is being confiscated. There are other claims made which will be referred to later.

The allegations of fact contained in the bill demurred to must be taken as true. Not so of conclusions, unless they necessarily follow from facts stated. The city of Utica is one of the cities of the state of New York of the second class, existing under the provisions of chapter 18, p. 28, of the Laws of 1862, and the acts amendatory thereof and supplementary thereto. The Utica Waterworks Company became a corporation of the state of New York under the provisions of chapter 154, p. 252, of the Laws of 1848, and the acts amendatory thereof. At the time of the filing of the bill the defendant George Davis was the collector of the Thirteenth ward in said city, and held a warrant for the collection of certain city taxes levied on and against the property of one of the complainants situated in said ward. By chapter 393, p. 937, of the Laws of 1867, it was enacted:

"The common council of the city of Utica are hereby authorized and empowered to make a contract with the Utica Waterworks Company, and to fix and agree upon the sum to be paid annually therefor, for a supply of water for the extinguishment of fires in said city; and said Utica Waterworks Company shall, when such contract is made, furnish water to the city of Utica for the purposes of extinguishing fires, and shall lay and extend its pipes and conduits in such streets as the common council shall designate, and provide suitable reservoirs to constantly supply said city with sufficient water for the extinguishment of fires. Said sum fixed as the annual sum to be paid to said Utica Waterworks Company for a supply of water for the purpose of extinguishing fires shall be added in each year to the tax authorized to be raised by the forty-seventh section of the city charter of said city of Utica, and shall be collected therewith, and by the same power and authority."

On the 19th day of May, 1868, the said Utica Waterworks Company, acting under said law and by virtue thereof, entered into a contract with said city of Utica to supply water for the purposes therein mentioned. The material provisions of such contract are in substance as

follows: The company agrees (1) to furnish water for the said city for the extinguishment of fires; (2) to lay and extend its pipes, etc., in the streets designated on a map and presented to the common council; (3) to provide suitable reservoirs to constantly supply said city with sufficient water for the extinguishment of fires. The city agrees to pay \$10,000 annually on the 15th day of November, and also to pay one-half of all taxes assessed on the said company or its works or property within the limits of the city and taxes thereon in excess of \$1,000. If the city shall determine to extend the pipes and conduits beyond the points designated on the map on any street, then the company is to do such work, and the city is to pay 7 per cent. upon the cost of such extension. The city is also to have water from the pipes of the company for municipal purposes without payment of water rent. The company is also to erect fountains in the public streets and furnish same with water for drinking purposes.

The bill of complaint then contains this broad allegation:

"Your orators further allege, upon information and belief, that said contract in its various provisions was not authorized or made in accordance with chapter 393 of the Laws of 1867, but all of its provisions were made in hostility to the provisions of said act, and contrary thereto, and that said contract was made without authority of law, and contrary to the law, and contrary to the rights of the complainants in this suit."

The West Canada Waterworks Company was organized in May, 1898. The common council of the city of Utica granted it permission to lay pipes, etc., in the streets of the city. In such consent it was stipulated that such company would furnish water to the city and its inhabitants for 25 per cent. less than was being charged by the Utica Waterworks Company for a corresponding service. In November, 1899, the Consolidated Water Company was organized. Thereupon said West Canada Company sold and assigned all its property rights and privileges, except such consent and its obligation thereunder, to the Consolidated Company, and the Waterworks Company also sold all its property rights and privileges to the Consolidated Company. The Consolidated Company claims that the contract with the city, above mentioned, passed to it by such sale and assignment from the Waterworks Company.

The bill of complaint alleges that such contract and agreement was nonassignable, and did not pass to the Consolidated Company, and it gained no rights thereunder as against the city or its inhabitants; also that the purpose of the Consolidated Company was to create, foster, and promote a monopoly for the supplying of water to said city for domestic and fire protection purposes, and to claim and enforce payment under said contract, and that it has received large sums of money, amounting to many thousands of dollars each year, from said city and its taxpayers under such claim under such contract, and that same has been demanded, collected, and received by it and paid to it illegally, in violation of law, and contrary to the rights of the said city and its citizens and taxpayers under the Constitution of the United States, and to that extent has confiscated the property of the taxpayers of said city of Utica, in violation of the Constitution of the United States.

The bill alleges that the city authorities have neglected and refused,

unjustly, unnecessarily, and in violation of the said constitutional rights of the complainants, to extend or have extended water mains and pipes to, or onto, or through the streets in said city where they have property assessed and taxed as aforesaid, to afford them or their property protection against fire, although requested so to do, so that they and their said property are without any protection whatever against fire; that the money collected by tax for fire protection purposes is largely to pay said Consolidated Company for furnishing water for such purposes to a part of the city only, and to a part of its taxable property owners only, and that such tax is being assessed and levied and collected in defiance and violation of their rights under the Constitution of the United States.

The bill sets out at considerable length and in considerable detail the imposition and collection of such taxes for seven years past, and the present assessment and levies of such taxes for such purposes, in the city of Utica, and the enforced collection of same in some instances, and in others, when paid, alleges that same were paid in ignorance of the facts and under a mutual mistake of fact, giving the amount of such taxes assessed and levied and paid or sought to be collected by levy and sale of their property on which same has become a lien. The bill alleges the annual assessment and collection and threatened collection of taxes on all taxable property in said city, including that of the complainants, to pay one-half of the taxes levied on the property of said Consolidated Company, and that none of it has been assessed or imposed to pay any tax on the property of the Utica Waterworks Company; no tax being assessed or levied on its property.

It is true that there is no direct allegation in the bill that taxes become a lien and that the property upon which assessed and levied may be and is to be sold to pay same in case of nonpayment; but the provisions of the charter of the city of Utica are made a part of the bill and show all this. I have not referred to many acts of the common council in regard to expenses incurred and alleged to be justified and authorized by the contract referred to and also charged to be confiscatory of property. It is unnecessary to go into these details.

The suit is brought in behalf of the complainant and all similarly situated, and the proper authorities were requested to take action and institute suit, but refused. There is a direct allegation that the amount involved exceeds \$2,000, exclusive of interest and costs, and it is not apparent on the face of the bill that this is not true. There are many statements of fact contained in the bill which tend to show that this is true. I do not think that the bill is multifarious. All the acts charged result in the imposition and collection of taxes alleged to be illegal, confiscatory, and imposed in violation of the rights of the complainants guaranteed by the Constitution of the United States. All the complainants are taxed for the purposes mentioned, and the main purpose of the suit is to get rid of this imposition of taxes in the future, prevent the collection of those now imposed, and the payment to the Consolidated Water Company of some \$40,000 now in the hands of the city officials to pay for water supplied, etc. The situation and rights of the complainants are sufficiently similar. Their interests may not be

joint, but they are common. Conceding the broad allegations of the bill to be true, including what are claimed to be conclusions, a good and sufficient cause of action is stated; but whether it is one of which the federal courts have jurisdiction is another question, and still another question is: Have the complainants full, complete, and adequate remedy at law? If the taxes are wholly illegal may not payment be made under protest and a suit at law be maintained to recover back?

This case has been before this court on demurrer before. 168 Fed. 737. The contract above referred to is set out in full at pages 741, 742, in that case. The bill of complaint has been twice amended since then, and the case as now presented varies largely from the one then stated. At that time no other persons or parties similarly situated had come in. Additional parties plaintiff are now in the case. The main question presented on this demurrer is: Is this a case arising under the Constitution and laws of the United States?

The provision of the Constitution of the United States claimed to be offended against or violated reads as follows:

"Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Const. U. S. Amend. 14.

The Legislature of the state of New York has vested the taxing power of the city of Utica in the common council of such city, and delegated that power to such city, acting by and through its common council and other officers not necessary to name. The act of 1867 also authorized the common council to make the contract referred to with the Utica Waterworks Company for a supply of water for the extinguishment of fires in said city; but by its provisions it was to lay its pipes and conduits on such streets as the common council should designate, to fix the sum to be paid, and include such sum in the tax levy and collect or cause same to be collected. Title 4 of the chapter provides, in defining the powers of the common council (section 35, c. 18, Laws 1862):

"Twenty-first. To establish, make and regulate public wells, aqueducts and reservoirs of water for the convenience of the inhabitants of the city and its protection against fires, and to prevent the unnecessary waste of water."

The power to determine what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the Legislature itself or delegated to a municipal corporation, is strictly a legislative power. *N. O. Waterworks v. La. Sugar Co.*, 125 U. S. 18, 31, 8 Sup. Ct. 741, 31 L. Ed. 607; *United States v. New Orleans*, 98 U. S. 381, 392, 25 L. Ed. 225; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197.

The provisions of the Constitution refer to and include all the instrumentalities of the state, to its legislative, judicial, and executive authorities; and whoever, by virtue of public position under the state, deprives another of any right protected by that amendment to the Constitution against deprivation by the state, violates the constitutional inhibition, and as he acts for and in the name of the state, and is clothed with the power of the state, his act is that of the state. *Chicago, Burlington & Q. R. Co. v. Chicago*, 166 U. S. 226, 233, 234, 17 Sup. Ct.

581, 41 L. Ed. 979; Penn Mut. Life Ins. Co. v. Austin, 168 U. S. 685, 694, 18 Sup. Ct. 223, 42 L. Ed. 626; City Railway Co. v. Citizens' S. R. Co., 166 U. S. 557, 562, 563, 17 Sup. Ct. 653, 41 L. Ed. 1114; Brannon's Fourteenth Amendment, 97, 98; Ex parte Virginia, 100 U. S. 339, 347, 25 L. Ed. 676; Barney v. City of New York, 193 U. S. 440, 24 Sup. Ct. 502, 48 L. Ed. 737.

The action of a city council, authorized to exercise the taxing power, in so doing, exercises the power of the state. *Murray v. Charleston*, 96 U. S. 432, 440, 24 L. Ed. 760. In *Barney v. City of New York*, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, it was held that:

"Where it appeared on the face of plaintiff's own statement of his case that the act complained of was not only unauthorized, but was forbidden by the state Legislature in question, the Circuit Court rightly declined to proceed further, and dismissed the suit."

The defendant Consolidated Water Company contends that the complainants, by the allegation of the bill quoted, have placed themselves squarely within this last-mentioned case; that the bill shows on its face that the acts complained of were not only unauthorized by the state, but contrary to and in defiance of the statute authorizing the taxation of the property of the citizens and residents of the city of Utica for the purposes mentioned and complained of. This demurring defendant insists that, this being so, the acts alleged are a violation of the laws of the state of New York, have been done and are being done in violation of the laws of the state, and cannot be regarded or treated as acts of the state, or as acts done under its authority or sanction, and that, all the parties being residents and citizens of the state of New York, its courts are competent to redress the grievances complained of, and that they must be appealed to to that end. In *Barney v. City of New York*, *supra*, the court said:

"Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the state. Complainant's grievance was that the law of the state had been broken, and not a grievance inflicted by action of the Legislature or executive or judicial department of the state; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of, or contrary to, state law. *Missouri v. Dockery*, 191 U. S. 165, 24 Sup. Ct. 53, 48 L. Ed. 133; *Civil Rights Cases*, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835; *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667."

The act of the Legislature of the state of New York quoted (chapter 393, p. 937, Laws 1867), authorized the common council of the city to make a contract with the Utica Waterworks Company for a supply of water for the extinguishment of fires in said city and to fix and agree upon the sum to be paid said Waterworks Company annually therefor, such sum so fixed and agreed upon to be added each year to the tax authorized to be raised by the forty-seventh section of the charter of the city (Laws 1862, p. 47, c. 18, as amended by Laws 1904, p. 324, c. 181) and collected therewith by the same power and authority. That section provides that:

"The common council shall have power in each year to raise by tax upon the real and personal property liable to taxation, in addition to the sums authorized to be raised by law, forty thousand dollars exclusive of the expense of its collection, to provide for the following purposes"—(1) a city fund for making and repairing bridges, defraying the expenses of public improvements

ordered by the common council, and other contingent expenses of the city; (2) a street lighting fund; (3) a park fund; (4) a paving fund; (5) a repair fund.

Section 48 of the charter provides how the assessment is to be made. It clearly confers the power on the common council to assess and collect the tax through the treasurer and collectors in the various wards of the city. The tax to pay for water for extinguishing fires is only authorized by the act in question (chapter 393, Laws 1867). That act is, of course, the act of the state, and it prescribes what may be done, the purpose, who shall do it, and how it shall be done. In doing the acts authorized thereby, all agencies of the city mentioned are agencies of the state of New York. If they exceed their powers, while they are still the agencies of the state, are they acting under the authority of the state, or are they acting without its authority and contrary thereto, so that it cannot be said the state is acting to deprive a person of property without due process of law, or so as to deny to a person the equal protection of the law? If the act of the Legislature referred to is misconstrued by the common council, or if no valid contract with the Consolidated Water Company exists, or if the Utica Waterworks Company had no power to assign its contract to the Consolidated Company, so that it took no rights under it, still the common council may be acting under and by virtue of the statute referred to, and, while its acts may be erroneous and not warranted by the law, may it not be said that, as it is purporting to act under the statute, the acts complained of are not wrongful individual acts for which redress must be sought in the state courts? To so hold would hardly give force to the language of the Supreme Court in *Barney v. City of New York*, supra:

"The principle is that it is for the state courts to remedy acts of state officers done without the authority of, or contrary to, state law."

In so far as this bill alleges acts complained of to be in violation of the statute of the state of New York above referred to and quoted, I am of the opinion that it presents a local or state question, and not a federal question, even though such acts are being done by officers of the city of Utica. If the officers of the state or city act, not by virtue of and under the authority of the statute and in pursuance thereof, but in opposition thereto and in violation thereof, they are violating the law of the state, and it cannot be said that the state has made a law authorizing such acts, or that the state has deprived any person of property without due process of law, or denied to any person the equal protection of the laws; and, even if the acts done violate the rights of the complainants, it cannot be said that the state has authorized them by its legislative, executive, or judicial instrumentalities. Clearly the Legislature of the state has not authorized the acts for they are committed in violation of its authority. The courts of the state have not held the acts legal and proper. While such acts are done by the executive officers of the state or city, clothed with power to tax in certain cases and for certain purposes, still they are acting in violation of the law of the state.

In *Siler et al. v. Louisville & Nashville R. R. Co.*, 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753 (where *Barney v. City of New York* was examined and distinguished), as here, there was no diversity of citizen-

ship, and jurisdiction in the Circuit Court of the United States depended upon the presence of a federal question. The Constitution of the state established a railroad commission with certain powers. On March 10, 1900, the McChord act (Laws Ky. 1900, p. 5, c. 2) was passed relating to the fixing of rates, etc. This act had not been construed by the highest court of the state, nor had it been held valid by any court. The commission, acting under the statute, or claiming to so act, promulgated an order making schedules for maximum rates on freight. The Louisville & Nashville Railroad Company filed its bill to enjoin the order of such commission. The Circuit Court held that the said McChord act violated the provisions of the fourteenth amendment. The defendants below (Siler et al.) appealed, denying the jurisdiction of the Circuit Court, claiming that no federal question was presented. The bill in that case not only attacked the validity of the McChord act as in violation of the fourteenth amendment, but also as in violation of section 4, art. 4, of the Constitution. The bill as filed also contained the averment that the said order of the Railroad Commission of Kentucky, in making a general schedule of maximum rates for the railroads mentioned in its order, was invalid, as unauthorized by the statute. Of this averment the Supreme Court, per Mr. Justice Peckham, said: "This is, of course, a local or state question." It is seen that the validity of the statute itself was challenged as in violation of the Constitution, and as a consequence the validity of all acts done or orders made under it were challenged as void. The bill also challenged the validity of the acts done and orders made by the commission as being unauthorized by the statute challenged as unconstitutional. Thus was presented the federal question that the statute was unconstitutional and void, and the order made by the commission void, and also the state or local question that the order made was invalid because not authorized by the statute. The court said:

"The federal questions, as to the invalidity of the state statute because, as alleged, it was in violation of the federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only. This court has the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the federal questions, or decide them adversely to the party claiming their benefit. *Horner v. United States* (No. 2), 143 U. S. 570, 576, 12 Sup. Ct. 522, 36 L. Ed. 266; *Fallbrook Irrigation Dist. v. Bradley*, 164 U. S. 112, 154, 17 Sup. Ct. 56, 41 L. Ed. 369; *Penn Mutual Life Insurance Co. v. Austin*, 168 U. S. 685, 694, 18 Sup. Ct. 223, 42 L. Ed. 626; *Burton v. United States*, 196 U. S. 283, 295, 25 Sup. Ct. 243, 49 L. Ed. 482; *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; *People's Savings Bank v. Layman* (C. C.) 134 Fed. 635; *Michigan Railroad Tax Cases* (C. C.) 138 Fed. 223. Of course, the federal question must not be merely colorable, or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction. *Penn Mutual Life Insurance Co. v. Austin*, 168 U. S. 685, 695, 18 Sup. Ct. 223, 42 L. Ed. 626; *Michigan Railroad Tax Cases* (C. C.) 138 Fed. 223, *supra*."

Taking *Barney v. City of New York* and the *Siler Case*, just quoted, together, it is clear that, unless the bill of the complainants here bases their ground of complaint on the federal question that the statute of 1867 is void, or on some other federal question (some question other

than acts done in violation of the act of the Legislature of 1867), the demurrer must be sustained on the ground this court has no jurisdiction. If a federal question is found in the bill, it must not be merely colorable or set up for the purpose of giving this court jurisdiction. *Siler et al. v. Louisville, etc.*, 213 U. S. 191, 192, 29 Sup. Ct. 451, 53 L. Ed. 753; *Penn Mut. L. I. Co. v. Austin*, 168 U. S. 685, 695, 18 Sup. Ct. 223, 42 L. Ed. 626. There must be allegations of fact showing that a federal question is involved. It is self-evident that the question whether or not the contract between the city and the Waterworks Company was assignable and passed to the Consolidated Company is a state and local question, and not a federal question. However, this may be a step in leading to and presenting a federal question, and, if a federal question is presented, then the question of the assignability of such contract may be tried here, and of itself may be decisive of this case. *Siler et al. v. Louisville, etc.*, supra.

Having alleged the nonassignability of the contract and the buying up of the other water companies, the bill alleges that the purpose of the Consolidated Water Company was to create, foster, and promote a monopoly for the supplying of water to the inhabitants of the city of Utica for domestic and fire protection uses and to enable said Consolidated Company to claim and enforce against the taxable property of the city payment on account of said contract, and that under the said claim it has annually demanded and received from the city of Utica large sums of money, giving the amounts, contrary to law, in violation of law, and in violation of the rights of said taxpayers of the city of Utica, and contrary to the Constitution of the United States, and in hostility thereto, which have been levied by the city of Utica on the taxable property of the city contrary to the rights of the said taxpayers under the Constitution of the United States, and contrary to and in violation of law, and to that extent has confiscated so much of the property of the taxpayers of the city of Utica, which confiscation, says the bill, is unlawful, illegal, and contrary to the Constitution of the United States. It is undoubtedly unlawful and illegal for any person to confiscate, under the guise of taxation or otherwise, the property of another or of others. The provisions of the Constitution of the United States, referred to, are, however, aimed at the action of the states, and not of individuals. If, then, the state has conferred the power to tax the property owners of a city in a certain event and for a certain purpose and to a certain amount, defining the event, purpose, and amount, on certain officers of such city, and that act of the state was legal, and not unconstitutional, but those who are to receive the taxes when collected unlawfully assign or pretend to assign their claim to another, who has no right to receive them, and that person acts illegally and intends so to do, and the city officials, under a mistake of fact, or of fact and law, assume that the right to assign existed, and proceed to levy, assess, and collect the tax and pay it over, has the state deprived any person of property without due process of law, or denied to any person the equal protection of the laws? Clearly it has not impaired the obligation of any contract by its action, so as to offend against the constitutional provision in that regard. It has authorized

the making of a certain contract for a certain purpose, and the levy and collection of a tax to meet its obligations. The state, by its Legislature, has never affirmed the legality of the contract, or expressly authorized an assignment thereof. Its courts have neither affirmed its legality or invalidity, nor affirmed or denied its assignability.

The bill also alleges that for the purpose of still further increasing the amounts annually assessed upon the property of the taxpayers of the city of Utica, and collected and paid to said Consolidated Company, and claimed by it under said contract, the said company has leased or otherwise acquired the control of the property of the New Hartford Waterworks Company and the Whitesboro Water Company (outside the city of Utica), and have connected mains with the city of Utica for supplying water to the inhabitants of certain towns and districts outside said city—naming them—all of which water passes through the city mains, and that by reason of such facts the assessed valuation of the property of such Consolidated Company has been largely increased, and that annually large sums of money have been collected from the taxpayers of Utica under the provisions of said contract and paid over to said Consolidated Company to reimburse it for one-half the taxes levied against it, less \$1,000, and that all such money so levied and collected as a tax has not been paid to the Utica Waterworks Company, and that the taxes paid with such money so collected were not assessed against said Utica Waterworks Company, but against the Consolidated Company, and the allegation is that all this was done and is being done by the said city authorities wrongfully, without authority of law, contrary to law, and contrary to and in violation of the Constitution of the United States. The bill then alleges as follows:

“Your orators further allege, upon information and belief, that neither the Utica Waterworks Company nor the Consolidated Water Company of Utica have complied with any of the conditions required by chapter 393 of the Laws of 1867 and the contract hereto attached and made a part of this amended bill of complaint, and each has failed, neglected, and refused to comply with the requirements of said contract, and that neither the Utica Waterworks Company nor the Consolidated Water Company of Utica has ever furnished a sufficient and adequate supply of water for fire protection purposes to the property of the city of Utica, and that by reason of the collection of said annual taxes by the city of Utica, and the payment of the amounts so collected over to the said water company, the same has been paid without authority of law, and in violation of the law, and in violation of the rights secured to the inhabitants of Utica by the Constitution of the United States, and that said sums of money annually collected and paid to the said water company have been collected and paid by the city and received by the water company by mutual mistake of fact as to all of the parties in interest.”

Assuming that all has been done by the common council, treasurer, and collectors of the wards of the city of Utica, still there is no allegation that the state by its courts or Legislature has authorized it, or declared it legal or constitutional. In fact, the allegation is that it was done in violation of the statute enacted by the Legislature, and in violation of the terms of the contract which was authorized by the Legislature and entered into between the city and the Utica Waterworks Company. Unless the acts of the city officials referred to are to be regarded as the acts of the state, and authorized or sanctioned by it, no federal question is presented by these allegations.

We have a breach of contract and a breach of duty by the city officials, but no sanction of the state, unless it be implied. But how can it be said that a state has authorized or sanctioned acts done by the officers of its municipalities and alleged to be illegal and in violation of the Constitution of the United States, where it is alleged that the state enacted a law defining and pointing out just what such officers might do, and that in the acts in question they have acted in opposition thereto and in violation thereof, instead of in accordance therewith?

In *Arbuckle v. Blackburn*, 191 U. S. 405, 24 Sup. Ct. 148, 48 L. Ed. 239, it was decided that where the state law under which the state officer acted was conceded to be constitutional, or its constitutionality was not questioned, but the dairy and food commissioner put a construction on it which made it unconstitutional, and his proposed and instituted acts unlawful and in violation of the federal Constitution, and the courts of the state had not decided that his proposed acts were constitutional and lawful, or his construction correct, no federal question was presented, and that jurisdiction rested on diversity of citizenship alone. The court said:

"The suggested controversy was purely hypothetical, and based the supposed constitutional objections on the contingency that, on issues of fact, it might be judicially determined that *Arlisa* came within the statute, which complainants denied."

In the case at bar the courts of the state of New York are open to the complainants, and if it shall be held by them that the acts complained of are legal, justified by the law or the act of the Legislature referred to, then such judicial intepretation will raise the federal question; for the state, through its courts, will have spoken. But until that has been done, and so long as the statute referred to is not questioned as contrary to the federal Constitution, and it is alleged that th acts of the city council are contrary to and in opposition to the law of the state, it is presumed that the courts of the state will do their duty, and undo all the illegal acts of the city officials, and give full redress. In *Defiance Water Co. v. Defiance*, 191 U. S. 184, 191, 24 Sup. Ct. 63, 66, 48 L. Ed. 140, the court said:

"Ordinarily the question of the repugnancy of a state statute to the impairment clause of the Constitution is to be passed upon by the state courts in the first instance; the presumption being in all cases that they will do what the Constitution and laws of the United States require."

See, also, *New Orleans v. Benjamin*, 153 U. S. 411, 424, 14 Sup. Ct. 905, 38 L. Ed. 764; *Chicago & Alton R. R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 1 Sup. Ct. 614, 617, 27 L. Ed. 636.

In *Barney v. City of New York*, 193 U. S. 438, 439, 24 Sup. Ct. 504, 48 L. Ed. 737, the Supreme Court quoted the following, with approval, from *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667, and the Civil Rights Cases, *supra*:

"But when a subordinate officer of the State, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the state' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong.

* * * In the Civil Rights Cases, in which the court was dealing with Act

March 1, 1875, 18 Stat. 335, c. 114 (U. S. Comp. St. 1901, p. 1260). Mr. Justice Bradley said: "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual—an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress."

In that case the acts complained of were done by or through the Board of Rapid Transit Railroad Commissioners. In *Siler v. Louisville & Nashville R. R. Co.*, supra, the court decided the case on the local or state question that the commission had no power under the statute of the state to make the order in question (see page 194 of 213 U. S., page 455 of 29 Sup. Ct. [53 L. Ed. 753]); but the court said:

"If the averment as to the invalidity of the order of the commission were the only ground upon which a federal question was founded, and if the bill alleged that the order was invalid because it was not authorized by the state, either by statute or in any other way, the objection might be good; but the bill sets up several federal questions."

The bill proceeds to allege that, acting under the alleged authority given by such contract and by direction of the common council of the city of Utica, the Waterworks Company and the Consolidated Company have laid water mains in about 98 miles of the streets of the city, leaving about 30½ miles of streets and the inhabitants thereon without any means for a water supply, or a water supply of any description, for any purpose, and that the property on said 30½ miles of streets is left without water for fire protection, but that, notwithstanding this fact, the property has been annually assessed and taxes levied thereon and collected on account of the water mains laid in other parts of the city; also, that mains have been duplicated and the cost assessed on all the property of the city, and taxes levied and collected on the percentage named in said contract. The bill alleges that the common council was without authority or jurisdiction to make such arrangement with the Consolidated Company, and that the agreement, therefore, was without authority of and contrary to law, contrary to the rights of all the taxpayers, and hostile to and in violation of their rights under the Constitution of the United States, and constitutes a confiscation of their property, contrary to such Constitution and in hostility thereto. The correctness of this conclusion that the acts are in violation of the Constitution, so far as raising a federal question is concerned, depends on the character of the acts done and the authority under which done. If not done by authority of the state of New York, express or implied, or sanctioned by it, and especially if done in violation of and opposition to its laws conferring the power to impose and collect taxes on the common council, and in violation of the contract authorized by the Legislature and entered into with the Waterworks Company, we have a violation of the laws of the state of New York pure and simple, committed by the officials of the city of Utica. The only authority conferred by the Legislature upon the common council of the city of

Utica in regard to the matters here in controversy was to enter into a contract with the Waterworks Company to provide a supply of water for the extinguishment of fires in said city, and to assess, levy, and collect, through the treasurer and collectors of the city, a tax to pay for such water. This is not a general and unlimited power, but is restrictive. I find no allegation in the bill anywhere that this statute is confiscatory in its operation, or in violation of the Constitution of the United States.

Assume that the common council, instead of entering into a contract with the Waterworks Company named in the act of the Legislature, had entered into a contract with some other company for a supply of water for such purpose, and had then proceeded to assess, levy, and collect a tax to pay therefor under the terms of such contract; is it true that such illegal action would present a federal question, or a case cognizable by the Circuit Court of the United States? No one can doubt that in such case an action in equity would lie in the state courts to enjoin the levy and collection of the tax as wholly unauthorized; no general taxing power having been conferred on the city of Utica or any of its officers by its charter. But it does not follow that such remedy may be pursued in the federal courts. If the state should sanction such action by its courts, a different question would be presented. If the Waterworks Company could not assign and transfer the contract lawfully made (we will assume) with the city, and the Consolidated Company took no rights under it as against the city, then the situation is the same as if the common council had acted and is acting, in imposing the tax, wholly without authority of law, and in opposition to or disregard of the law restricting its power to contract to a specific company. In short, it would present the case of a municipal corporation of a state assessing and levying and collecting a tax upon the property of its citizens, not only without authority of, but in violation of, the law of the state. Would this be the act of the state in any legal sense?

In *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 760, the city of Charleston was incorporated by an act of the Legislature of the state of South Carolina, which act of incorporation conferred upon the city the power to make—

“such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit, and advantage of the city as shall appear to them expedient.”

Under this power the city passed an ordinance to raise supplies to meet the expenses of the city government for the current fiscal year by assessing a tax of two cents on the dollar on the value of all real and personal property in the city; the tax on the city stock (really an indebtedness of the city) to be retained by the city treasurer out of the interest thereon, when the same became due and payable. The tax was levied and retained from the stock held by Murray, a resident of Bonn, Germany, who brought suit in the state court to recover the amount of the tax assessed and retained under this ordinance. Judgment was given for the defendant, and affirmed by the Supreme Court of the state, thus necessarily affirming the validity of the ordinance

and the validity of the tax so assessed. The case was taken to the Supreme Court of the United States on writ of error, and it was objected that the Supreme Court had no jurisdiction, as no federal question was raised of record or presented in the state courts. This objection was overruled. The court held:

"Wherever rights, acknowledged and protected by the Constitution of the United States, are denied or invaded by state legislation, which is sustained by the judgment of a state court, this court is authorized to interfere."

Amongst other things, the court said:

"But neither the charter itself, nor any subsequent acts of legislation, directly or expressly interfered with any debts due by the city, or gave to the city any power over them. They simply gave limited legislative power to the city council. It was not until the ordinances were passed under the supposed authority of the legislative act that their provisions became the law of the state. It was only when the ordinances assessed a tax upon the city debt, and required a part of it to be withheld from the creditors, that it became the law of the state that such a withholding could be made. The validity of the authority given by the state, as well as the validity of the ordinances themselves, was necessarily before the court of common pleas when this case was tried; and no judgment could have been given for the defendants without determining that the ordinances were laws of the state, not impairing the obligation of the contracts made by the city with the plaintiff. * * * It is plain, therefore, that both in the common pleas and in the Supreme Court of the state a federal question was presented by the pleadings and was decided—decided in favor of the state legislation, and against a right the plaintiff claims he has under the Constitution of the United States. The city ordinances were in question on the ground of their repugnancy to the inhibition upon the states to make any law impairing the obligation of contracts; and the decision was in favor of their validity. Nothing else was presented for decision, unless it be the question whether the acts of the state Legislature authorized the ordinances; and that was ruled affirmatively. The jurisdiction of this court over the judgments of the highest courts of the states is not to be avoided by the mere absence of express reference to some provision of the federal Constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of state legislation, this court is authorized to interfere. The form and mode in which the federal question is raised in the state court is of minor importance, if, in fact, it was raised and decided. The act of Congress of 1867 gives jurisdiction to this court over final judgments in the highest courts of a state in suits 'where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity. * * * That involved in the judgment of the court of common pleas and in that of the Supreme Court of the state was a decision that the city ordinances of Charleston were valid, that they did control the contract of the city with the plaintiff, and that they did not impair its obligation, is too plain for argument. * * * The court gave judgment for the defendant, which would have been impossible, had it not been held that they have the force of law, notwithstanding the Constitution of the United States, and the Supreme Court affirmed the judgment. Our jurisdiction, therefore, is manifest."

In the case at bar no court of this state has sustained the validity of the acts complained of under the state statute or the action of the city council. In fact, the bill of complaint as amended repeatedly, and from beginning to end, alleges that such acts were contrary to and in violation of the law, and without warrant of law. The validity of the act of the Legislature of the state is not denied, only the acts done under it. If, then, the common council of the city of Utica acted in defiance of

the act of the Legislature, and no court of the state has upheld its action as a valid exercise of power under such statute, how can it be said that its unauthorized resolutions or ordinances imposing the taxes, if there were any, and it is not alleged there were, became a part of the law of the state, or the action of the state?

However, the Supreme Court of the United States, in the case of *Murray v. Charleston*, held that a federal question was presented in the state courts. That federal question must have been presented on the allegations setting up the state law, the city ordinances enacted by virtue thereof and claimed to be authorized thereby, the nature and character of the "stock" or debt of the city, and the retention from the plaintiff of a part of that amount under the guise of taxation by virtue of the ordinance. If a federal question was thus presented in the state court, it did not arise out of the decision of the Supreme Court of the state of South Carolina, but from the unconstitutionality of the ordinance, which, as we have seen, was held to have become a law of the state, when enacted, whether actually authorized by the statute or charter of the city or not. I think, therefore, that the real and determining question here is whether or not the resolutions or action of the common council of the city of Utica in imposing the tax or taxes in question had the force of law—are to be regarded as laws of the state. In *New Orleans Waterworks Company v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 30, 31, 8 Sup. Ct. 741, 747, 748, 31 L. Ed. 607, this question was under consideration, and the court per Mr. Justice Gray without dissent, said:

"In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals. * * * As later decisions have shown, it is not strictly and literally true that a law of a state, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the Legislature in the ordinary course of legislation, or in the form of a Constitution established by the people of the state as their fundamental law. * * * So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the Legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States. For instance, the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the Legislature itself, or delegated by it to a municipal corporation, is strictly a legislative power. *United States v. New Orleans*, 98 U. S. 381, 392, 25 L. Ed. 225; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197. Accordingly, where the city council of Charleston, upon which the Legislature of South Carolina, by the city charter, had conferred the power of taxing persons and property within the city, passed ordinances assessing a tax upon bonds of the city, and thus diminishing the amount of interest which it had agreed to pay this court held such ordinances to be laws impairing the obligation of contracts, for the reason that the city charter gave limited legislative power to the city council, and, when the ordinances were passed under the supposed authority of the legislative act, their provisions became the law of the state. *Murray v. Charleston*, 96 U. S. 432, 440, 24 L. Ed. 760. See, also, *Home Ins. Co. v. City Council of Augusta*, 93 U. S. 116, 23 L. Ed. 825."

In *United States v. New Orleans*, 98 U. S. 381, 392, 393, 25 L. Ed. 225, the court, per Mr. Justice Field, said:

"The position that the power of taxation belongs exclusively to the legislative branch of the government no one will controvert. Under our system it is lodged nowhere else. But it is a power that may be delegated by the Legislature to municipal corporations, which are merely instrumentalities of the state for the better administration of the government in matters of local concern. When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of those purposes, its authorities, however limited the corporation, must have the power to raise money and control its expenditure. In a city, even of small extent, they have to provide for the preservation of peace, good order, and health, and the execution of such measures as conduce to the general good of its citizens; such as the opening and repairing of streets, the construction of sidewalks, sewers, and drains, the introduction of water, and the establishment of a fire and police department. * * * All of them require for their execution considerable expenditures of money. Their authorization, without providing the means for such expenditures, would be an idle and futile proceeding. Their authorization, therefore, implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose."

It seems, from all the cases, that a municipality like the city of Utica has delegated to it legislative powers, especially in matters of taxation, and that in imposing taxes it represents the state, and that its acts are the acts of the state, unless expressly prohibited.

The bill of complaint, as amended, and now before the court, seems, however, to charge that all the acts complained of were done in violation and defiance of all law, as well as of the Constitution of the United States. There is no allegation that the common council of the city of Utica adopted ordinances or by-laws for the imposition of these taxes under the powers delegated to it by the Legislature, and that same became a part of the law of the state, and were unconstitutional and void as in conflict with the Constitution of the United States. How can it be said that the state has had anything to do with the imposition of these taxes, or that it has sanctioned them, unless we infer the existence of ordinances or by-laws? Were these acts the acts of the state, for the reason they were done by the common council of the city illegally and without warrant of law? If we regard the municipality as an instrumentality or agency of the state, with delegated legislative powers, and, notwithstanding the limited character of the taxing power conferred, treat such acts as those of the city acting by its common council in the exercise of such powers, and not as the wrongful acts of the individuals composing it, I think a federal question is presented, and that this court has jurisdiction. While certain powers of taxation were conferred expressly, still in *United States v. New Orleans*, *supra*, the court said:

"When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited."

There is no law of the state of New York in "express terms" prohibiting the exercise of the power that was exercised by the common

council in this case and claimed to be in violation of the Constitution of the United States. The same case says:

"But it [the power of taxation] is a power that may be delegated by the Legislature to municipal corporations, which are merely instrumentalities of the state for the better administration of the government in matters of local concern."

This being so, we necessarily conclude that the city of Utica, a municipal corporation of the state of New York, was vested with all powers of taxation for all purposes necessary for its existence (and the procuring of water for fire protection is such a purpose, it having no water supply of its own) except those "in express terms prohibited"; that there was no express prohibition by the Legislature on the city or common council, which forbade it to do what it did do; that, in acting as it did and is doing through its common council, it was but a mere instrumentality of the state, and that all such acts must be deemed to have been done by or with the sanction of the state of New York; that the acts of the city cannot be regarded or treated as the wrongful acts of individuals merely, done in violation of the law of the state. As the state had acted in doing what was done, it is not necessary that the complainants pursue their remedy in the state courts as for a violation of state laws.

The case of *Barney v. City of New York*, supra, does not seem to reach the case of a municipal corporation, where the power of taxation is granted generally by the state, except as prohibited in express terms, as in that case and others cited the powers of the state officers or agencies were expressly limited; that is, they had only the powers expressly granted. In 5 *Encyclopedia U. S. Sup. Ct. Reports*, 545, the author states the rule thus:

"When a subordinate officer or agency of the state, in violation of state law, undertakes to do that which is not only unauthorized, but which is forbidden by the state law, such action cannot be said to be action by the state, within the intent and meaning of the fourteenth amendment. In such cases the grievance is simply that the state law has been broken, and not that the state has inflicted a wrong through its legislative, executive, or judicial department.

3. *Aggrieved Person must Invoke the Aid of the State Courts.*—The doctrine here is that the aggrieved party must first invoke the aid of the state courts, since it is for the state courts to remedy the acts of state officers done without authority of, or contrary to, state law. In such a case the complaining party must exhaust his remedy in the state courts by prosecuting his case to the state court of last resort for cases of that character; and until he has done this it cannot be said that he has been denied due process or deprived of his property by state action. If the decision of the highest state court to which he can resort is adverse to him, he can then take his case on writ of error to the United States Supreme Court upon the ground, not that the proceeding or action complained of was contrary to or unauthorized by state law, but upon the ground that what was complained of as a deprivation of life, liberty, or property without due process of law, in violation of the fourteenth amendment, has at last received the sanction of the state, and, in effect, become the act of the state itself."

Under the allegations of the bill this clearly is a case of equitable cognizance. *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 284, 285, 29 Sup. Ct. 426, 53 L. Ed. 796, and cases cited; *Ogden City*

v. *Armstrong*, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

It would seem plain that much is demanded by way of relief that could not be granted, conceding all the allegations of the bill to be true; but a demurrer does not lie to the demand for relief. Nor is it intended to indicate that all the matters charged, if true, are the subject of relief. What is decided is that, on the whole bill, a case is made of equitable cognizance, and of which this court has jurisdiction, and that the bill is not open to the charge of multifariousness. Several questions have been raised and discussed, which the court is not called upon to determine in advance of the final hearing. It will hardly be contended, I think, that the city of Utica, by its common council, had the right to go outside the city and make improvements and expend money, or contract with some corporation so to do, for the benefit of outside localities, as well as Utica, in order to secure water for both fire protection and domestic uses in the city, and then levy and assess a tax on all the property and property owners in the city to meet such expenses, while giving to a portion of such inhabitants only the benefits of fire protection and the use of such water for domestic purposes. The power of taxation is very broad and sweeping, and necessarily must be; but at the same time it has its limitations by the provisions of the Constitution of the United States, as many cases hold, and some of which were cited when this case was before this court on the former demurrer. There should be a speedy determination of this case on the merits, and if not at issue and tried at the December term the motion to vacate or modify the injunction may be renewed.

The demurrer is overruled, and the motion to dissolve the injunction denied for the present.

THE NIMROD.

(District Court, S. D. Alabama. August 13, 1909.)

No. 1,203.

1. COLLISION (§ 11*)—NAVIGATION RULES—CONSTRUCTION—"STEAM VESSEL."
Every vessel propelled by machinery is considered a "steam vessel," within the meaning of the navigation rules.
[Ed. Note.—For other cases, see Collision, Dec. Dig. § 11.*
For other definitions, see Words and Phrases, vol. 7, pp. 6654, 6655.]
2. COLLISION (§ 67*)—NAVIGATION RULES—CONSTRUCTION—"UNDER WAY."
A vessel, although her headway is killed in the water, is considered "under way," and subject to the navigation rules, unless she is at anchor, or tied to the shore, or aground.
[Ed. Note.—For other cases, see Collision, Dec. Dig. § 67.*
For other definitions, see Words and Phrases, vol. 8, p. 7161.]
3. COLLISION (§ 39*)—STEAM VESSELS CROSSING—FAULT.
The tug *Nimrod* left the wharf in Mobile, and when proceeding down the river, about the middle of the channel, ran down and sank a power launch, and the sole occupant thereof was drowned. When the tug approached, the launch was lying on the west of the channel, about 50 feet

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from the course of the tug, pointed down the river, and was nearly motionless, until the tug reached a point 50 to 75 feet to the north of it, when it suddenly started ahead at a rapid speed on a course crossing that of the tug. The occupant of the launch was not at the wheel, gave no signal as required by the rules, having the tug on his port bow, and apparently paid no attention to the tug until immediately before the collision. When the launch started and changed its course, the tug stopped her engines; but there was not sufficient time to change her course or materially reduce speed. *Held*, that she was not in fault, but that the collision was due solely to the negligence of the deceased.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 39; Dec. Dig. § 39.*]

In Admiralty. Action by the administrators of A. Danenberg, deceased, against owners of the tug Nimrod, to recover damages for the death of libelants' intestate, in collision. Decree for defendants.

Webb & McAlpine and Leo M. Brown, for libelants.

Pillans, Hanaw & Pillans, for defendants.

TOULMIN, District Judge. This is a suit in admiralty, brought by the administrators of A. Danenberg, deceased, who is alleged to have been drowned through the negligence of the officers of the tug Nimrod. The suit is brought against the owners of the tug.

The libelants allege that the tug Nimrod left the foot of Dauphin street, blew a leaving signal, and proceeded down the river, and that the deceased, A. Danenberg, had not left Government street with his launch, but was in it heading in a southerly or southeasterly course; that he thence turned easterly across the river, and proceeded 50 or 75 yards. The tug was at that time about 150 feet up the stream northerly from the launch, and was approaching at a rate of 5 or 6 miles an hour. At that time Danenberg appeared to be having some trouble with his machinery used in the launch. Libelants further allege that the servants of the defendants, in charge and control of the tug, negligently failed to change her course or lessen her speed; that she gave no signal, by bell, whistle, or in any other manner, to warn Danenberg, until approaching within about 30 feet of the launch, when the pilot gave the first warning by calling to Danenberg, on which Danenberg turned his wheel in such way as to cause the launch to take a course downstream; that the speed of the tug was not lessened, and almost immediately after said Danenberg changed the direction of the launch the tug struck it, caused it to sink and Danenberg to be drowned. Libelants then aver that the collision could have been avoided if the pilot of the tug had given the proper signals, required by the regulations, in due time, and that the collision could have been avoided if he had changed the course of the tug, so as to have proceeded in a more easterly or southeasterly direction.

The death of Danenberg must have been caused by the wrongful act, omission, or negligence of the agents or servants of the defendants to render them liable therefor. The libelants charge that it was caused by the negligence of the master and pilot of the tug. The defendants deny that said master and pilot was guilty of any negligence in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

premises, and furthermore aver that the deceased, Danenberg, was himself guilty of negligence, in having no lookout or other helper on his launch, and in the improper manner in which he navigated and maneuvered his boat, which proximately contributed to the cause of his death.

After a very careful examination and consideration of the evidence, which, as is usual in such cases (cases of collision), is quite conflicting, I find from the weight of the evidence the facts of the case to be substantially these:

The steam tug Nimrod left the foot of Dauphin street, in the city of Mobile, about 2 or 3 o'clock p. m., on or about August 22, 1908, blew a leaving signal, and proceeded down the channel of the Mobile river; that Danenberg was at that time in his launch at the foot of Government street, on the same (west) side of the river, and two blocks below Dauphin street—perhaps some 900 feet—the launch heading north. Danenberg very soon started out from this position, turned his launch around, and headed in a southerly or southeasterly course, downstream. When in 50 to 75 feet west of the direct southern course of the tug, outside of and near to the west bank of the channel of the river, and well clear of the tug's course, his launch stopped. He appeared to be working with his engine, which was situated near the stern of the boat. The wheel was in the bow of the boat. The boat was variously estimated at from 18 to 25 feet long. Danenberg was alone on the launch. When the launch had stopped, and Danenberg was working with his engine, her bow was headed south. Danenberg was facing north; his back being towards the bow. At this time the tug was about 100 feet north of him, on a north and south line down which the tug was traveling and 50 to 75 feet east of where the launch had stopped. The launch was stationary, or slowly drifting down with the tide. Suddenly, when the tug was nearly abreast of her—probably 50 feet farther north, and 50 to 75 feet east—the launch started ahead, and circled or turned to the eastward, running at rapid speed in the direction of the course the tug was pursuing. The launch was a very smart boat, got off quickly when her engine started up, and going, as stated by one of the witnesses, "at a very rapid clip up until the collision."

At the time the engine started and the launch moved off, Danenberg was not at the wheel, and did not reach the wheel until the two vessels were very close together—said by some of the witnesses practically together. When Danenberg got to his wheel, he appeared to turn it hard to starboard, and succeeded in deflecting the course of the launch slightly to the south or southwest, but not sufficiently to avoid the collision. The launch received a glancing blow about $3\frac{1}{2}$ to 4 feet aft her port bow; the blow on the tug being about the boilers, some 25 feet from the stem of her bow. The launch was not crushed or very badly damaged, but partly overturned and caused to sink, in which unfortunate accident Danenberg was drowned.

Charles Davis, a witness for libelants, testified that, when he first noticed the boats, they were 100 or 150 feet apart, both going down the river. The launch was westward of the tug, and not quite to the

channel, and the tug about the center of the channel. The launch finally got into the channel, and the collision occurred.

Hendrickson, who was a member of the tug's crew, and a witness for libelants, testified that, when he first noticed the launch, it was about 100 feet ahead of the tug, and looked to be going downstream; that she was out of line of the tug about 50 feet or so, and was about 100 feet to the south and off the tug's track. When he saw the launch, Danenberg was back at his engine, and when about 50 feet away the launch turned to southeast or east, and its course was then across the line, north and south, that the tug was traveling. This was immediately before the accident, and close to it.

Peter Forbes, the master and pilot of the tug, testified in substance: That, when he first noticed the launch, she was leaving the wharf about the foot of Government street. That she came out heading up the river, turned, and headed south. She seemed to break down; was to the side of the tug's course about 75 or 80 feet. She stopped a few minutes after she left the wharf. Danenberg was at the engine after she stopped. Just before the tug got abreast of her she started up, got under way, and turned to port or eastward; had been heading south. Danenberg was not at his wheel when the tug got there, and was not at his wheel when the two boats were near together, when witness holloaed at him. That he (witness) was at the wheel of the tug and never left it. When he saw the launch turning so as to bring on a collision, besides exclaiming, he rang the bell to stop the boat, and he put the helm to starboard, the effect of which is to throw the boat to port. The boat obeyed very little for want of time. That he did everything under existing conditions to avoid the collision. There were only a few seconds, and the whole thing was done. The launch was on his starboard bow. The tug had approached to within 75 or 80 feet of the place of collision when the launch got under way. This is estimated; it being hard to estimate distance on water exactly. He received no signal from Danenberg, before he started up, that he was going to start. The launch hit the tug about abreast the pilot house. The tug was not going over 6 miles an hour. He further testified that it is not customary to give signals to a vessel at rest in the position this launch was at the time. She was on the west side of channel. The tug was to the east of her, near the middle of the channel. After he headed south, and saw the launch coming out from the wharf, he could not say he lost sight of her. He was 75 or 80 feet north of the point of collision at the time the launch started up. He put his wheel to starboard to take the boat to the east, but could not, in the time he had, do so. The vessels were pretty near together then. The launch, when she started up, was going as fast, if not faster, than the tug, and it took but a few seconds for the tug to run 75 feet. That the first thing he did was to ring the bell to stop, then put the wheel to starboard, and this was before the collision. That he did not have space enough to go and to deflect either to the east or west of the launch. The engine of the launch started while she was bearing south, and she swept around towards the tug.

Forbes is corroborated as to many of the material facts stated by him by the witness Glidden, the engineer of the tug, who testified to

the ringing of the stopping bells; by August Lesin, deck hand on the tug; and Hendrickson, also a member of the crew of the tug. Lesin testified he first saw the launch lying head down the river, stopped; the tug was going down on the east side of her; launch a good distance off; also that Forbes put his wheel hard over, or tried to, but could not get it over quick enough to get clear; that he rang the bell to stop the engine, etc. Hendrickson says he thinks the stopping bell was rung just before the collision. He also says the engine was stopped, and the tug's speed was lessened, when the collision occurred.

Forbes is also corroborated by Peter Smith, a bar pilot in Mobile harbor. He was on the quarter deck of a schooner anchored in the river. He corroborates Forbes in his statement as to some of the material facts testified to by him, and also as an expert pilot is corroborative of Forbes. He is also corroborated by Bernard Anderson, a master and pilot of a steamer. He was on the wharf at the foot of Church street, about abreast of where the collision took place, and in view of it.

Witness for libelants, Curry, testified that the tug's engine was stopped at the time of the collision. Several other witnesses testify in harmony with the foregoing statement of the facts as found by me, more specific reference to which would unnecessarily extend this opinion now already too long.

As before stated, there is conflict in the evidence. Some of libelants' witnesses testify that Danenberg left the Government street wharf and went directly east across the river, but stopped shortly before he reached the channel, seeming to have some trouble with his engine. One of said witnesses stated that he stopped a short distance from the wharf, then started up, and he did not see him stop again, but ran at a rapid clip up to the time of the collision, going across the course of the tug, and was run into by the tug in so doing; that the tug did not change its course, did not lessen its speed, and that he heard no bell ring. Another of said witnesses stated that the launch was going across the river to the east, did not stop until she reached the channel, and was directly in the course or line of the route of the tug, and was "motionless" in such way when the tug ran down upon her; that the tug must have been 100 feet, more or less, from the launch at the time the launch reached the point where she lay motionless and the collision took place. The tug gave no signal and did not appear to change her course or slacken her speed; did not see the launch have any trouble with her engine starting out in the beginning. She went out very smoothly.

This witness is in conflict as to several of his statements, and particularly in that the launch was lying "motionless" directly in the path of the tug when she was struck, with every other witness in the case who testified on that point, except, perhaps, the witness Holmes. Holmes says, when the launch stopped, he noticed the tug north, coming down, distant something like 100 feet, more or less, and the launch was directly in the path of the tug. The witnesses for the libelants generally testify that they heard no signals given, that they heard no bells rung at or before the collision, and that the tug did not appear to lessen her speed or change her course at all.

On the part of the defense it is not claimed that there was any material change, if any deflection, in the course of the tug. The evidence in their behalf is that the stopping bell was rung and the engine stopped, and that evidence tends to show that there was not space and time enough to stop the tug, or materially lessen her speed, from the time the "risk of collision" appeared to the time the collision occurred. Most of the witnesses, who testified favorably to the defense, as to the ringing of the stopping bell and stopping the engine, and to the attempt of the pilot to starboard the wheel, "were in a situation favorable for observation and who testify affirmatively and positively to the occurrence," while the evidence of the libelants on that point is purely of a negative character. *Chicago Ry. Co. v. Andrews*, 130 Fed. 65, 64 C. C. A. 399; *B. & O. R. Co. v. Baldwin*, 144 Fed. 53, 75 C. C. A. 211.

Rule 9 of the pilot rules provides that:

"When two steamers are approaching each other at right angles or obliquely so as to involve risk of collision, other than when one steamer is overtaking another, the steamer which has the other on her own port side shall hold her course and speed; and the steamer which has the other on her own starboard side shall keep out of the way of the other, by directing her course to starboard so as to cross the stern of the other steamer, or, if necessary to do so, slacken her speed or stop and reverse. The steamer having the other on her own port bow shall blow one blast of her whistle as a signal of her intention to cross the bow of the other, holding her course and speed, which signal shall be promptly answered," etc.

The launch is a steam vessel. Every vessel propelled by machinery is considered a steam vessel. Act Jan. 18, 1897, c. 61, 29 Stat. 489 (U. S. Comp. St. 1901, p. 3029); *Hughes on Admiralty*, p. 216. "And a vessel, even though her headway is killed in the water, is considered under way, unless she is at anchor, or tied to the shore or aground." *Hughes on Admiralty*, p. 216.

The contention of the libelants is that, when Forbes saw Danenberg go back to his engine, he should have slackened the speed of the tug, or stopped, or reversed. This contention must be based on the theory that the two steamers were approaching each other at right angles or obliquely, so as to involve risk of collision. This is clearly the libelants' theory as contended for on their evidence.

Under rule 9, *supra*, the steamer having the other on her own port bow shall blow one blast of her whistle as a signal of her intention to cross the bow of the other, holding her course and speed, which signal shall be promptly answered by the other steamer by one short blast, etc. In this case we find the launch, having the tug on her own port bow, should have blown one blast of her whistle as a signal of her intention to cross the bow of the tug, holding her course and speed, which signal was to be promptly answered by the tug. Until such signal was given no obligation rested on the tug to answer. There is no proof that the launch gave the required signal. It is to the contrary.

If it be conceded that the tug was running at an unlawful rate of speed, or was in fault for violating any of the navigation rules, and the death of Danenberg was the result of the combined negligence of both the tug and launch, there can be no recovery. *Mooney v. Car-*

ter, 152 Fed. 147, 81 C. C. A. 365. The rigid doctrine of the common law as to contributory negligence applies in such cases. Hughes on Admiralty, p. 208.

Article 29 of the regulations for preventing collisions upon certain rivers and inland waters of the United States, provides that:

"Nothing in these rules shall exonerate any vessel, or the owner or master thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required * * * by the special circumstances of the case." Act Aug. 19, 1890, c. 802, 26 Stat. 320, § 1 (U. S. Comp. St. 1901, p. 2871).

"It is said that rules of navigation are only intended to apply when vessels are approaching each other in such directions 'as to involve risk of collision.' * * * The mere fact that vessels are in sight of, or even near, each other, navigating the same waters, does not bring these enactments into play. If their courses are parallel, and sufficiently far apart to clear with a safe margin, * * * there is no need for rules of navigation." Hughes on Admiralty, p. 233.

"If two vessels are moving on courses that, if held, would pass clear, then there is no risk of collision, and no rule is necessary." Hughes on Admiralty, p. 238, and authorities cited.

In my opinion the weight of the evidence in this case clearly establishes these facts, namely, that the launch was lying outside of and west of the channel, heading south down the river, drifting but little, if any at all; that the tug was 100 or 150 feet north, coming down the channel of the river on a direct course at least 50 feet east of the position of the launch; that the launch started up, turned eastward, and approached the channel at a fast rate of speed, and that Danenberg was not at his wheel; that the courses of the two vessels, as indicated at the time the launch was lying idle and started up, were sufficiently far apart for the tug to clear her with a safe margin; that no "risk of collision" between the two vessels was involved until the launch started up, turned to the eastward, and proceeded at a rapid speed towards the channel, down which the tug was approaching at a rate of speed of at least 6 miles an hour; that at the time the launch started up and turned eastward the tug was from 50 to 75 feet north, and about the same distance on a line east, on her course down the channel; that no signal was given by Danenberg, indicating his intention to change his course from that which the position of the launch indicated he was going, at the time he started his engine and got in motion.

My opinion further is that Danenberg neglected precautions which were required by the special circumstances of the case. He is presumed to have known the unreliability of the kind of engine that he was using, which the evidence tends to show it was, and he neglected to have a proper lookout, or any one on his launch with him to aid him in her navigation. From my view of the evidence, I am of opinion that the claimants are not entitled to recover. Although Danenberg may have been negligent in failing to have a proper lookout, and have been negligent in starting his engine, putting his launch in motion and running at right angles or obliquely towards the course of the tug, under the then existing conditions, yet if the pilot of the tug had been guilty of wantonness, that is, was so recklessly indifferent to Danenberg's peril as to have consciously failed to use all means at hand to have

avoided the unfortunate occurrence, as contended by libelants' counsel, my decision in this case would be different. But I find from the decided weight of the evidence no ground for such contention.

My conclusion is that the claim of the administrators of A. Danenberg, deceased, must be disallowed and dismissed.

COUND v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court, W. D. Texas, El Paso Division. November 6, 1909.)

No. 492.

1. COURTS (§ 284*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

The federal employer's liability act (Act April 22, 1908, c. 149, § 2, 35 Stat. 65, 66), which makes common carriers by railroad within the territories of the United States liable for injuries to employes as therein stated, supersedes the common law in the territories with respect to such liability, and any cause of action within its terms is necessarily one arising under a law of the United States, and on that ground within the jurisdiction of a federal Circuit Court, where the requisite amount is involved.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 284.*

Jurisdiction in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.]

2. COURTS (§ 270*)—JURISDICTION OF FEDERAL COURTS—DISTRICT OF SUIT.

An action in a federal court on a cause of action arising under a law of the United States, although the parties are citizens of different states, is not one in which "jurisdiction is founded only" on diversity of citizenship, within the meaning of the federal judiciary act of 1875 (Act March 3, 1875, c. 137, § 1, 18 Stat. 470), as amended in 1887 (Act March 3, 1887, c. 373, 24 Stat. 552) and 1888 (Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), and, unless the objection is waived, can only be brought in the district of which defendant is an inhabitant.

[Ed. Note.—For other cases see Courts, Cent. Dig. § 810; Dec. Dig. § 270.*

Diverse citizenship as ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

At Law. Action by George C. Cound against the Atchison, Topeka & Santa Fé Railway Company. On plea to jurisdiction. Plea sustained.

The purpose of this suit—brought originally in this court—was to recover damages of the defendant, in excess of \$2,000, for injuries alleged to have been received by the plaintiff in the territory of New Mexico, while engaged in the discharge of his usual duties as brakeman on a freight train. The material question to be determined is one of jurisdiction of the court, and the facts bearing upon this question are conceded by counsel of the respective parties. Diverse citizenship clearly appears; the plaintiff being a citizen of Texas and a resident of this district, and the defendant a corporation organized under the laws of the state of Kansas, and hence, for jurisdictional purposes, a citizen and inhabitant of that state. The injuries complained of were the result of an accident which occurred in March, 1909. In view of the importance of the question presented for the consideration of the court, it is thought proper to insert the cause of action and the allegations affecting the question of jurisdiction in the language of the pleader:

"That plaintiff is a resident and citizen of the city and county of El Paso, and state of Texas, and of the Western district of Texas, and has been such a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

citizen and resident for many years past. That the defendant is a foreign railway corporation, duly and legally incorporated under the laws of the state of Kansas, and is a citizen of said state, where it has its domicile, but is now, and was on the day hereinafter mentioned, engaged in the business of running and operating a railroad into the city and county of El Paso, and state of Texas, and the Western district of Texas, where it maintains an office and local agent. That said defendant is a common carrier of freight and passengers for hire, and operates a line of railway extending from El Paso, Tex., northerly through the territory of New Mexico to Raton, N. M., and as such common carrier operates freight and passenger trains for hire in and through the territory of New Mexico, and employed a large number of brakemen, and other employes, whose business it was to run and operate said trains for hire.

"That on and prior to the 17th day of March, 1909, plaintiff was employed by defendant as a brakeman on a freight train running between Las Vegas, N. M., and Raton, N. M. Plaintiff says that on or about the 17th day of March, 1909, he was ordered and directed by said defendant, and its duly authorized agents, to assist in the running and operating of a freight train for defendant from Las Vegas, N. M., to Raton, N. M.; that when said train arrived at or near Raton it became necessary, and part of plaintiff's duty as brakeman on said train, to dismount from said train, and throw a switch; that after he had performed his duties it then became necessary for him to climb on said freight train, and ride same to its terminal, or destination; that while plaintiff was in the exercise of due care for his own safety, and attempting to climb onto one of the cars composing said train, and while in the act of mounting the top of said car by the use of the ladder, hand rail, or hand hold maintained thereon for that purpose, one of the hand holds or hand rails at or near the top of said car suddenly pulled loose and gave way, and plaintiff was thrown and fell from said car and injured, as hereinafter set out, without any fault or contributory negligence on his part. Plaintiff says that said car, hand hold, and appliances thereon were unsafe and dangerous, substantially as follows, to wit:

"That said hand hold was defective and insecurely fastened and maintained to said car. That the board or plank, or part of the car to which said hand hold was maintained by means of a lag screw, or bolt, was old and rotten, and in such a defective condition as not to be of sufficient strength to maintain the weight of plaintiff, when he attempted to use said hand hold to pull himself on top of the car. That on account of the fact that said hand hold was negligently, carelessly, and insufficiently fastened and maintained to said car, or on account of the fact that the bolt or lag screw was not properly and securely fastened into and maintained to the plank, or the car, or on account of the fact that the car was old, rotten, and split, the same pulled loose and gave way when plaintiff attempted to use said hand hold, and he was thereby thrown and fell from said car and injured.

"Plaintiff says that it was the duty of said defendant, and its duly authorized agents, to provide for his use a reasonably safe and suitable car, hand holds, and all appliances thereto attached, in a reasonably safe and sound condition, and to inspect and repair said car, or to see that the same was inspected and repaired, and kept in a reasonably safe condition; but plaintiff avers and charges that said defendant, and its duly authorized agents, in a negligent manner and way, placed said car in the train at Las Vegas, N. M., without inspecting same, or making a proper inspection of said car, in order to discover the defects and defective condition of said hand hold, and ordered and directed this plaintiff to use said car and appliances, with said hand hold insecurely and insufficiently fastened and maintained to said car, or with the plank to which said hand hold was fastened in such a rotten and defective condition as to render said hand hold insufficient and dangerous for use.

"Plaintiff further avers and charges that if said defendant had exercised ordinary care, and made a proper inspection of said car and appliances, all the above defects could have been discovered and remedied, and plaintiff would not have been injured; that said defendant, and its duly authorized agents, at the time and long prior to the happening of said accident, knew that said hand rail or hand hold was negligently fastened and maintained to said car, and knew that the same was insufficient to be used as a hand hold, and knew that

the top of said car or plank to which said hand hold was fastened was old, rotten, or split, and that it would be necessary for plaintiff, or some other employé, to use said hand hold, or hand rail, in mounting or dismounting from said car, and, when the same was used in the manner and way in which plaintiff was attempting to use same, that the same would pull loose or give way, and plaintiff, or some other employé, would be killed or seriously injured, or by the exercise of ordinary care and inspection could have known all the above facts.

"Plaintiff says that he was ignorant of any of the aforesaid defects in said car, hand hold, or appliances until too late to avoid said accident, and on account of the darkness of the night could not have discovered same by the exercise of ordinary care; and plaintiff says that each of the aforesaid negligent and careless acts and omissions on the part of said defendant, and its duly authorized agents, was the direct and proximate cause of said accident, and plaintiff's consequent injuries, for which defendant is liable.

"Plaintiff further represents and shows to the court that on or about the 22d day of April, 1908, the Congress of the United States of America passed and approved what is known as 'the Federal Employer's Liability Act,' which said act is now in full force and effect in the territory of New Mexico, and was at the time and place of the happening of this accident, and is the law governing the liability of the defendant in this case, and on which plaintiff relies for a recovery herein, both as to the liability of the defendant as a common carrier in the territory of New Mexico, as well as to the rule of evidence governing such actions, and the measure of damages, which said act, on which plaintiff relies for a recovery herein, as well as the fact that the defendant is a citizen of the state of Kansas, and plaintiff a citizen of the state of Texas, and of this district, gives this court jurisdiction of this suit and cause of action."

The defendant filed the following plea to the jurisdiction of the court:

"Comes now the defendant, and appearing specially, and for the purpose only of filing this its objections to the jurisdiction of this court by way of plea in abatement, and says: That this defendant is a railway corporation duly chartered under the laws of the state of Kansas, and under the laws of no other state or territory, and that it has and maintains its general office, where all its records are kept, in the city of Topeka, in Shawnee county, state of Kansas, and that it is an inhabitant and citizen of said city of Topeka, Shawnee county, and state of Kansas, and that the defendant is an inhabitant of the First division of the federal judicial district of Kansas, in which division is situated said city of Topeka, and Shawnee county: that the defendant is not an inhabitant of the Western district of Texas, or any part of same, but that it has its domicile and principal office and habitat in said Topeka, Kan., and not in the Western district of Texas, or any part thereof.

"That if plaintiff has any cause of action as pleaded, or otherwise, same arises under the laws of the United States, as by plaintiff's petition pending in this cause is manifest, and for the reason that this case is one arising under the laws of the United States, and is against a corporation incorporated in the state of Kansas, and under the laws thereof, and for the reasons herein set forth, this court cannot longer take cognizance of this action, and for all the reasons stated herein this defendant objects and protests against this court taking further action herein, except to enter an order dismissing this cause for want of jurisdiction.

"Wherefore this defendant prays judgment of this honorable court as to its jurisdiction to further hear and determine this cause, and prays that it be dismissed, with its cost."

With the view of meeting the objections interposed by the defendant to the jurisdiction of the court, the plaintiff filed an amended petition, in which the cause of action is set forth as in the original; but the amendment contains no reference whatever to the act of Congress entitled "An act relating to the liability of common carriers by railroad to their employes in certain cases," approved April 22, 1908, and commonly known as the "Employer's Liability Act." To be more specific, the following allegations of the original petition are pre-terminated in the amendment:

"Plaintiff further represents and shows to the court that on or about the 22d day of April, 1908, the Congress of the United States of America passed and approved what is known as 'the Federal Employer's Liability Act,' which said act is now in full force and effect in the territory of New Mexico, and was at the time and place of the happening of this accident, and is the law governing the liability of the defendant in this case, and on which plaintiff relies for a recovery herein, both as to the liability of the defendant as a common carrier in the territory of New Mexico, as well as to the rule of evidence governing such actions, and the measure of damages, which said act, on which plaintiff relies for a recovery herein, as well as the fact that the defendant is a citizen of the state of Kansas, and plaintiff a citizen of the state of Texas, and of this district, gives this court jurisdiction of this suit and cause of action."

To the amended petition the defendant interposed another plea to the jurisdiction of the court, claiming, as in its first plea, the right to be sued in the district of Kansas. The cause coming on to be heard upon the pleadings and the admitted facts, the plea was sustained, and the suit dismissed. The plaintiff did not except to the ruling, preferring to institute his suit in the state court.

Patterson & Wallace, for plaintiff.

Turney & Burges, for defendant.

MAXEY, District Judge (after stating the facts as above). As disclosed in the statement of the case, this suit was brought by the plaintiff to recover damages of the defendant, in excess of \$2,000, for injuries which he received during the month of March, 1909, in the territory of New Mexico, while discharging his usual duties as brakeman on one of the defendant's freight trains. The plaintiff is a citizen of Texas, and resides within the Western district of the state; and the defendant is a common carrier incorporated and organized under the laws of the state of Kansas, and operates a line of railway from El Paso, Tex., through New Mexico, and into the state of its incorporation. It maintains a general office, where its records are kept, in the city of Topeka, Kan. The sole question submitted for decision is whether this court has jurisdiction, over the protest of the defendant, to hear and determine the cause. On the one hand, it is insisted by the plaintiff that the jurisdiction obtains, since diverse citizenship exists and the suit was brought in the district of his residence, where due service was had upon an authorized agent of the defendant. Upon the other, the defendant contends that the suit should be brought in the district of which it is an inhabitant, to wit, the district of Kansas, because the jurisdiction claimed is not founded only on the fact that the suit is between citizens of different states, but that it is based upon the additional ground that the suit is one arising under a law of the United States.

Which of these divergent views is correct? To answer the question satisfactorily it becomes necessary to ascertain (1) whether the suit arises under a law of the United States; and (2) whether, if so arising, it was brought in the proper district. As to the first suggestion, the petition of the plaintiff discloses that the cause of action had its origin in the territory of New Mexico, and subsequent to the passage of the act, entitled "An act relating to the liability of common carriers by railroad to their employés in certain cases," popularly known as the "Employer's Liability Act." Act April 22, 1908, c. 149, 35 Stat. pt. 1, pp. 65, 66. Section 2 of the act is in the following words:

"That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

That the Congress has, within constitutional limitations, full and complete legislative authority over the people of the territories, admits of no question. "Congress may not only abrogate laws of the territorial Legislatures," said Mr. Chief Justice Waite, speaking for the court in *National Bank v. County of Yankton*, 101 U. S. 133, 25 L. Ed. 1046, "but it may itself legislate directly for the local government. It may make a void act of the territorial Legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states." See, also, *Mormon Church v. United States*, 136 U. S. 42-44, 10 Sup. Ct. 803, 34 L. Ed. 481, and authorities cited.

Here, then, is an act of Congress, enacted for the purpose of enabling employes of common carriers by railroad to recover damages for injuries suffered by them while employed by the common carriers in the territories. The section of the act quoted has specific application to the territories, and, being the supreme law of the land (Const. art. 6), supersedes all other laws embracing the same subject-matter. By this act the common law is modified in essential particulars; as, for example, where the injuries of the employé result in death, the cause of action survives to his personal representatives for the beneficiaries named in the act. Section 2 of the act in effect abolishes the common-law doctrine of fellow servant, and sections 3 and 4 materially modify, if they do not practically destroy, the common-law doctrine of contributory negligence and of assumed risk. Section 5 renders void any contract, rule, regulation, or device whatsoever intended by the common carrier to exempt itself from any liability created by the act.

When the act is analyzed, it becomes apparent that it was the purpose of the Congress to confer rights and benefits upon the injured employé which were denied him by the common law; and hence the existence of a common-law right of action on the part of an injured employé cannot, in reason, be claimed in the presence of this act of Congress. Indeed, the act is the law, and the only law, under which suits like the present one may be brought. It is the law of the case, by which the rights of the employé and the liability of the carrier are measured. The very subject-matter of the controversy is federal. The suit involves the construction, application, and effect of an act of Congress (*Swafford v. Templeton*, 185 U. S. 487, 22 Sup. Ct. 783, 46 L. Ed. 1005; *Wiley v. Sinkler*, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84); and, tested by all the authorities, it is one arising

under a law of the United States. It was said by Mr. Justice Strong, as the organ of the court in *Tennessee v. Davis*, 100 U. S. 264, 25 L. Ed. 648, that:

"A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted."

See, also, *Wyman v. Wallace*, 201 U. S. 230, 26 Sup. Ct. 495, 50 L. Ed. 738; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140; *Kansas Pacific v. Atchison Railroad*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482; *Railroad Company v. Mississippi*, 102 U. S. 141, 26 L. Ed. 96; 2 *Bates*, Fed. Proc. at Law, § 693.

The present case grows out of, and has its origin in, a law of Congress, and its correct decision depends upon a construction of that law. This court, therefore, having jurisdiction of the cause as one arising under a law of the United States, it is quite immaterial whether the plaintiff declare, in his petition, expressly upon the act, as in the present case he did in his original petition, or whether the pleadings be silent touching jurisdictional averments. If the case arise—as did the case before the court—under the second section of the employer's liability act—that is, if an employé of a carrier by railroad suffer personal injury from the negligence of the latter while employed in the performance of his duty, and such injury result from an accident occurring in the territories—appropriate allegations of such facts are alone sufficient to confer jurisdiction of the case upon a United States court, without specially pleading the act, or without referring to its provisions. This result follows necessarily, since, in the case supposed, the suit is founded upon a law of the United States, which it is the duty of federal courts to take notice of and to enforce. See *Voelker v. Railway Company (C. C.)* 116 Fed. 867; *Thornton, Employer's Liability and Safety Appliance Acts*, §§ 104, 107.

Attention will now be directed to the second query above propounded. Was the present suit brought in the proper district? The general jurisdiction of the court is not here involved, but the question has reference merely to the place of suability; and in this connection it may not be amiss to add that the record does not present any question of waiver, on the part of the defendant, of its right or privilege of being sued in the district of which it is an inhabitant. In the first pleading filed by the defendant, a protest is entered against the court's jurisdiction, and it is insisted that the suit should be brought in the district of Kansas. In the examination of this question no aid is derived from the employer's liability act, and recourse must be had to the act of March 3, 1887, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508). The applicable part of the first section of the act reads as follows:

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature,

at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Repeating the language of the statute:

"No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

That, for jurisdictional purposes, a railway corporation is a person and inhabitant of the state under the laws of which it is incorporated, has been so definitely and conclusively settled by the Supreme Court that a reference to authorities in support of the proposition is deemed altogether useless. Referring to the statute, and eliminating the federal feature of the present case, the jurisdiction of the court would be clear beyond controversy, since in that case the jurisdiction would be founded only on the fact of diverse citizenship. But here there appear two sources of jurisdiction, the one founded on diverse citizenship and the other upon the fact that the suit arises under a law of the United States. In the former case, the statute authorizes suit to be brought in the district of the residence of either the plaintiff or the defendant, where the jurisdiction is founded only on the fact that the action is between citizens of different states; while, in the latter, suit must be brought in the district of which the defendant is an inhabitant. Where the two sources of jurisdiction are combined in one suit, can it be said that the jurisdiction is founded only on the fact that the action is between citizens of different states? If the language of the statute be given its plain and ordinary meaning, the question propounded must unquestionably be answered in the negative, since the jurisdiction cannot be founded only—that is, using the definition of Webster (*Web. Dict.* p. 913), "utterly, entirely, wholly"—on one ground, when another and equally important constitutional ground is present in the same suit. In cases of this kind, therefore, the suit should be brought in the district of which the defendant is an inhabitant.

The court recognizes the importance of the question under discussion, and has given it careful consideration. Its decision is based upon the language of the statute; but it is thought that the conclusion announced is clearly supported by the case of *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402. If the court has correctly construed the law, the competent authority may readily make any amendment which may be deemed wise and proper. On the other hand, if the construction of the statute, applied by the court, be erroneous, the error may be easily corrected by the appellate tribunals.

For the reasons assigned, the plea to the jurisdiction should be sustained, and the suit dismissed for the want of jurisdiction; and it is so ordered.

PERCY et al. v. UNION SULPHUR CO.

(District Court, D. Maine. October 27, 1909.)

No. 71.

1. SHIPPING (§ 181*)—DEMURRAGE—ARRIVAL OF VESSEL—CONSTRUCTION OF CHARTER PARTY.

A schooner was under charter providing that her lay days for loading should commence "from the time the vessel is ready to receive * * * cargo and notice thereof is given. * * * Vessel to take turn in loading * * * if required." She arrived in the loading port and gave notice of her readiness to receive cargo. The only berth fitted to load her cargo was owned and controlled by the charterer, and she was required to await her turn, which involved a delay of several days. *Held*, that her lay days commenced from the time she arrived and gave notice.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 592; Dec. Dig. § 181.*]

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

2. SHIPPING (§ 171*)—DEMURRAGE—PRACTICAL CONSTRUCTION OF CHARTER PARTY BY PARTIES.

Where, after a vessel was loaded, upon a question of demurrage arising, the charterer's agent, under authority from his principal to indorse upon the bills of lading "when lay days commence and when vessel loaded," indorsed such dates, which were accepted by the master, such action amounted to a practical construction of the charter party by the parties, which was entitled to great, if not controlling, influence.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 568; Dec. Dig. § 171.*]

In Admiralty. Action by Samuel R. Percy and others, as owners of the schooner *Cora F. Cressy*, against the Union Sulphur Company for demurrage. Decree for libelants.

Edward C. Plummer, for libelants.

Wallace, Butler & Brown, Harrington, Perkins & Englar, and Bird & Bradley, for respondent.

HALE, District Judge. This is a libel in personam, brought by the owners of the five-masted schooner *Cora F. Cressy*, to recover for her detention at Sabine Pass, Tex., while under charter to the respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The charter party is dated January 11, 1907. By it the charterers agreed to furnish the schooner at Sabine a full cargo of sulphur in bulk, which she was to carry to Baltimore, Philadelphia, or Portland, as ordered, on the signing of the bills of lading.

The provisions of the charter party, material in this cause, are the following:

"It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched), commencing from the time the vessel is ready to receive or discharge cargo, and notice thereof is given to the parties of the second part: Shippers to furnish cargo at the rate of 300 tons per day, Sundays and holidays excepted, and discharge 300 tons per day, Sundays and holidays excepted. Vessel to take turn in loading and discharging, if required. Vessel to be free of wharfage at both loading and discharging port. Vessel not to report for cargo before February 20, 1907, unless with consent of the charterers. And that for each and every day's detention by default of said parties of the second part, or agent, one hundred and seventy-five dollars per day, day by day, shall be paid by said parties of the second part, or agent, to the said parties of the first part, or agent."

The Cressy arrived at Sabine Pass Saturday afternoon, March 16, 1907, and came to anchor at the usual anchorage where vessels lie which are to load at the respondent's dock.

The master of the Cressy gave notice to C. H. Dickinson, the charterer's agent at Sabine, at 9 o'clock in the morning of Monday, March 18, 1907, that his vessel was ready to receive cargo; and Mr. Dickinson made the following indorsement on the master's copy of the charter party:

"Sabine, Texas, 3/18/07.

"Schr. Cora Cressy ready for cargo 9 a. m. Monday, March 18, 1907.

"Union Sulphur Company,

"C. H. Dickinson, Agent."

There was but one loading berth at Sabine for vessels like the Cressy, and that berth was controlled by the respondent, who had installed machinery for the loading of sulphur cargoes. It was expected that, with the use of such machinery, a very large quantity could be loaded in a day.

At the time of the Cressy's arrival at Sabine, several vessels had arrived ahead of her, which were under charter to the respondent for sulphur cargoes. One of these vessels was then loading at the respondent's dock, and the others were at their anchorage waiting for an opportunity to go to the dock. While the Cressy remained at her anchorage waiting for a berth, she was at all times in readiness to receive cargo. The Cressy was berthed at the respondent's dock at 1 o'clock in the afternoon of April 8th, and loaded in turn with the earlier arriving vessels. After she reached her berth, her loading proceeded at the rate of more than 300 tons per day, and was completed at noontime on April 11, 1907, when she had on board about 3,000 tons. On the day after the completion of her loading the charterer's agent made the following indorsement upon the master's copy of the charter party:

"Sabine, Texas, April 12, 1907.

"Schooner Cora F. Cressy finished at noon, April 11, 1907.

"Union Sulphur Company,

"C. H. Dickinson, Agent."

Immediately after the completion of the Cressy's loading, some question arose between the master and Mr. Dickinson, the respondent's agent, in reference to indorsing on the bills of lading the amount of the demurrage which they had then agreed to be due the vessel; and thereupon Mr. Dickinson wired his principal (the Union Sulphur Company), at New York, for instructions, and on April 12th he received the following reply:

"Schooner Cressy. Endorse on bills of lading when lay days commence and when vessel loaded. Demurrage, if any, settled at destination."

Upon the receipt of this telegram, Mr. Dickinson made the following indorsement upon the bills of lading:

"Sabine, Texas, April 12, 1907.

"The schooner Cora F. Cressy was ready for cargo at 9:00 a. m. on March 18, 1907. Finished loading at noon, April 11, 1907. Assuming that her cargo consists of 3,000 tons, her lay days expired on April 11, 1907, at 9:00 a. m., as per charter party, dated January 11, 1907; hence demurrage is due this vessel for 13 days and 3 hours.

Union Sulphur Company,

"C. H. Dickinson, Agent."

Thereupon the master signed the bills of lading, proceeded on his voyage, and made due delivery of the cargo.

The libelants contend that, under the terms of the charter party, the charterers were required to furnish cargo at the rate of 300 tons per day, counting from the time of the vessel's report and readiness for cargo. The respondent contends that it was required to furnish cargo at that rate only from the time the vessel reached her loading berth.

1. From what time were the libelants entitled to have their lay days count?

The answer to this question must rest upon the proper construction to be given to the charter party under which the vessel was to receive her cargo. In *Harding v. Cargo of Coal (C. C.)* 147 Fed. 971, this court has passed upon questions quite similar to those under consideration in the case now before it.

In that case the court had occasion to say that the contention there made as to the construction of charter parties—

"should not be followed where a reasonable construction may be given, which gives force to every term and provision of the contract, and is, at the same time, consistent with law and with the intention of the parties."

There the charter party provided that the lay days should commence from the time the captain reported himself ready to receive or discharge cargo, and excepting Sundays and national legal holidays, unless used; that the vessel was to have her turn in loading, and should be loaded promptly.

In that case, as in the case now before me, it appeared that the dock at which the vessel was to be loaded was wholly under the control of the charterer; and all vessels that arrived were obliged to come to an anchorage in the harbor, from which point they reported to the charterer's agent, and then waited until such time as the charterer had a berth at which the vessel could be docked and loaded, when the char-

terer would send a steam tug and berth the vessel at such dock as it desired to load her.

In that case the agent of the railroad company, at whose dock the vessel was to load, admitted that under the provisions of the charter party the vessel was an "arrived vessel," and entitled to count her time from the time she came to her anchorage and gave notice to the charterer's agent of her readiness to load.

In the case at bar, when the vessel came to her anchorage at Sabine and notified the charterer of her readiness for cargo, there was nothing further that she could do, except to wait the convenience of the charterer in finding a berth and arranging for her loading.

The present case differs from the *Harding Case* in but one essential particular, and that relates to the party by whom, and the manner in which, the vessel was to be docked. The evidence upon this point was within the power of the charterer. But neither party has offered any proofs on this point. In the absence of testimony, the case cannot be distinguished from the principles which the court announced in the *Harding Case*.

In *Merriam v. United States*, 107 U. S. 437, 441, 2 Sup. Ct. 536, 540, 27 L. Ed. 531, the Supreme Court said:

"It is a fundamental rule that in the construction of contracts the courts may look, not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." *Nash v. Towne*, 5 Wall. 689, 18 L. Ed. 527; *Barreda v. Silsbee*, 21 How. 146, 161, 16 L. Ed. 86; *Brawley v. United States*, 96 U. S. 168, 24 L. Ed. 622.

In the light of these decisions of the Supreme Court, it is the duty of this court to look, not only at the language employed by the parties in making their contract, but at the subject-matter of the surrounding circumstances, and to avail itself of the same light which the parties enjoyed when the contract was executed. If we examine this charter party in view of all the circumstances, the language of Judge Dallas in *Carbon Slate Co. v. Ennis*, 114 Fed. 260, 261, 262, 52 C. C. A. 146, 147, 148, although in another connection, is applicable:

"The ship's readiness to receive the cargo 'from the charterers' shippers' was not dependent upon their readiness to assign her a berth. So long as this was not done, she was detained in waiting, not by any lack of readiness on her part, but by the unreadiness of the shippers, and therefore they, and not the master, were responsible for the consequent delay in loading her. * * *

"If, as is contended, the delay in question was caused by a custom of the port that each vessel should await its turn to obtain a wharf, that fact could not relieve the charterers from their positive engagement as to the time at which the lay days would commence to count."

Under the terms of the charter party the libelants were clearly entitled to have their vessel's lay days count from 9 a. m., March 18, 1907, at which time both parties conceded that the vessel was ready for cargo. Any other conclusion would be not merely unreasonable, but contrary to the understanding of both parties, and inconsistent with the language of the charter party, when examined in the light of the surrounding circumstances.

2. It is necessary for the court also to pass upon the question: What effect should be given to the indorsements made by the charterer's agent upon the charter party and bills of lading?

After the vessel had finished loading, the question arose as to whether the demurrage, which the master of the schooner claimed, and which the charterer's agent conceded to be due the vessel, should be indorsed upon the bills of lading.

It is true that the charter party provided that the bills of lading were to be signed "without prejudice to this charter," and when the question of the indorsement arose the libelants did not insist upon this provision of the charter party; but, with a full knowledge of all the existing conditions, they directed their agent to indorse upon the bills of lading "when lay days commence and when vessel loaded." They must, therefore, be held to have waived their rights in that particular.

In *The Dictator* (D. C.) 30 Fed. 637, 639, Judge Simonton said:

"A party is presumed to waive a right when his acts are wholly inconsistent with the assertion and exercise of the right."

Mr. Dickinson communicated with his principal in New York, and upon the receipt of the telegram, the contents of which I have already referred to, he made the indorsement upon the bills of lading, and thereupon the master of the *Cressy* signed them, and proceeded on his voyage.

We, therefore, have what may be said to be a "practical construction" of the contract while the parties were in the midst of its performance, which the courts have frequently said "is one of the best indications of their true intent." *Fitzgerald v. First National Bank*, 114 Fed. 474, 478, 52 C. C. A. 276, 280.

The fact that the indorsement as made contains an error does not prevent its being accepted, so far as it conforms to the facts and was authorized by the charterer.

The respondents, by their agent at Sabine, not merely adopted this practical construction of the contract at the time of the vessel's arrival, but later, when the question of the indorsement arose, the charterer's agent then agreed with the master of the *Cressy* upon the very question now in dispute.

A most salutary rule in this connection is stated in *Marriner et al. v. Luting*, Fed. Cas. No. 9,104:

"An agreement as to the proper interpretation of a contract bars each party from thereafter claiming a construction inconsistent therewith."

The respondent, through its duly authorized agent, adopted a practical interpretation of the contract, which is entitled to great, if not controlling, influence. *Topliff v. Topliff*, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1110.

The whole testimony relating to the indorsements made upon the charter party and bills of lading confirms me in the result which I have reached.

The entire evidence, confirmed as it is by the acts of the parties and the decisions of the court, are in accord upon this branch of the case, and lead to the conclusion already announced.

3. I will not take as final, however, the respondent's indorsement that demurrage is due for 13 days and 3 hours; but, unless the parties stipulate as to the amount of the demurrage, the matter may be referred to an assessor to compute the same upon the findings of the court, taking into account the actual quantity of cargo which the vessel had on board.

An interlocutory decree may be entered for the libelants.

ANDERSON et al. v. J. J. MOORE & CO.

(District Court, N. D. California. August 31, 1909.)

No. 13,767.

SHIPPING (§ 177*)—DEMURRAGE—CONSTRUCTION OF CHARTER PARTY—ARRIVAL OF SHIP.

Under a charter party of a ship to carry a cargo of coal from New Castle, Australia, to San Francisco, to be there discharged "in the usual and customary manner at any safe wharf or place * * * as directed by consignee," lay days to commence when the ship was ready to discharge and written notice was given, the ship did not arrive at her destination to entitle her to give such notice until she was in the berth assigned and when the master was promptly notified on her arrival that the cargo had been sold to a fuel company and would be discharged at its bunkers, a delay of 42 working days before the ship could there obtain a berth in her turn was at her own risk, it being the custom of the company to discharge each vessel in turn, and the charterer is not liable for demurrage because of such delay.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 576-582; Dec. Dig. § 177.*

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

In Admiralty. Libel by Andrew Anderson and others, as owners of the ship *Columbia*, against J. J. Moore & Co. to recover demurrage. Libel dismissed.

H. W. Huéton, for libelants.

William Denman, for respondent.

DE HAVEN, District Judge. This is an action brought by the owners of the ship *Columbia* to recover \$3,264.42 as demurrage for an alleged delay of 42 days in unloading that vessel, under a charter party entered into between the managing owner of the ship and the respondent corporation June 26, 1907. The *Columbia* carried, under this charter, a cargo of coal for respondent from New Castle, Australia, to the port of San Francisco, arriving in the latter port January 14, 1908, and the next day her master gave notice to respondent, who was also the holder of the bill of lading, of the vessel's arrival and readiness to discharge, and her managing owner was informed, by the respondent, that the cargo carried by her had been sold to the Western Fuel Company, and that the ship "would dock at the bunkers of that company"; that the bunkers were crowded, and the vessel would probably be delayed three or four weeks before she could

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

reach the place of discharge. The vessel, however, was not given a berth until March 19, 1908.

The reason for this delay seems to have been that prior to that date the bunkers were continuously occupied by cargoes and vessels which had arrived in the port of San Francisco before the Columbia, and it was the general practice of the Western Fuel Company to discharge vessels in the order of their arrival in port, although it appears from the evidence that, during the time the Columbia was delayed, one schooner, which arrived in port after her, was permitted to discharge 300 tons of cargo at these bunkers. But with this exception, the practice of the Western Fuel Company in discharging vessels was to discharge them in the order of their arrival. The Columbia, after reaching the berth assigned her, was discharged at the rate specified in the charter, and the delay of which she complains is that which occurred prior to reaching the berth to which she was ordered.

1. The question for decision here is whether the libelants are, by the terms of the charter party, entitled to recover demurrage for the delay in discharging the cargo of the Columbia under the circumstances above stated. The charter party first provides that the vessel shall load a full and complete cargo of coal at New Castle, and then proceeds;

" * * * And being so loaded shall therewith proceed to San Francisco harbor, California, to discharge at any safe wharf or place within the Golden Gate and deliver the said full and complete cargo, in the usual and customary manner at any safe wharf or place or into craft alongside as directed by consignee.

" * * * * *
"Frost or floods * * * or any other hindrance of what nature soever beyond the charterers' or their agents' control, throughout this charter, always excepted.

" * * * * *
"To be discharged as customary, in such customary berth as consignees shall direct, ship being always afloat, and at the average rate of not less than 150 tons per weather working days (Sundays and holidays excepted), to commence when the ship is ready to discharge, and notice thereof has been given by the captain in writing; if detained over and above the said laying days, demurrage to be at 3d. per register ton per day."

It will be seen that by the terms of the charter, the respondent, as consignee, had the option to direct the vessel to deliver her cargo at any safe wharf or place within the Golden Gate, or in craft alongside; and I think the evidence shows that the respondent exercised this option on the 15th day of January, 1908, by informing the managing owner of the Columbia that the cargo of the vessel had been sold to the Western Fuel Company, and that she was to be docked at that company's bunkers, although formal written notice directing the master to repair to a berth there provided for the ship was not given until March 16, 1908. The fact that the coal bunkers occupied three separate piers does not render the notice of the place of discharge insufficient, as the bunkers were under one management, and the master of the vessel must have understood that the ship was to be assigned to the first vacant berth at one of the parallel piers, and no more specific designation was requested.

It is the settled rule that the lay days named in the charter or the bill of lading, within which the ship is entitled to deliver her cargo, do not commence to run until she has arrived at her destination—that is, until she has reached the place where she has contracted to deliver her cargo; and, until her voyage has been thus completed, there is no obligation upon the part of the charterer or consignee to discharge her, and the vessel is not entitled to give notice of readiness to discharge.

In *Leonis Steamship Company, Limited, v. Rank, Limited*, 1 K. B. Div. (1908) 499, the rule for determining when a ship is an “arrived ship”—that is, when it may be said the ship has completed the carrying voyage—is thus stated by Kennedy, L. J.:

“Now, the answer to the inquiry whether the ship can or cannot properly be described as an ‘arrived’ ship obviously depends upon the point which the parties have chosen to designate in the charter party as the destination. The degree of precision is purely a matter of agreement between them. In practice, the destination is generally one of the following: (1) A port; (2) a specified area within a port, such, e. g., as a basin, a dock, or a certain distance or reach of shore on the seacoast or in a river; or (3) the still more limited and precise point where the physical act of loading is to take place, as, e. g., a particular quay, pier, wharf, or spout, or (where the operation is to be performed by means of lighters, and the ship is not to be in a shore berth) a particular mooring. In each of the last two cases—(2) and (3)—it is settled law that the point of destination is equally to be treated as designated in the charter party, whether the point be named in the document by its local title, or there is in the charter party an express reservation to the charterer of the privilege to fix the point of destination by his order or direction.”

Now, as already stated, the *Columbia* was, upon her arrival at San Francisco, seasonably directed, by respondent, to deliver her cargo at the bunkers of the Western Fuel Company. This direction was given in the exercise of the right given by the charter party, and, under the rule stated in the case just cited, the place so designated is to be regarded as if specifically named in the charter party as the place of delivery; and, this being so, it must be held, under the authorities, that the voyage of the *Columbia* did not terminate until she reached the berth to which she was directed, and she was not, within the meaning of the charter party, ready to deliver her cargo, or entitled to give notice of her readiness so to do, until that time. *Tharsis Sulphur & Copper Co., Limited, v. Morel Bros. & Co., etc.*, 2 Q. B. Div. 647; *Murphy v. Coffin*, 12 Q. B. Div. 87.

In the first of the cases last cited, the question arose in an action to recover demurrage under a charter party which obligated the ship to proceed to Mersey, or so near thereto as she might safely get, and deliver her cargo “at any safe berth as ordered on arrival in the dock at Garston.” The vessel was ordered to a particular berth, which she was not able to reach for some time on account of its crowded condition, but it was held that the obligation of the charterer to unload did not commence until the vessel was in the berth ordered.

The case of *Murphy v. Coffin*, 12 Q. B. Div. 87, was an action for demurrage. The charter party provided that the ship was to proceed to a named port and there deliver her cargo “along consignees’ or railway wharf or into lighters * * * as ordered.” The vessel arrived at the port of destination and was ordered to discharge at the

railway wharf, but, as all of the discharging berths were crowded at that time, she was not berthed at the railway wharf until 24 hours after her arrival in the dock. It was held that the vessel was not entitled to recover for this delay. The decision of the court was put upon the ground that the lay days named in the charter did not commence to run until the termination of the voyage, and that the voyage did not terminate until she was actually in the berth to which she had been directed.

Mathew, J., in delivering the opinion of the court in that case, said:

"It is the ordinary and reasonable rule that the lay days under a charter party do not begin to run until the vessel has arrived at her place of destination. The charter party here seems to have been framed in the hope of avoiding the questions which have arisen in numerous cases as to the respective rights and liabilities of shipowners, charterers, and consignees with respect to the discharge of cargo where the place of destination is a dock. The vessel is to load, proceed to Dieppe, and deliver her cargo 'alongside consignees' or railway wharf, or into lighters, or any vessel or wharf where she may safely deliver, as ordered.' The place of destination is, therefore, such one of these places as the charterers may order. When the vessel arrived in the dock at Dieppe she was ordered to discharge at the railway wharf, which was then occupied by other vessels, so that there was no berth vacant for her, and it was not until she obtained one that she was in a position to discharge her cargo. * * * I am of opinion that the railway wharf was the only place of destination under the charter party; that the lay days did not begin to run until the vessel had secured a berth there."

In my opinion the rule announced in the foregoing cases is sound, and is therefore to be followed in the decision of this case.

2. But it is further urged, in behalf of the libellant, that, conceding that the charter party gave to the respondent the option of naming the berth for the delivery of her cargo, it was not authorized to name the wharf which the vessel could not reach without the long delay occurring in this case. In other words, the contention of the libellant is, in effect, that the charter party should be construed as only giving the charterer the option to name a ready berth, but I am satisfied, notwithstanding what was said in *Williams v. Theobald* (D. C.) 15 Fed. 465, that the court is not authorized to import such words into the contract.

It was said by Bowen, L. J., in construing a similar provision in the charter party under consideration in *Tharsis Sulphur & Copper Co. v. Morel Bros. & Co.*, 2 Q. B. Div. 647:

"Then we were told that an option was given to the charterer, and that it was not properly exercised unless a berth was chosen that was empty. But I think there was a confusion in this argument also. The option is given for the benefit of the person who has to exercise it. He is bound to exercise it in a reasonable time, but is not bound in exercising it to consider the benefit or otherwise of the other party. The option is to choose a port or berth or dock; that is, one that is reasonably fit for the purpose of delivery. * * * To limit the option of the charterer by saying that, in the choice of a berth, he is to consider the convenience of the shipowner, is to deprive him of the benefit of his option. The most that can be said is that the charterer does not exercise his option at all unless he chooses a berth that is free or is likely to be so in a reasonable time."

In the construction of charter parties, or bills of lading, it is well to keep in mind the language of Judge Brown in the case of *Fish v. One Hundred and Fifty Tons of Brown Stone* (D. C.) 20 Fed. 201:

"It is in the power of the vessel always to provide against any loss on her part through detention from accidental causes at the place of discharge, if such be the intention of the parties, by inserting in the bill of lading the time within which the cargo must be received, or by other familiar provisions, such as that the vessel shall have 'dispatch' or 'quick dispatch,' either of which would cast the risk of delay upon the consignee."

This is particularly applicable here. The charter party was made in view of the fact that many vessels were or might be engaged in the carriage of cargoes of coal to the port of San Francisco, and, where many vessels are entering a port of discharge, the fact that there may be at some time a congestion in the facilities of discharge, because the wharves cannot accommodate all of the ships ready to discharge at the same time, is not so remote a contingency that it ought not to be guarded against by the ship in the contract of carriage, if it is the intention of the parties that the charterer or consignee shall assume the risk of delay from such a cause. This can be done in the manner suggested in the above quotation, or by the insertion of other apt words in the charter or bill of lading, such as that lay days shall commence when vessel "is ready to unload and written notice given, whether in berth or not," which were held sufficient for that purpose in *W. K. Niver Coal Co. v. Cheronea S. S. Co.*, 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. (N. S.) 126.

The wharf to which the *Columbia* was ordered by respondent was not free, and the ship was delayed on that account for a period of 42 days, but the court cannot say that the action of the respondent was arbitrary or unreasonable, and therefore not within both the letter and spirit of the charter. The wharf was safe, and one proper for the reception of the cargo, and the option given appears to have been exercised in good faith, for respondent's benefit, and this is all that the charter requires in the matter of designating the place of discharge. The language of the court in *Evans v. Blair*, 114 Fed. 616, 52 C. C. A. 396, is applicable here. After referring to the cases of *Murphy v. Coffin*, 12 Q. B. Div. 87, and *Copper Co. v. Morel* (1891) 2 Q. B. Div. 647, above cited, the court in that case said:

"The result of this class of cases, after some fluctuation, has been to leave the consignee a somewhat unlimited power in the matter of selecting the berth, regardless of its crowded state, provided only it is a safe one. This, however, comes from the fact that the charter party, or bill of lading, contained express language favorable to the consignee, and from the application of the well-known rule that where, in maritime contracts, parties have seen fit to choose fixed forms of expression, the great variety of contingencies incidental to maritime transactions disenable the courts from establishing any safe theory by which the letter can be modified to meet any supposed intent."

It follows from these views that the libel must be dismissed; and it is so ordered.

MOWINCKEL v. DEWAR et al.

(District Court, N. D. California. August 31, 1909.)

No. 13,775.

1. SHIPPING (§ 181*)—DEMURRAGE—ARRIVAL OF SHIP AT DESTINATION—FAILURE OF CONSIGNEE TO DESIGNATE PLACE FOR DISCHARGING.

Where the consignee of a ship's cargo is given the right by a charter party to designate the place of discharge at the port of delivery either at a safe wharf or alongside, it is his duty to exercise such option within a reasonable time after notice of the arrival of the vessel, and his failure to do so is a waiver of the right and entitles the ship to consider her voyage at an end and give notice of her readiness to discharge, which will start her lay days to running.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 592; Dec. Dig. § 181.*]

2. SHIPPING (§ 181*)—DEMURRAGE—COMMENCEMENT OF LAY DAYS FOR DISCHARGING.

A ship arrived from Australia in the port of San Francisco with a cargo of coal under a charter which provided that she should discharge at that port at any safe wharf or place or into craft alongside as ordered by the consignee and also for the allowance of demurrage for 12 days. She gave notice of her arrival on February 4th, and her master was told by the consignee to apply to a fuel company which had bought the cargo for orders. Such application was made, but she received no directions as to a place to discharge until the 26th, and was then compelled to await her turn. On the 7th the master gave notice of her readiness to discharge to both parties. *Held*, that two days was a reasonable time for the consignee to designate a discharging berth, and that the notice of the 7th started her lay days to running, and entitled her to demurrage at the charter rate after their expiration for the ensuing 12 days and to damages in the nature of demurrage for the detention thereafter, also at the charter rate unless it was shown, as it might be by either party, that such rate was not the true measure of the actual damages.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 592; Dec. Dig. § 181.*]

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

3. SHIPPING (§ 106*)—BILL OF LADING—CONSIGNEE.

When the purchaser of a cargo has the bill of lading issued by the vessel indorsed to his agent to enable such agent to enter the cargo at the custom house, and to make sale and delivery thereof, upon arrival, the owner is to be regarded as consignee, and as such is bound by the stipulations contained in the bill of lading.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 106.*]

In Admiralty. Libel by J. Ludwig Mowinckel, as owner of the steamer *Rygja*, against James Dewar and others for demurrage. Decree for libellant.

McClanahan & Derby, for libellant.
Frank & Mansfield, for respondents.

DE HAVEN, District Judge. This is an action by the owner of the Norwegian steamer *Rygja* to recover damages for an alleged delay upon the part of the respondents in unloading that vessel under a charter party, entered into November 30, 1907, at London, between the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

owner and the respondent, Lithgow Coal Association, a foreign corporation. The action is against the Lithgow Coal Association, as charterer, and the members of the firm of Dewar & Webb, as consignees of the cargo carried under the charter.

The libel sets out the charter, from which it appears that the ship was obligated to load a cargo of coal, for the charterer, at Sydney, New South Wales, and carry the same to San Francisco. The charter provided, among other things, that the ship should:

"(4) * * * deliver the said full and complete cargo in the usual and customary manner at any safe wharf or place, or into craft alongside at San Francisco, or other safe place within the Golden Gate, always afloat as ordered by consignees.

"(5) * * * Floods and frosts * * * or any other hindrance whatsoever or wheresoever occurring, affecting * * * the discharge of said cargo * * * or its removal from alongside after discharge, are throughout this charter party always mutually excepted."

"(12) * * * The cargo to be taken delivery of from alongside ship at the average rate of not less than 600 tons per working day (Sundays and legal holidays excepted) from the time the ship is in berth and ready to discharge, and 24 hours' notice thereof has been given by the master in writing, with 12 days allowed on demurrage."

The libel alleges that the Rygja took on board the cargo named in the charter, and arrived at San Francisco February 4, 1908, was duly entered in the customhouse on the same day, and thereupon gave notice to one Evan C. Evans, the agent of the firm of Dewar & Webb, of her arrival and readiness to discharge cargo; and that it was not until February 26th of that year that the master received any order or instructions in relation to the berth to which he was to proceed for the discharge of his cargo.

The original answer of all the respondents denied that the firm of Dewar & Webb was the consignee of the Rygja's cargo, and alleged "that the Western Fuel Company was the consignee of said cargo"; and further alleged that on February 5, 1908, the master of the Rygja was informed by Evan C. Evans, agent for Dewar & Webb, "that the receiver of his cargo was the Western Fuel Company, from whom he was to take orders, under clause 4 of his charter party, and that on the 10th day of February the said master was informed by that company that 'it was to take delivery of the cargo aboard his vessel as per terms of his charter party.'"

The answer was filed October 15, 1908, and on February 17, 1909, the respondents, composing the firm of Dewar & Webb, amended their answer and alleged that the Lithgow Coal Association was the consignee of the Rygja's cargo, and that Evan C. Evans, as agent for Dewar & Webb, was the purchaser of said cargo, "to be delivered by said Lithgow Coal Association to said Evan C. Evans, landed on the wharf at San Francisco; duty paid."

Under the issues made by the pleadings, it is necessary to determine when the Rygja arrived at the place where, under her charter, she had the right to make delivery of her cargo, and also whether the firm of Dewar & Webb was consignee. It appears from the evidence that the Lithgow Coal Association delivered on board the Rygja, at Sydney, 5,346 tons of coal, for carriage from that port to the port of San Fran-

cisco, and for which a bill of lading was issued to the said charterer. Dewar & Webb thereafter purchased the cargo, to be delivered at San Francisco, and thereupon, and as part of the transaction, the Lithgow Coal Association indorsed the bill of lading to Evan C. Evans. The purpose of this indorsement was to enable Evans to enter the cargo at the customhouse, and make sale and delivery thereof at San Francisco for Dewar & Webb. While the cargo was afloat Evan C. Evans, acting as the agent of Dewar & Webb, sold the cargo to the Western Fuel Company, that company to take delivery of the same upon the wharf at San Francisco, the contract also giving the buyer the right to designate the wharf at which delivery should be made.

The Rygja arrived in the port of San Francisco on February 4, 1908, and, after having been duly entered at the customhouse, her master, on the same day, gave Evan C. Evans the following written notice:

"To Consignees of the Steamer 'Rygja':—I hereby beg to notify you that my steamer 'Rygja' has arrived and entered at the custom house, and ready to discharge at 3 p. m."

On the next day, February 5th, Evans replied to this notice, as follows:

"In answer to your notice addressed 'to the Consignees Steamer "Rygja,"' left at my office yesterday after 3 p. m., I beg to advise you that the receivers of your cargo are the Western Fuel Company, who have a copy of the charter party, and from whom you will please take your orders, under clause four of your charter. The agent of the Lithgow Colliery is Mr. John Barneson, of the firm of Barneson-Hibbard Company, East street, City.

"Yours very truly,

Evan C. Evans,

"Representative of Dewar & Webb, London."

The master thereupon notified the Western Fuel Company of the arrival of his vessel, but did not receive any direction in relation to a discharging berth. He then gave notice of his readiness to discharge to Capt. John Barneson, referred to in the letter of Evans, as the agent of the Lithgow Coal Association. Barneson replied February 7th, saying:

"I acknowledge receipt of your notice, dated February 4th, 1908. Will notify you as soon as a berth can be obtained for discharging.

"Yours very truly,

John Barneson,

"Representative Lithgow Coal Assn."

February 7, 1908, the master of the Rygja addressed a joint notice to the Western Coal Company, Evan C. Evans, representing Dewar & Webb, of London, England, Barneson-Hibbard Company, Incorporated, and John Barneson, representing the Lithgow Coal Association, in which he referred to the former notice given by him on the 4th of February; and added:

"I therefore again give notice that at 3 o'clock, p. m. on the 4th day of February, 1908, the Steamer 'Rygja' had entered at the Custom House, in this port, and was ready to discharge her cargo, and that ever since such time she has been and now is ready to make discharge. And I hereby again make demand upon you, jointly and severally, as representing the charterers of the 'Rygja' that you exercise the option given by the charter party, a copy of which I am informed is in the hands of the Western Fuel Company, and designate 'any safe wharf or place, or into craft alongside at San Francisco,

or other safe place in the Golden Gate, always afloat' at which delivery of said cargo may be made."

The next day Evans replied to this letter as follows:

"In answer to your circular letter, a copy of which was left at my office. So far as I am concerned, I have only to refer you to your charter party and to my letter of the 5th inst. instructing you to where your steamer would discharge.

"If you did not ascertain from the Western Fuel Company when you first called on them the particular wharf of theirs that your steamer is to proceed to, I would suggest that you again call on the company and get this information.

Yours very truly,

Evan C. Evans,

"Representing Dewar & Webb, London."

The Barneson-Hibbard Company also replied, and called the attention of the master to the notice given him by "Mr. E. C. Evans, referring you to the Western Fuel Company, for instructions as to berth, which notice we confirm and repeat."

February 10, 1908, the Western Fuel Company replied, saying:

"We are to take delivery of the cargo of coal aboard your vessel as per terms of your charter party."

February 11, 1908, the attorneys for the Rygja's master addressed a communication to the Western Fuel Company, in which they said:

"As the captain of the 'Rygja' has had contradictory information on the subject, we should be obliged if you will affirm or disaffirm the statement that under clause four, of the charter party, he is to take his orders from you, as the consignees of the cargo. If you affirm this, will you please advise us when you become the holders of the bill of lading, covering this cargo, and also whether the 'Rygja' is to look to you for the payment of her freight and demurrage, and oblige."

In response to this, the Western Fuel Company "denied that it was the consignee of the 'Rygja's' cargo, or the holder of the bill of lading covering the same, and also denied that the 'Rygja' was to look to the Western Fuel Company for her freight."

February 15, 1908, the master of the Rygja was informed by letter from John Barneson, that he had no authority to act for the Lithgow Coal Association in the matter of the Rygja's cargo.

February 18th, Evan C. Evans informed the master of the Rygja, by letter, that he had received a message from Dewar & Webb to pay the Rygja's freight, as per charter party, for account of that firm.

Finally, on February 26, 1908, Evans sent the master of the Rygja the following letter:

"Referring to my letter to you on the 5th inst., I now beg to inform you that I am instructed by the Western Fuel Company to instruct you to take the 'Gymeric's' berth, as soon as she has finished discharging. You will therefore please be careful to see that you follow the S. S. 'Gymeric' and as soon as you are in berth and ready to discharge to give me and/or the Western Fuel Company notice thereof."

The Rygja, on March 13, 1908, reached the discharging berth, to which she was thus assigned, and concluded the delivery of her cargo on the 22d of the same month.

It also appears from the evidence that, at the date of the arrival of the Rygja at San Francisco, there was a controversy between the Western Fuel Company and the representatives of the Lithgow Coal As-

sociation and Dewar & Webb, growing out of the refusal of the Western Fuel Company to receive the Rygja's cargo unless the vendors would undertake to secure that company against any damage which it might sustain in the event that the cargo contained an excess of 20 per cent. of screenings. This controversy was not adjusted until February 8, 1908, at which time the Western Fuel Company finally consented to accept delivery of the cargo, under an agreement then made.

1. The bill of lading, as I construe it, incorporates the terms and stipulations of the charter above set out; and my conclusion is that, although Evan C. Evans, as indorsee of the bill of lading, held the legal title to the cargo of the Rygja until it was delivered to the Western Fuel Company, still he held it as the agent of Dewar & Webb, and that firm was, in fact, the consignee of the cargo, and as such is bound by the stipulations contained in the bill of lading.

2. It will be noticed that clause 4 of the charter obligates the Rygja to deliver her cargo, "in the usual and customary manner, at any safe wharf or place or into craft alongside at San Francisco, or other safe place within the Golden Gate, always afloat as ordered by the consignee"; and clause 5 provides that the lay days are to commence "from the time the ship is in berth and ready to discharge and 24 hours' notice thereof has been given by the master."

In the case of *Anderson v. Moore* (No. 13,767) 173 Fed. 539, this day decided by me, it was held that similar terms in the charter there considered gave to the consignee the option to direct a delivery of the cargo at either one of the places referred to in the charter, and that when such option was seasonably exercised the ship could not be said to be ready to discharge, nor her lay days commence to run, until she was in the berth, or place designated by the consignee for such discharge, although she might be delayed in reaching such berth by reason of its occupancy by other ships entitled to priority in discharging their cargoes.

The cases of *Tharsus Sulphur & Copper Co., Limited, v. Morell Bros. & Co.*, 2 Q. B. Div. (1891) 647, and *Bulman v. Fennick*, 1 Q. B. Div. (1894) 179, were decided upon the same principle. In all of these cases the option given to the consignee had been properly exercised.

In passing upon the question, when the lay days of the Rygja commenced to run, it is necessary to first determine when the consignee exercised the option given it by the charter to direct the particular place at which the vessel was to discharge, and my conclusion is that such option was not exercised until February 26, 1908.

The direction given to her master by Evans, as agent for Dewar & Webb, on February 5th, to take orders from the Western Fuel Company in relation to the place of delivery, was not effectual because that company did not, when applied to, give any order or direction in the matter, and, as it appears from the evidence, did not at that time recognize that it was under any obligation to receive the cargo; nor was the subsequent letter of that company, under date of February 10th, stating that it would take delivery of the cargo, "as per terms of the charter party," a sufficient designation of the place where the

cargo was to be delivered. But if this letter should be construed as a designation of the place where the vessel was to discharge, the notice was, in my opinion, too late, because it was not given in a reasonable time after the vessel arrived at San Francisco.

When the notice of the Rygja's arrival and readiness to discharge was given, on February 4th, she had reached one of the alternative places of discharge named in the charter, as much so as if she had been lying at the bunkers of the Western Fuel Company, where she finally discharged, for, whether lying at the one place or the other, her consignee had at that time the right to order her to any other safe wharf or place in the port of San Francisco for the discharge of her cargo.

But the consignee was required to exercise this option, or right given him by the charter, within a reasonable time. *Tharsus Sulphur & Copper Co., Limited, v. Morell Bros. & Co., Limited*, 2 Q. B. Div. 647. The time for that purpose cannot be extended to meet the convenience of the consignee in negotiating a sale of the cargo, nor, as in this case, in settling a controversy between the consignee and its vendee as to the conditions upon which the latter will receive the cargo.

The evidence tends to show that if the vessel had, upon her arrival, been ordered to the bunkers of the Western Fuel Company, she could not have discharged her cargo at an earlier date than she, in fact, did, because of the occupancy of those bunkers by vessels arriving in port prior to the Rygja; but I do not think this is material in determining the question whether the consignee's option to name the place of discharge was exercised in a reasonable time. The bunkers of the Western Fuel Company were not the only places where the vessel could have been required by the consignee to deliver her cargo, and if it could delay naming one of these bunkers as the place of discharge from the 4th to the 10th or 26th of February, and still retain the option given by the charter, it would have had the right at the latter date to direct the vessel to proceed to one of the many other places referred to in the charter and discharge, if for any reason it had then been the interest of the consignee to so order. The contract does not contemplate that the vessel shall be delayed for so long a time, after her arrival in port, before receiving notice of the place where she is to discharge her cargo.

The failure of the consignee in this case to exercise its option to order the vessel to a place of discharge within a reasonable time was a waiver of the right, and as the vessel was in one of the alternative places at which she might, by the terms of the charter, have been required to deliver her cargo, her master had the right to say that her carrying voyage was then ended, and to give notice of her readiness to discharge. This conclusion necessarily follows from the elementary rule of law that, where a contract provides alternative modes of performance, and gives the right of election to one party, upon the failure of such party to make his election at the proper time, the right to elect the mode of performance passes to the other party.

3. It follows from the views here expressed that the libelant is entitled to recover, and there remains for consideration only the amount of such recovery.

In my opinion the reasonable time within which the consignee was required to exercise the option given to direct the place where the Rygja should discharge expired on February 6th, and, not having been exercised within that time, the vessel is to be regarded as an arrived ship on February 7th; and notice of her readiness to discharge was properly given on that day. Twenty-four hours after this notice—or excluding Sunday, February 9th—her lay days commenced February 10th, and excluding Sunday, February 16th, expired February 19, 1908, after which the libellant is entitled to recover from respondents demurrage for 12 days, at the rate of four (4) pence per register ton per day, as provided in the charter, and damages in the nature of demurrage for each day of the subsequent delay in discharging the vessel's cargo.

The rule of damages, when the ship is detained longer than the agreed number of days on demurrage, is thus stated in section 609, Carver's Carriage by Sea (2d Ed.):

"Damages for detention are generally calculated at the rate which has been agreed upon for the demurrage days, if any are provided for. But either party may show that that is not the true measure of the loss to the shipowner by the detention, and in that case the rate ought not to be adopted."

See, also, *Randall v. Sprague*, 74 Fed. 247, 21 C. C. A. 334.

I am unable to agree with the contention of respondents that libellant is not entitled to recover damages, in the nature of demurrage, because the ship could not in any event have obtained employment during the period she was detained beyond the 12 demurrage days. The Rygja was, in fact, employed by the respondent during her detention for the storage of coal, and the measure of damage for such detention and use is as stated in the foregoing quotation from Carver's Carriage by Sea.

Let a decree be entered in favor of libellant for damages and costs, in accordance with this opinion, and the case will be referred to United States Commissioner Brown to ascertain and report the amount of judgment to be recovered by libellant.

KAUFMAN v. GARNER.

(Circuit Court, W. D. Kentucky. November 1, 1909.)

1. COURTS (§ 344*)—FEDERAL COURTS—PROCEDURE—DETERMINATION OF VALIDITY OF PROCESS.

The validity of the service of a summons must be determined by a federal court on general principles of jurisprudence, in the absence of any statute or established judicial rule in the state to render the federal conformity statutes applicable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. § 344.*]

2. PROCESS (§ 119*)—VALIDITY OF SERVICE—NONRESIDENT—ATTENDANCE ON CRIMINAL CASE.

Under the rule of a majority of the federal courts, a nonresident, who comes into a state for the sole purpose of appearing before a court in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which he is charged with a crime, in obedience to a recognizance previously given by him, is exempt from service of summons in a civil action while in such attendance, or before he has secured further bail required by the court.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 149; Dec. Dig. § 119.*]

Action by Max Kaufman, administrator of Yetta Kaufman, deceased, against W. S. Garner. On motion by defendant to quash returns on summonses. Motion sustained.

N. L. Goldsmith and Fairleigh, Straus & Fairleigh, for plaintiff.

A. E. Richards and O'Neal & O'Neal, for defendant.

EVANS, District Judge. On July 16, 1909, the plaintiff's intestate and daughter, a child six years of age, was run over and killed by defendant at Tenth and Market streets, in the city of Louisville. On the ——— day of July, 1909, as stated in the plaintiff's petition, he was appointed and qualified as administrator of his child's estate. While the date is left blank in the petition, the pleading seems to have been sworn to on July 17th. It appears from the affidavits filed that a policeman saw the accident and at once arrested the defendant, who was taken before the proper authorities of the city. This was not done at the instigation, nor with the knowledge, of the plaintiff. On the 17th of July the defendant appeared in the police court, and, his case being assigned to July 29th for examination, he was required to and did give bond for his appearance on that day. On July 28th the plaintiff's petition, which, as we have seen, had been verified by the plaintiff's oath on July 17th, was filed in the Jefferson circuit court, and on that day a summons was issued thereon in due form by the clerk, and placed in the hands of the sheriff of Jefferson county for service. On the next day, the defendant being in the courtroom of the police court pursuant to the requirements of his bond, and awaiting the call of his case, was then and there served by the sheriff with process in this case, and that officer made return on the summons as follows:

"Executed July 29, 1909, on W. S. Garner, by delivering to him a copy of the within summons. Chas. L. Scholl, S. J. C., by Matt. Chambers, D. S."

For some reason the plaintiff, on July 29th, had an alias summons in the case issued by the clerk, which was also placed in the hands of the sheriff, and that officer in due form by written indorsement thereon authorized Robert Halley, as special bailiff, to execute the summons. Halley, under oath, made return on the writ in this language:

"Executed the within summons on July 29, 1909, by reading the same to the defendant, W. S. Garner, and attempting to deliver to him a copy of same. The said W. S. Garner refused to permit said copy of said summons to be delivered to him, whereupon I laid said copy of said summons on the floor of the automobile in which said W. S. Garner was then and there seated, and directed his attention to same. The said Garner stated that he would not accept said summons and resisted the service of same."

It appears, and the court finds, that the last service was made after the defendant had been held over by the the police court to answer in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the circuit court on October 29, 1909, and while, with his counsel, he was on his way to find his surety, which he must do in order to give the required bond, and thus be released from potential, if not actual, custody. Upon this occasion his counsel advised him not to receive the summons, and he refused accordingly. It does not appear that plaintiff's attorney, Mr. Goldsmith, appeared in the police court on the 17th; but he did appear therein and assist the proper prosecuting attorney in the examining trial on July 29th, at which time, as we have seen, the defendant was held over to October 29th, to then answer any indictment that might be found against him in the circuit court, which alone, under the Kentucky law, had jurisdiction of the crime of murder or of manslaughter; the police court only having jurisdiction in such cases to discharge, commit, or hold to bail after an examination into the facts. It does not appear that the plaintiff or his attorney in any way procured the coming into Kentucky of the defendant for the purpose of getting service upon him of process in this action.

The defendant, who at all the dates mentioned was, and who continuously for many years before had been, a citizen of the state of Illinois, specially appeared for the purpose in the state court, and upon his petition, which showed him to be a citizen of Illinois and the plaintiff to be a citizen of Kentucky, removed the case to this court. Upon docketing the cause here, he moved the court to quash the returns upon the two summonses, and the motion has been elaborately and ably argued by counsel.

Inasmuch as the defendant was voluntarily in Kentucky when the accident to plaintiff's intestate occurred, if he had been served with process before he left Jefferson county, Ky., the matter might possibly have been easily disposed of; but neither process was so served. Neither summons was executed upon the defendant until he subsequently came back, in pursuance to the stipulations of his bond, to appear in the police court of Louisville on the 29th of July, and then the services were both made before he was finally released from his duty of further attendance upon that court, namely, before he had given the required bail for his appearance in the circuit court on October 29th. It clearly appears that the only purpose of the defendant in coming to Kentucky upon this occasion, and of being here on the 29th of July, was to meet the requirements of his bond to then appear for examination in the police court on the charge of murder, which had been made against him.

The motion of the defendant has raised a very interesting and important question, which the court has very carefully considered.

1. It is urged that this court, upon that question, should be controlled by the rule established by the Court of Appeals of Kentucky, and it is insisted that that rule is that, where a defendant is served with process under such a state of fact as appears in this instance, he is properly before the court by a service which was not made under circumstances that would require it to be set aside. We are quite sure that the Court of Appeals has never established, nor meant to establish, a rule applicable to this case, either by its decisions in *Lewis v. Miller*, 115

Ky. 623, 74 S. W. 691, and Linn v. Hagan, 87 S. W. 763, 27 Ky. Law Rep. 996, or in any other case. However, without distinguishing those cases in detail, for present purposes we may assume that they establish a definite rule in Kentucky for cases where the person served with process claimed to have come to this state (though without being subpoenaed) to testify in his own case; but does it follow, either that the Court of Appeals would have held that those decisions would embrace a case like this, or that this court is required to enforce in this radically different case any rule announced in them? If the state of Kentucky had enacted any statute providing for the service of process upon persons under circumstances such as this case presents, and the Court of Appeals of the state had interpreted the language of that statute, the federal courts, in cases where the decision was applicable, might be bound to accept that interpretation. Confessedly, the state of Kentucky has enacted no statute which directly or indirectly provides for a case where a person is served with a summons while appearing in and attending upon any court in which he is charged with a criminal offense. Nor do we find that the Court of Appeals of the state has ever passed upon the question involved in this case, and we think it has never done so.

Section 721 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 581) provides that:

"The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

It can hardly be maintained that this section requires us to apply the rule there prescribed to the decision of this motion. The obvious reason is that there is neither statute nor established judicial rule in Kentucky which applies to a case like this.

Section 914 (page 684), embracing what is called the "Practice Act," is as follows:

"The practice, pleading, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

The question involved here cannot, we think, be properly held to embrace either the practice, the pleadings, or the forms and modes of proceeding existing at this time in the courts of record of this state, within the meaning of this section. We cannot find that there now exists in this state any statute or established judicial rule applicable to the case of a person accused of a public offense, who, being away from home, is served with process in a civil action while, in obedience either to the process of the court or the requirements of a bail bond, he is attending the court in which the criminal charge against him is pending, for the purpose either of examination or trial, and when his presence in the locality where he is served with process is, as here, altogether for the purpose of obeying the process of the court in the criminal case or meeting the requirements of the bail bond therein.

We therefore conclude that the pending motion must necessarily be determined upon general principles of jurisprudence, and not upon rules of local law, even if the latter were fixed or ascertainable. In cases where we are bound to follow local law, it would only be where there is, in fact, an applicable local law to follow. Unless there is such local law, we are left to ascertain for ourselves the proper rule or the controlling principle upon which a question is to be determined.

2. But when we reach this point our real difficulty begins, for, while the decisions of the courts upon the point at issue have been numerous and various, neither the Supreme Court of the United States nor any Circuit Court of Appeals, so far as we have found, has ever decided the question. In Pennsylvania, in Vermont, and probably in other states, the rule seems to be that, where a person against whom a criminal accusation is pending in another county or state than his own is present in such court in obedience to its process, and is there served with a summons in a civil action there brought, he cannot successfully say that the service was not proper. The reason appears to be, as stated by at least one of the courts, that, as he attends by compulsion in a criminal case, the liability to be served with process in a civil action does not embarrass him. We confess that this reason does not impress us as being particularly forceful in the light of many more recent cases, although it is backed by the authority of so great a name as that of Chief Justice Redfield in *Scott v. Curtis*, 27 Vt. 762. The reason given in support of this view may smack somewhat of the old notion that a criminal always deserves harsh treatment; but even that idea, if ever justifiable, can only be so after a conviction, and not while the presumption of innocence must be indulged. If, as all the cases seem to agree, the proposition that parties and witnesses, when attending court in a civil action, should be exempt from the service of process in actions against themselves, is based upon considerations alike of public policy and the dignity and independence of the court first acquiring jurisdiction, as well as the idea that such attendance is under compulsion, we think the stress of the reason for such exemption is obviously stronger where the attendance is in a criminal case, in which the compulsion is more peremptory and pronounced than it is in a civil action.

The rule in England is possibly somewhat similar to that in Vermont; but the system of jurisprudence in that country in respect to process and its service formerly was, and now probably is, so different from ours, that English cases have not lent much aid in our investigations.

An examination of numerous cases has led the court to the conclusion that the prevailing rule in the federal courts has been the other way. See, particularly, *United States v. Bridgman*, Fed. Cas. No. 14,645; *Murray v. Wilcox*, 122 Iowa, 188, 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. Rep. 263; *Kinne v. Lant* (C. C.) 68 Fed. 440; *Small v. Montgomery* (C. C.) 23 Fed. 708; *Hale v. Wharton* (C. C.) 73 Fed. 741; *Peet v. Fowler* (C. C.) 170 Fed. 618; *Skinner v. Waite* (C. C.) 155 Fed. 828; *Morrow v. Dudley* (D. C.) 144 Fed. 441.

While in most of the cases we have cited the person served with process was in attendance upon a court in a civil action, either as a liti-

gant or as a witness, yet in those of them where the person was in attendance in a criminal case the same rule was applied, and, as already indicated, we cannot resist the conclusion that the demands of public policy which require the invalidation of a service of process where the case is a civil one are not stronger nor more logical or philosophical than where attendance upon the court is in a criminal case. We confess to the conviction that the general principle upon which both classes of cases must turn is as applicable to the case of a person who is attending a criminal trial as to the case of a person who is attending the trial of a civil action.

It may be that one of the underlying principles for the general rule in either case might be found in the proposition stated in the opinion of the Supreme Court in *Re Johnson*, 167 U. S., at page 125, 17 Sup. Ct. 737, 42 L. Ed. 103, where Mr. Justice Brown, speaking for the court, said:

"Ever since the case of *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169, it has been the settled doctrine of this court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession."

But, without elaboration, we content ourselves with saying we are convinced that the rule has been established by the decisions of the federal tribunals that in a case like this the summons was not served under such circumstances and in such a way as to bind the defendant; and our investigations have persuaded us that the same rule prevails in a large majority of the states of the Union whose courts have passed on the question. Nevertheless, there might be hardship in its application in this instance, particularly if the laws of Illinois fail to permit the enforcement in that state of any rights which arose in Kentucky in favor of the plaintiff as against the defendant, or if those laws would not, upon proper application, enable the administrator of the decedent to sue there by permission of the courts of that state. We apprehend, however, that the laws of Illinois amply provide for the enforcement of the plaintiff's rights in that state.

The injury was inflicted in Kentucky, and most of the witnesses probably reside here. Nevertheless, a defendant is usually entitled to be sued at his place of residence, and this right can only be defeated where the action is purely local, or where service of process can be properly made upon him elsewhere. The hardship of the case upon one side or the other cannot change the grounds of public policy, upon which the courts hold that such service of process as was made in this case cannot be given effect against the protest of the person served. Of course, a person served with process away from his home may waive his objections thereto; but we see no indication in this case that the defendant ever waived any of his rights in the premises. He did not voluntarily place himself within reach of the process of the court here; nor did he, by coming here under compulsion, waive his right to be sued at home.

It results that the motion to quash each of the returns upon the two summonses issued in this case should be sustained.

CITIZENS' SAVINGS & TRUST CO. et al. v. ILLINOIS CENT. R. CO. et al.

(Circuit Court, E. D. Illinois. October 27, 1909.)

CORPORATIONS (§ 170*)—SUITS BY STOCKHOLDERS—GROUNDS OF ACTION.

A county subscribed for stock of a railroad company, and issued its bonds in payment therefor, which were transferred by the company, but in suits brought by the holders were adjudged void. The certificate of stock issued to the county was thereafter canceled by a decree of court for want of consideration, and by a subsequent decree in a suit by the bondholders the company was required to issue certificates for such stock to them, which it did. *Held*, that such bondholders did not become stockholders of the company until such decree, nor did the stock then devolve upon them by operation of law, since they might have sued for damages, instead of for the stock, and that therefore, under equity rule 94 of the federal courts, they could not maintain a stockholders' suit to set aside leases or transfers of property made by the company prior to such date.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 626; Dec. Dig. 170.*]

In Equity. Suit by the Citizens' Savings & Trust Company and another against the Illinois Central Railroad Company and others. On demurrers to bill by defendants Illinois Central Railroad Company and United States Trust Company. Demurrers sustained.

The bill herein exhibited by the complainants against the Illinois Central Railroad Company, the Belleville & Southern Illinois Railroad Company, the St. Louis, Alton & Terre Haute Railroad Company, and the United States Trust Company of New York in substance and legal effect discloses that on December 5, 1870, the Belleville Company did attempt to sell to Perry county, Ill., one thousand shares of its capital stock, of \$100 each, in exchange for 100 bonds of said county, in the aggregate \$100,000, dated January 1, 1871, each for \$1,000, with interest as by coupons attached, payable to the Belleville Company, or bearer, 20 years after date. The Belleville Company delivered the bonds to Selah Chamberlain under contract for constructing purposes, who sold them, and of which in 1871 complainant purchased 40 thereof, amounting to \$40,000, and that complainant Chaplin is the trustee for 39 of said bonds similarly purchased by several of his beneficiaries; that previous to their issue an attempt had been made to authorize the issue of said bonds by a vote of the electors of said county, conditioned that the Belleville Company would locate its machine shops at Duquoin, in said county, but the bonds were issued without such condition having been fulfilled. The contract with Chamberlain for construction provided that he should have all unsubscribed stock at the time of completion of the road. Until 1887 the said county treated the bonds as valid, and paid the interest, but in 1890 failing therein, in a suit by the complainant in the United States Circuit Court to collect such interest, it was adjudged by the court the bonds were invalid. Subsequently the Belleville Company procured Stebbins, a stockholder, to sue for a cancellation of the stock held by said county, and the state court decreed accordingly, which was affirmed by the State Supreme Court October 16, 1897, and the shares of stock previously held by the county were surrendered and canceled in the same month, and as so canceled returned to the Belleville Company. June 8, 1895, complainant sued in equity in the United States Circuit Court the Terre Haute Company, Belleville Company, and Perry county, to be subrogated to the right of Perry county, but later, June 21, 1898, dismissed the suit by reason of the decision of the state Supreme Court previously mentioned. April 15, 1898, complainant sued the Belleville Company in equity in the United States Circuit Court, on its own behalf and that of other holders who might choose to intervene, asking that the Belleville Company might be declared a trustee of the \$40,000 par value of its capital stock, for use of complainant, in which the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

beneficiaries of complainant Chaplin later intervened. The court dismissed the bill for want of equity, but the Circuit Court of Appeals reversed such decree, with directions to grant to complainant the decree prayed for, which was done accordingly May 16, 1903; and on the 12th day of May, 1904, the Belleville Company did deliver to complainant certificates for 400 shares and for the beneficiaries of Chaplin 390 shares of the stock of the Belleville Company.

The Belleville Company, having been organized under the laws of Illinois of February 14, 1857, and March 4, 1859, did construct and put in operation a line of railway from Belleville to Duquoin, 56.4 miles, and October 1, 1866, issued \$1,000,000, par value, first mortgage sinking fund bonds due in 30 years, with 8 per cent. interest, and on the same day leased all its property to the Terre Haute Company for 999 years for 40 per cent. of the gross earnings on the first \$7,000 per mile, except certain coal business, to be 30 per cent., and generally all above \$7,000 to \$14,000 per mile 30 per cent. and 20 per cent. on gross earnings above \$14,000 per mile, under which the Terre Haute Company operated the road until October 1, 1895, and under which from \$178,000 to \$228,580 was paid as yearly rentals. Previous to October 1, 1885, the Belleville Company lawfully issued \$1,235,000 preferred capital stock, entitled to 8 per cent. annual dividends and \$417,000 common stock, to which latter the Perry county stock belonged, as well as that issued under the order of the decree above mentioned. From 1885 to 1894 dividends were paid on the preferred stock annually from 5 per cent. to 8 per cent.; and on September 24, 1895, out of the surplus earnings of the Belleville Company there was declared a dividend of 19 per cent. on the common stock, but the dividends on stock in litigation were set apart and withheld. The lease of October 1, 1866, was a fair and beneficial lease, and by proper management would have yielded dividends upon the common stock; but because of things done, to be hereafter mentioned, by the defendant the Illinois Central Railroad Company, the rentals were and are insufficient to pay dividends on the common stock after October 1, 1895. The Illinois Central Railroad Company, owning and operating a line of road with western terminus in Duquoin, and being desirous of procuring a road of its own to East St. Louis, it is alleged as a conclusion merely, formed a fraudulent and unlawful scheme to procure control of the Belleville Company and Terre Haute Company by acquiring control of all or sufficient number of the shares of the capital stock of each to control the policies and destinies of the same, and solely in the interest and for the benefit of the Illinois Central Railroad Company; and on or before April 1, 1896, in pursuance of said unlawful plan and scheme, the Illinois Central Railroad Company had purchased and did own or control all the preferred stock of the Belleville Company except 25 shares, and all its common stock except 5 shares, and the 1,000 shares for which said certificates had been issued to Perry county. On April 4, 1896, the Illinois Central Railroad Company procured the execution by the officers of the Belleville Company to it of all the property of the Belleville Company leased to the Terre Haute Company for 99 years, and which it is averred was executed in order to defraud the equitable owners of said 1,000 shares of common stock for which said certificates had been issued to Perry county. Said lease was highly beneficial to the Illinois Central Railroad Company, but detrimental to the Belleville Company; but said lease provides that the Illinois Central Railroad Company shall pay the Belleville Company \$61,200, to be paid to the holders for the time being of the outstanding preferred stock of said Belleville Company as dividends guaranteed to them by the lessee at the rate of 4.8 per cent. per annum, and as further rental to be paid the interest on the outstanding bonds of the Belleville Company, amounting to \$1,000,000. On September 10, 1897, by means of the control of stock before mentioned, the Illinois Central Railroad Company procured the Belleville Company to transfer all its property to the Terre Haute Company in consideration of \$1,400,000 of the bonds of the Terre Haute Company, with 4 per cent. interest due in 1951, the assumption of the outstanding first mortgage bonds of the Belleville Company, and the assumption of the liability of the Belleville Company under the lease of April 4, 1896, all of which it is averred was grossly inadequate. On February 17, 1904, the Terre Haute Company executed a deed of its property to the Illinois Central Railroad Company, leaving the only asset of the

Belleville Company the bonds of \$1,400,000 of the Terre Haute Company, the income thereon being \$56,000, sufficient only to pay 4½ per cent. on preferred stock, and the common stock is left without value. On September 15, 1897, the Illinois Central Railroad Company and the Terre Haute Company mortgaged those properties to the United States Trust Company for \$15,000,000.

In its prayers the bill seeks divers discoveries, cancellation of the leases of October 1, 1895, and September 15, 1897, and deeds of September 10, 1897, and February 17, 1904, for accounting, receiver, and for general relief.

Squire, Sanders & Dempsey and Stewart, Eliot, Chaplin & Blayney, for complainants.

Blewett Lee, for defendant Illinois Cent. R. Co.

Rearick & Meeks, for defendant United States Trust Co.

WRIGHT, District Judge (after stating the facts as above). The arguments of the demurrers of the respective defendants to the bill of complaint of the complainant have taken a broad range, and have included many questions, in view of the conclusion to be reached, not necessary to decide. The questions most elaborately argued by counsel for each side of the case, numerous authorities being cited thereon, are as to the statute of limitations and the equity rules concerning laches. Very much could be said upon this subject, and arguments of the strongest character could be produced as affecting either side of the contention here, were it necessary to enter upon that subject in order to reach a conclusion and support the judgment of the court upon it. In my considerations of the case I am met with another question, the determination of which has precluded me from going further into the case and giving judgment upon other questions so ably and elaborately argued by the counsel for the respective parties.

In the beginning it is both necessary and material to determine when the complainants became stockholders in the Belleville Company. This is a stockholders' bill, founded on rights which might properly be asserted by the corporation itself. If, then, the complainants were not shareholders at the time of the transaction of which they complain, unless such shares have devolved upon them since by operation of law, then under the provision of equity rule 94, as well as under the general rules of equity in most jurisdictions, and of which equity rule 94 is but declaratory, the complainants are without equity, and the court should so decree, and dismiss the bill accordingly. This doctrine is so elementary that it seems to me it would be like pedantry to indulge in the citation of authorities in support of it.

As to the precise time when complainants became shareholders in the Belleville Company much more could be said, if I did not feel bound by what the Circuit Court of Appeals has said, and in the very cause in which that court awarded the complainants the stock in question. The decision in that case is *res judicata*, and for that reason alone is binding in this case; but otherwise the opinion of the court in the case is of controlling authority, because it is the expression of the superior court. In that case it was said of the same bonds, stock subscription, and stock here involved in the present case:

"The bonds were void. The stock subscription was void. The stock certificate was void; but the stock was not void. The 1,000 shares, with respect

to which the void subscription was made and the void certificate issued, were a part of the authorized capital stock, were as existent and as valid as any other of the shares, and were fully in the directors' power to dispose of for value to any one who had capacity to contract." *Citizens' Saving & Loan Association v. Belleville & Southern R. R. Company*, 117 Fed. 109, 54 C. C. A. 495.

If, then, as the court said, the shares were fully in the directors' power to dispose of for value to any one who had capacity to contract, such shares belonged to the Belleville Company, and were wholly under its dominion, and were not and could not be owned by complainants, or any other person, without the consent of the directors, for value received, and the title in such shares being so vested, at no time was it divested until the vis major, the coercive force, of the decree of the court of May 16, 1903, caused the stock to be conveyed and delivered to complainants on May 12, 1904, when they for the first time were given dominion and ownership to the property thereby represented. Previous to that time complainants had but a right of action, and possessed nothing but a right of action, which they might, if they so willed, have converted into a suit for damages; and it could as well be said they owned the specific dollars with which the judgment might have been paid as that they owned the particular shares of stock with which the decree was eventually satisfied. In truth, if we might be permitted to go behind the discussion of the Circuit Court of Appeals, and look into the facts as disclosed by the bill of complaint, it would be discovered that, inasmuch as the bonds were void, the stock subscription of Perry county was void, the stock certificate to it also being void, and by reason of all these voids the stock was all the time remaining unsubscribed in the Belleville Company, it belonged to Chamberlain under his contract, by which he was to receive all unsubscribed stock remaining at the completion of the construction of the road.

Legally can there be a doubt that the title was in him, in view that all other attempts to dispose of it had been futile, and judicially decreed to be void, and it was only by force of the decree that was given, and until then, that he was divested of such title, and the same transferred to complainants? While it does not appear that Chamberlain was a party to that proceeding, that does not affect the force of the decree itself, but would be, if any defect at all, an error for which the person entitled might seek a remedy in some appropriate way. And from these simple statements of the clear situation of the stock in question it is apparent, without further argument, that the stock did not devolve upon the complainants by operation of law since the transactions complained of, but merely as the result of implied contract springing from the failure of the original consideration of the purchase by Perry county, merged in and given effect by the decree of May 16, 1903.

Entertaining the views I have endeavored to express, the necessity of going into the many other questions so ably and interestingly argued by counsel is thereby superseded, and no essential purpose would be subserved thereby; and I am not, therefore, disposed to extend this opinion to a tedious length, to include an irrelevant discussion, as it

follows from the reasons already given that I am of the opinion the bill is without equity.

The demurrers will be sustained, and the bill dismissed for want of equity, at the cost of the complainant. Let a decree be prepared accordingly.

In re FRITZ.

(District Court, E. D. New York. November 6, 1909.)

1. BANKRUPTCY (§ 410*)—DISCHARGE—EXTENSION OF TIME TO FILE APPLICATION—NOTICE.

An application by a bankrupt for an extension of time within which to file an application for discharge, made under Bankr. Act July, 1, 1898, c. 541, § 14a, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), being wholly to the discretion of the judge, it is not necessary that notice thereof be given to all creditors; the notice of hearing required to be given by section 58a (page 3444) being sufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 694; Dec. Dig. § 410.*]

2. BANKRUPTCY (§ 413*)—APPLICATION FOR DISCHARGE—HEARING ON OBJECTIONS.

Under rule 41 in bankruptcy in the Eastern District of New York, which requires that, on a reference of an application for discharge to which objections have been made, the party filing the objections shall deposit an amount sufficient to cover the cost of the hearing and a fee of \$5 for each hearing, it is the duty of objecting creditors to bring the matter on for hearing; otherwise, the master or referee is warranted in dismissing the specifications.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 712-728; Dec. Dig. § 413.*]

3. BANKRUPTCY (§ 417*)—DISCHARGE—REVOCATION.

The fact that the receiver for a creditor of a bankrupt did not receive the written notice of the bankrupt's application for discharge, owing to the fact that the creditor's address was not given in the schedules, although the receiver's name and address were disclosed by the proofs, is an irregularity merely, which is not sufficient ground for setting aside the order for discharge, where the notice was published as required, and in the absence of fraud.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 869; Dec. Dig. § 417.*]

In the matter of Samuel Fritz, bankrupt. On petition to vacate order of discharge. Petition denied.

See, also, 152 Fed. 562.

Charles H. Smith, in pro. per.

Samuel Fritz, in pro. per.

CHATFIELD, District Judge. Charles H. Smith, as receiver of one Hyman Brown, proved a claim in the above-entitled proceeding for the amount of a judgment previously recovered by Brown against the bankrupt. This proof of claim was filed at a meeting subsequent to the first meeting of creditors. The schedules do not show the receiver as a creditor, but do contain the memorandum of a debt, amounting to \$65, belonging to one A. Brown, whose residence is scheduled as un-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

known. The first meeting of creditors was held on the 21st day of December, 1906; the schedules having been filed upon the 3d day of December, 1906, and the judgment of Hyman Brown having been recovered in a Municipal Court upon the 10th day of December, 1906.

It must further be noticed that the A. Brown whose debt is recited in the schedules never proved any claim. No application for discharge was made until the 8th day of February, 1908, when, upon a petition by the bankrupt's attorney showing facts sufficient in the court's opinion to bring the case under the provisions of section 14a of the bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), an order was made allowing the bankrupt to file his petition for a discharge within the 18 months provided by the statute. Upon the same day a petition for discharge was filed, which petition was verified by the bankrupt himself, and notices were sent out by the clerk of the court, upon the 25th day of February, 1908, as shown by his certificate filed in the proceedings, while the legal notice was also printed in a Brooklyn daily paper, under order of the court. Publication in the newspaper began on the 25th day of February, 1908, and the hearing was set for the 6th day of March, at which time specifications in opposition were filed by certain creditors, which were duly referred to the referee, subsequently dismissed by him, and a discharge recommended, inasmuch as the creditors did not proceed with a hearing upon the specifications.

Rule 29 of the District Court for the conduct of bankruptcy proceedings in this district provides that, after 30 days have elapsed from the date of the order of reference to a referee of an adjudicated petition in voluntary bankruptcy, the petition may be dismissed if no proceedings have been taken therein by the bankrupt; while rule 41 directs that specifications in opposition to the discharge may be referred to a special commissioner, and that the party filing the specifications shall deposit an amount sufficient to cover the expenses of taking the proofs and a fee of five dollars for each hearing. The referee signed his report, recommending the dismissal of the specifications, on the 21st day of October, 1908, his report was duly confirmed on notice to the creditors who had appeared, and the discharge of the bankrupt entered November 13, 1908.

A petition has now been made by Mr. Smith, as attorney in person for himself as receiver of the Brown judgment, to vacate the order extending the time of the bankrupt to apply for a discharge, and also to set aside the dismissal of the specifications and to vacate the discharge of the bankrupt. The foregoing detailed statement of the steps in the proceedings has been made necessary by the particular questions raised upon the objections presented on this motion.

The first objection is that the order of February 7th was granted ex parte and upon insufficient statements. The law provides that such an extension of time to apply for a discharge may be granted, if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within the 12 months provided by section 14a. Section 58a provides that creditors shall have at least 10 days' notice of all hearings upon applications for the discharge of the bank-

rupt; but inasmuch as this provision insures a notice of the proceedings themselves, it would not seem that the notice of application for leave to apply, or for an extension of the time therefor, could be said to be an application for discharge, especially in view of the fact that it is to be made to appear "to the satisfaction of the judge." The matter is thus one of discretion, and notice to all creditors does not seem necessary.

A hearing upon whether the bankrupt's time to apply for a discharge should be extended, if objection were made, would involve a further reference, and, substantially, require going over much of the same ground as would be covered in the hearing upon the petition, and certainly in almost every instance produce no result. Nor does the objection that the petition for this extension of time was made by the attorney raise any serious question. So long as the application for discharge was verified by the bankrupt, and so long as the attorney's affidavit is satisfactory and worthy of belief, especially if the facts are within his own knowledge, it is difficult to see why his affidavit should not be sufficient.

The specifications of objection to a discharge should have been brought on for hearing by the creditors. Under rule 41 in this district the person interested in preventing a discharge, and who is bound under the law to furnish some evidence that the bankrupt has done, or failed to do, the acts specified in section 14 of the bankruptcy act, is required to deposit with the referee a sum sufficient to guarantee that the expenses of the reference will be paid. The bankrupt is not expected to stand the expenses of his bankruptcy proceeding, further than to turn over his entire estate. Even his attorney's fee for the matters required of the bankrupt may come out of the estate. Section 64 (3). The creditors' expenses in opposing a discharge, if successful, should be borne by all of the creditors who are benefited thereby, and, if unsuccessful, may, in the discretion of the court, be paid out of the estate. But the object of the bankruptcy statute is to allow a bankrupt to give up his property and be relieved from his debts, as well as to compel a person who is insolvent and committing acts of bankruptcy to distribute his assets equally. After adjudication, an involuntary bankrupt should not be placed in a worse position than one who has filed a voluntary petition for his own benefit. It would seem, therefore, that to ask a man (who has either given up or has been compelled to give up all his property, and who is entitled in return therefor to a discharge from his debts, if he be honest) to forego the rights which the law gives him, unless he can raise funds sufficient to conduct a reference, which may be arbitrarily forced upon him if a creditor is spiteful, is beyond the intention of the statute.

It is always within the power of the court to impose costs against a creditor who does not seem to be acting fairly, or to compel the bankrupt to pay costs before acting on the commissioner's report, if the expenses should be borne by the bankrupt. But nothing would seem to be gained by waiting for the bankrupt, in every case, to deposit the expenses of a proceeding directed against himself.

Another objection is that the referee has not filed a certificate showing that the bankrupt has conformed with the provisions of the bank-

ruptcy act, as required by section 14b. Such a certificate is required by rule 26 of this court, but is merely a method of proving to the court facts which could be inferred from the record, and conclusions to be drawn from the testimony on file. A favorable report upon specifications of objection must include all of the elements covered by such a certificate, and in the present case the special commissioner made such a report. It would have been well to have withheld the order of reference until this certificate had been filed, and, if no opposition had been made to the discharge, the order of discharge could not have been entered until the filing of such a certificate. But at the present time there is nothing in the objection presented.

The most serious objection, however, is that Mr. Smith, as creditor, states in his affidavit that he received no notice of the application for a discharge. It is evident from an examination of the record that he had filed his claim with the referee prior to the sending out of notices for the hearing upon the discharge application. It is also apparent from the record that the referee did not report the claim as filed by Mr. Smith until a dividend sheet was furnished, namely, upon the 8th day of September, 1909. General Orders of the Supreme Court No. 24 (18 Sup. Ct. viii) requires as follows:

"The referee shall forthwith transmit to the clerk a list of the claims proved against an estate, with the names and addresses of the proving creditors."

And the bankruptcy statute (section 58) requires 10 days' notice to all creditors by mail—

"to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors.
* * * of (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts."

As has been previously stated, the clerk of this court certified, upon the 25th day of February, 1908, that he had sent notices of said application to all known creditors. The objecting creditor now presents an affidavit in which he states that he is informed by the clerk's office that notices of the hearing on the petition for discharge were mailed only to the creditors set forth in the schedules.

In view of the certificate of the clerk above referred to, and in the absence of any definite affidavit as to how the Brown notice was mailed, it is impossible to determine whether the requirements of the statute were met with respect to the particular creditor, whether that creditor be "A. Brown, address unknown," or "Charles H. Smith, as receiver for H. Brown." The bankruptcy law requires notice of application for discharge to be printed in a designated newspaper, and that was done in the present case. The only purpose of printing such a notice would be to cover instances where the creditor's name and address was not correctly set forth in the papers. In other words, it would be a notice to the public; and in the present case to set aside the discharge would mean that the notice by publication was of no effect whatever. In addition, the application of the creditor to have the discharge revoked, because he did not receive notice, could not be granted in that form. At most, he would be entitled to now proceed before the referee, and, if his objection should be substantiated, then the court

would have to determine whether the discharge should be finally set aside (section 15), or whether the claim of this particular creditor had not been discharged by the proceedings (section 17 [3]).

But upon the condition of the record, and the certificate of the clerk that notices were mailed, and in the absence of anything to indicate that this particular creditor, or any other, has been injured by any fraud on the part of the bankrupt, the discharge will not be opened for the suggestion of irregularity, in that one of the creditors asserts that he did not receive the notice supposed to have been mailed. If such a result could follow, under the present circumstances, it would be necessary to reopen or revoke the discharge if the notice to a creditor were lost in the mail, and no discharge would be sufficiently stable to be of any purpose whatever, if it could be attacked by proof that notice was not received.

The motion must be denied.

INDEPENDENT TRANSP. CO. v. CANTON INS. OFFICE, Limited.

(District Court, W. D. Washington, N. D. October 16, 1909.)

No. 3,849.

1. INSURANCE (§ 645*)—MARINE INSURANCE—ACTION ON POLICY—PLEADING.

In an action on marine insurance policies, a breach of any of the warranties made therein by the insured is matter of defense, to be pleaded and proved by respondent.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 645.*]

2. INSURANCE (§ 272*)—MARINE INSURANCE—CONSTRUCTION OF WARRANTY.

A provision in a marine insurance policy reading, "Vessel warranted employed in the general passenger and freighting business on Puget Sound," relates to present and not future employment; and the fact that the vessel was out of commission at the particular time of a loss is not a breach of such warranty, which will defeat a recovery on the policy.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 272.*]

3. INSURANCE (§ 470*)—MARINE INSURANCE—NOTICE OF ABANDONMENT.

Notice of abandonment of a vessel to the insurers, reciting the acts done by the owners in raising the vessel after she sank and that they considered her a constructive total loss, specifies a valid ground for abandonment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1214; Dec. Dig. § 470.*]

4. INSURANCE (§ 470*)—MARINE INSURANCE—ABANDONMENT—WAIVER.

The unexcused failure of the owners of a vessel to give notice of abandonment to the insurers until four months after she sank, and two months after she had been raised and cleaned and in condition for a survey, was a waiver of the right to abandon for a constructive total loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1218; Dec. Dig. § 470.*]

5. WORDS AND PHRASES—"EMPLOYED."

The word "employed" is a verb of past or present tense, and cannot be accurately used potentially to indicate future action, unless qualified by additional words.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2377-2380; vol. 8, p. 7649.]

In Admiralty. Suit by the Independent Transportation Company against the Canton Insurance Office, Limited. On exceptions to amended libel. Sustained in part.

Ira A. Campbell, for libelant.

William H. Gorham, for respondent.

HANFORD, District Judge. These several suits are founded upon policies insuring the steamer Vashon. The policies were issued at Seattle. They contain the usual restrictions in the San Francisco form of marine policies, and the following special warranty clause:

"Vessel warranted employed in the general passenger and freighting business on Puget Sound, within a radius of 30 miles from Seattle. Warranted no lime under deck."

The first exception is on the ground of alleged insufficiency of the libels in the failure to allege compliance on the part of the insured with the requirements of express warranties in the policies; the contention being that the libelant should assume the burden of alleging and proving that there was no breach of the warranties. This is contrary to the fundamental principle that courts do not presume that a contract has been broken, nor require a litigant to prove a negative. Therefore, notwithstanding the authorities, the court holds that a breach of warranty should be pleaded as a special defense in order to present that issue in the best form for adjudication. The first exception is overruled.

The respondents have introduced, and made part of the record in the case, the notice of abandonment of the vessel and proof of loss, whereby it appears that the Vashon, at the time of the disaster which occasioned the loss, was out of commission and moored in the Duwamish river; and it is contended that, as she was not then employed in the general passenger and freighting business on Puget Sound, there was a breach of the special warranty, which avoided liability under the terms of the policies. The respondents contend for the principle that insurers are entitled to insist upon strict and literal compliance with special warranties, and deny the right of the libelant to introduce parol evidence to explain or vary the terms of the warranty clauses. This argument recoils, for application of a rigorous rule defeats the purpose for which it has been invoked in these cases. Unless the rules of grammar shall be disregarded, or the phraseology of the warranty changed by a somewhat liberal construction, there is no apparent breach. It is not pretended that the record shows that the Vashon was not employed in the general passenger and freighting business on Puget Sound when the policy was issued. The word "employed" is a verb of the past or present tense, and cannot be accurately used potentially to indicate future action, unless qualified by additional words not found in these warranty clauses. The argument for the respondents assumes that the warranties relate to future employment of the vessel during the life of the policies, and that the clauses should be interpreted to read: "Vessel warranted to be employed in the general passenger and freighting business on Puget Sound." The interpolation of the words "to be" would materially change the meaning of the

clause, and it is not permissible to thus interpolate, in order to change the meaning of a contract which courts are required to enforce strictly according to the terms assented to by the parties. The second exception is overruled.

The third exception is for alleged failure to allege a valid notice of abandonment on which to base the claim for a constructive total loss. The written notice which was served is criticised on the ground that it failed to specify that the vessel suffered a mishap while employed on the water of Puget Sound. For reasons stated, this ground of objection is untenable. The only other criticism of the notice is that it failed to assign a reason for abandonment of the vessel. The notice states that the vessel sank in the Duwamish river, and that, acting under the advice of Capt. Gibbs, the underwriters' surveyor:

"The owners raised her and placed her on the flats in the lower part of the city; but notwithstanding these efforts she is still badly damaged, and her owners consider her a constructive total loss."

There is no contention that these statements were untrue, and, being true, they amount to specifications of a valid reason for abandonment. The third exception is overruled.

The fourth exception is for alleged waiver of the right to abandon, by excessive delay without any valid excuse. It appears from the record that the vessel sank on the 15th of December, and the owner had notice of the happening on the 16th. The notice of abandonment was given four months thereafter, which was three months after the vessel had been raised, and two months after she had been cleaned, so as to be in condition for inspection and survey of damages. For cogent reasons, the insured party is required to act promptly in giving notice of abandonment, when it is intended to claim for a constructive total loss; and, without reasons justifying delay for the period which elapsed in this instance, the insurers have justice on their side in claiming that the right to abandon was waived. The fourth exception is sustained by the court.

If the libellant claims that there was any justifiable excuse for delay, leave will be granted to further amend the libel to show the facts.

UNITED STATES v. PORTLAND COAL & COKE CO. et al. (six cases).

(Circuit Court, W. D. Washington, W. D. October 5, 1908.)

Nos. 1,280-1,285.

MINES AND MINERALS (§ 35*)—ENTRY OF COAL LANDS—VALIDITY.

Under Rev. St. § 2347 (U. S. Comp. St. 1901, p. 1440), which permits the entry of coal lands by a qualified person or association, but in case of a person not exceeding 100 acres, and in case of an association not exceeding 320 acres, persons cannot lawfully associate themselves together to enter tracts of 160 acres each in severalty, but to be held for the joint benefit of all in equal shares, and patents issued on entries made under such an agreement will be canceled at suit of the United States.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87; Dec. Dig. § 35.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suits by the United States against the Portland Coal & Coke Company and others for cancellation of patents. Decree for complainant.

Charles J. Bonaparte, Atty. Gen., Henry M. Hoyt, Sp. Asst. U. S. Atty., Potter C. Sullivan, U. S. Dist. Atty., and Frederick G. Dorety, Asst. U. S. Dist. Atty.

Snow & McCamant, Warren E. Thomas, and T. G. Hailey, for defendants.

HANFORD, District Judge. In these six cases the government sues to obtain decrees canceling patents issued for lands entered under the coal land law, which permits entries by individuals of not exceeding 160 acres, and by associations of not exceeding 320 acres, of public land containing coal deposits and chiefly valuable for coal mining. The several bills of complaint are similar in their allegations, and, considered together as one general complaint, they show that separate entries were made by individuals and associations, each of a quantity of land not exceeding the maximum, and that the lands were paid for and patents issued to the persons in whose names the entries were made; the aggregate quantity of land so patented being about 6,300 acres. As ground for cancellation of the patents it is averred that the entries were made in pursuance of a conspiracy between the defendants to acquire the title to a large tract of coal land, in violation of law, for the use and benefit of the Oregon Railroad & Navigation Company, a corporation, and that to effect the object of the conspiracy the Portland Coal & Coke Company was incorporated as a subsidiary corporation, dominated by the Oregon Railroad & Navigation Company, and that the money expended in exploring the lands for the discovery of coal, and all other incidental expenses, and for the payment to the government of the price for the lands, was furnished by the Oregon Railroad & Navigation Company.

A number of the defendants have failed to answer or plead, and decrees pro confesso have been entered against them, and all of the cases have been submitted by the United States district attorney for decision upon the bills and the several answers filed by the Oregon Railroad & Navigation Company, E. E. Lytle and wife, and McKenzie and Goss. Some of the other defendants filed answers disclaiming any interest in the property, and as to them the suits have been dismissed. The Portland Coal & Coke Company has not answered, and it appears to have ceased to exist as a corporation by reason of its failure to pay the license fee required by the laws of Oregon, under which it was incorporated.

The answer of the Oregon Railroad & Navigation Company is defensive only, to the extent of denying all averments of the bills charging it as a promoter of the Portland Coal & Coke Company and as a co-conspirator with others to acquire the land, and disclaims any right to or interest in any part thereof, and prays for a decree in its favor for costs.

The defendants Lytle and wife, by their answer, deny the ownership of the government subsequent to the issuance of patents, "except

as this court may hold that, by reason of an unintentional violation of the laws of the United States, the title of the complainant * * * was never divested." This is a negative pregnant, equivalent to an admission that the entries were unlawful and that the patents did not convey a valid title. The answer of these two defendants controverts the charges of conspiracy and fraudulent design contained in the bills of complaint, but expressly admits that a number of individuals and associations made coal land entries aggregating about 6,300 acres, and that there was an understanding between them to the effect that all were to co-operate together in developing and exploiting the property as an entirety, and contribute to the general expenses, and share in whatever profits might be realized, and aver that they acted under legal advice, and believed that such a combination was not unlawful, and that the Portland Coal & Coke Company "was organized solely for the purpose of carrying out the pooling arrangement above referred to." They further aver that the land was all paid for out of money contributed by the several entrymen and deposited in the Merchants' National Bank of Portland, Or., to the credit of the Portland Coal & Coke Company, and they admit that the defendant E. E. Lytle claims an interest in the land by virtue of deeds executed by the several entrymen subsequently to the issuance of the patents.

In case No. 1,280 the defendants McKenzie and Goss by their answer deny all the charges of conspiracy and fraud, deny that there was an agreement, preceding the entry made in their names, binding them to convey the title or hold it in trust, and deny that the United States has had any right to or interest in the property subsequent to the issuance of the patent to them. They admit, however, that coal land aggregating about 6,300 acres was entered as alleged in the bill of complaint, and that it was their "expectation * * * that the lands * * * should be developed and exploited at the joint expense of the entrymen thereof, and that the proceeds of all mineral extracted or taken therefrom and sold should be used for the payment of the expense of development and exploitation, and for the payment of the expense of operation, and that when said lands should have been entered, * * * and title therein vested in the several entrymen, * * * the said lands * * * should be developed and exploited, and the mines thereon operated for the benefit of all of said entrymen share and share alike." They further aver that the land covered by the entry made in their names was paid for with money furnished by the defendant E. E. Lytle, and that the deed which they executed was intended as security for the repayment of said money, and that it has all been repaid, except \$200, and that Lytle has now no interest in said land, except as security for said balance. They also aver that they acted under the advice of counsel, and believed, and now believe, that a combination of individuals for the purpose of co-operation in acquiring and operating coal-mining property at the joint expense of all, and for the sharing of profits equally, is not contrary to law.

Considered in its entirety, this answer is a virtual confession that they, the answering defendants, voluntarily associated themselves with others to acquire tracts of land in severalty, but to be held for the joint

benefit of all in equal shares, and the only actual opposition to the granting of the decrees demanded by the government is this contention of these two defendants that the pooling scheme above outlined is not contrary to the statute. Their solicitors have failed, however, to sustain this contention by any argument, and it is the opinion of the court that it cannot be sustained. If the scheme was not unlawful, each member of the combination would have a legal right to compel his fellow members to hold each and every tract for the benefit of all, and to have an accounting of all profits derived from mining operations in each and every tract, although the legal title might be retained by the individual members in severalty. So that the object of the combination was to acquire coal land in excess of 320 acres for an association, although the law fixes the maximum quantity at 320 acres.

For the reason above stated, and upon the authority of the decision of the Supreme Court in the case of *United States v. Trinidad Coal & Coking Co.*, 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640, decrees will be entered in each of the cases as prayed for in the several bills of complaint, except that costs will not be decreed against the Oregon Railroad & Navigation Company, or either of the other defendants who have disclaimed any interest in the property. Judgments in their favor for costs will be denied, for the reason that the government is not liable to defendants for costs.

THE MARIE PALMER. THE JAMES McCaULEY. THE BLANCHE HOPKINS.

(District Court, E. D. Pennsylvania. October 29, 1909.)

Nos. 76, 77.

1. COLLISION (§ 135*)—DAMAGES—MODE OF ASCERTAINMENT.

Where the value of a schooner before collision was fixed by appraisers, and she was shortly after sold before being repaired, and the repairs made by the purchaser exceeded those necessary on account of collision damage, a proper measure of such damage is the difference between her sound appraised value and her sale price, with interest from the date of collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 289; Dec. Dig. § 135.*]

2. ADMIRALTY (§ 52*)—PAYMENT INTO COURT—INTEREST.

The owners of a vessel, sold pending a suit for collision, which made it necessary to deposit the proceeds in court, on a decree exonerating her from fault, are entitled to recover interest on the amount of such deposit from the vessel adjudged in fault.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 433-436; Dec. Dig. § 52.*]

3. COLLISION (§ 136*)—DAMAGES—DEMURRAGE.

Where a vessel injured in collision is allowed demurrage for the time disabled, based on her average net earnings before and afterward, she is not entitled to add to such sum the wages and cost of provisioning the crew during the time, nor prime of the master under his contract, both of which were necessarily considered in computing her net earnings.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 290; Dec. Dig. § 136.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Admiralty. Suits for collision by the schooner Marie Palmer and the schooner Blanche Hopkins, respectively, against the tug James McCaulley. On exceptions to report of commissioner. Report affirmed, as modified.

Howard M. Long, for the Marie Palmer.

Henry R. Edmunds, for the Blanche Hopkins.

John F. Lewis and Francis C. Adler, for the James McCaulley.

J. B. McPHERSON, District Judge. In these two actions, which are founded on the collision between the schooner Marie Palmer, in tow of the tug James McCaulley, and the schooner Blanche Hopkins, the tug was adjudged to be solely at fault ([D. C.] 155 Fed. 894), and the ascertainment of the damages was referred to a commissioner, whose report is now before me upon exceptions. His examination of the questions presented to his consideration was unusually careful and painstaking, and his findings of fact are conceded to be unexceptionable. Indeed, his report is so convincing upon several important subjects originally in dispute that the futility of attack upon it was recognized, and a number of exceptions were formally abandoned at the argument. One or two matters remain about which a few words may be said.

I incline to the opinion that the commissioner's suggestion (Report, page 18) of an alternative method of ascertaining the damage done to the Hopkins should be adopted. The vessel was appraised at \$3,000 after the collision and before any repairs were made, and her value before the collision was fixed by the same appraisers at \$8,000. She was sold shortly after this valuation for \$4,100, and was then thoroughly repaired by her new owners; more work being done upon her than was necessary to make good the damage done by the collision. Under these circumstances, it seems to me that the simplest and most satisfactory method of compensating the persons who owned her at the time of the collision is to award them the difference between her sound value, which I think may fairly be accepted as \$8,000, and the value after the collision, which has been ascertained by the sale to be \$4,100. Upon this difference, \$3,900, interest should be allowed from the date of the collision. The same persons are also entitled to take out of court the \$4,100 which has been paid into the registry; but the tug should be charged with interest upon this sum also, although only from the day of sale. In consequence of her wrongful act, it became necessary to convert the Hopkins into money, and it is one of the direct results of her act that the court has been obliged to hold the fund until the end of the litigation, thus preventing those who owned the Hopkins at the time of the collision from using the money meanwhile. The Grapeshot, Fed. Cas. No. 5,703, 2 Woods, 46, is an analogous case, although the facts are not identical.

So far as the Marie Palmer is concerned, only two subjects of complaint are left. The commissioner is said to be wrong, first, because he estimated the rate of demurrage to which she was entitled by averaging her daily net earnings for a certain period before and after the collision, but did not add to the rate thus estimated the daily ex-

penses of the schooner for the wages and provisions of her crew; and, second, because in estimating the same rate he refused to add the average daily primage of the master, amounting to \$5.08 per day. As it seems to me, the cases cited in support of the first position do not support it. *New Haven Steam-Boat Co. v. Mayor, etc.* (D. C.) 36 Fed. 716, was a case in which the owner of a vessel that had been disabled by collision was allowed a certain sum per day as the hire of another vessel that had taken her place, and the court further ruled that in addition to this sum the wages of the crew, who were actually and necessarily occupied on the disabled boat and under pay during the time of her repair, was a proper item of damage. In *The Saginaw* (D. C.) 95 Fed. 703, the injured vessel was denied demurrage because no actual pecuniary loss was proved; but two items of expense were allowed, \$170 for night work in expediting her unloading, and \$29.29 for extra cost of boarding passengers during the delay. In *Fisk v. City of New York* (D. C.) 119 Fed. 256, demurrage was refused to a pleasure yacht because no actual pecuniary loss was shown; but it was held (following *The Conqueror*, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937) that an allowance should be made for the wages and provisions of the crew, so far as their presence on the yacht appeared to be necessary while the repairs were going on. Evidently, these decisions do not support the Palmer's argument, for in none of them was there an allowance for detention based, as in the present case, upon the net earnings of the vessel for a specified period. Such a basis necessarily takes into account the expenses of the ship, including the wages and food of the crew, and, having affected the computation once, these items should not be specifically allowed for again. As appears from the opinion in *The Conqueror*, page 127 of 166 U. S., page 516 of 17 Sup. Ct. (41 L. Ed. 937), the net earnings of the vessel may in a given case furnish a proper basis for estimating the damages caused by detention:

"In the absence of such market value, the value of her use to her owner in the business in which she was engaged at the time of the collision is a proper basis for estimating damages for detention, and the books of the owner, showing her earnings about the time of her collision, are competent evidence of her probable earnings during the time of her detention."

This being a proper basis, therefore, and it appearing from the testimony that the master's primage was added to his salary in computing the expenses of the vessel, it is evident that no separate allowance for primage should be made. The master testified that his pay was \$40 a month and 5 per cent. of the gross stock or freight, and this primage, which is nothing more than a commission on the freight, is as much a part of the ship's expenses as the stipulated sum of \$40 per month. It diminishes the freight, and leaves that much less for the ship. On the subject of primage, see 20 Amer. & Eng. Ency. of Law (2d Ed.) p. 231, § 3; *Charleton v. Cotesworth*, 21 E. C. L. 408; *Carr v. Austin, etc., Co.* (C. C.) 14 Fed. 419. I agree with the commissioner that no authority has been shown for the allowance of primage as a specific item of damage in this case.

It is argued, on behalf of the tug, that part of the costs should be charged against the Palmer, because much of the inquiry was taken

up in examining two unfounded claims that were presented on behalf of the schooner, but were rejected by the commissioner. After due consideration of this subject, I am of opinion that the tug's position is well taken, and that the decree should require the Palmer to pay one-third of the costs, including the stenographer's charge and the fee of the commissioner; this fraction to be directly paid by the Palmer, or to be taken out of the sum to which she is entitled against the tug.

With the modifications herein directed, the report of the commissioner is approved.

An allowance of \$350 for towage is made to the schooner *Blanche Hopkins*.

STATE OF ARKANSAS v. ST. LOUIS & S. F. R. CO.

(Circuit Court, W. D. Arkansas, Ft. Smith Division. November 4, 1909.)

REMOVAL OF CAUSES (§ 4*)—NATURE OF CONTROVERSY—ACTION TO RECOVER PENALTY.

Kirby's Dig. Ark. § 6813, provides that if any railroad company in the state shall violate any of the provisions of the act of which it is a part, or any of the rules made by the State Railroad Commission for which there is no other penalty prescribed, it shall be liable to a penalty of not less than \$500 nor more than \$3,000 for each violation, to be recovered in an action brought, in the name of the state, by the prosecuting attorney of the proper district. *Held*, that an action to recover such penalty, while civil in form, is in its nature criminal, and is not removable into a federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 13; Dec. Dig. § 4.*]

Action by the State of Arkansas against the St. Louis & San Francisco Railroad Company. On motion to remand to state court. Motion sustained.

William A. Falconer, for the State of Arkansas.
B. R. Davidson, for defendant.

ROGERS, District Judge. Section 6813, Kirby's Dig. Ark. provides in substance, that if any person or corporation operating a railroad or express company in the state of Arkansas shall violate any of the provisions of the act of which that section is a part, or any of the rules regarding railroads made by the State Railroad Commission and for which there is no other penalty prescribed in the act, they shall be liable to a penalty of not less than \$500 nor more than \$3,000 for each violation of the act; that the said penalty may be recovered in an action to be brought in the name of the state of Arkansas in the county in which such violation occurred; that the commission shall institute such action through the prosecuting attorney of the proper district; that the said action shall not be dismissed or compromised without the consent of the court and of said commissioners. In pursuance of that section of the statute the State Railroad Com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mission enacted rule No. 44, which went into effect October 20, 1906, which is as follows:

"In case of failure on the part of the shipper to give routing instruction, it shall be the duty of the railroad receiving the shipment to forward it via such route as will make the lowest rate."

While the statute referred to and the rule quoted above were in force, the St. Louis & San Francisco Railroad Company received a shipment of lime at Johnson, a station on said road in Washington county, Ark., to be delivered at Dequeen, Ark. The shipper gave no instructions as to how the lime should be routed. The Frisco Railroad Company shipped the lime via its own route to Poteau, Okl., then down the Kansas City Railroad Company to Dequeen, in Arkansas. The prosecuting attorney for the Fourth judicial circuit of Arkansas, in which Washington county is situate, by the direction of the Arkansas State Railroad Commission, filed a suit in the name of the state in the circuit court of Washington county, Ark., against the St. Louis & San Francisco Railroad Company for the penalty prescribed by the statute, alleging in substance that the route over which the lime was shipped was routed at 23 cents per cwt., whereas the railroad company could have shipped the lime on its own line to Van Buren, thence over the St. Louis, Iron Mountain & Southern Railway Company to Hope, Ark., and over the St. Louis & San Francisco Railroad Company to Ashdown, Ark., and thence over the Kansas City Southern Railroad Company to Dequeen, Ark., the place of consignment, which route, it is alleged, was a reasonable route, at a cost of 12 cents, per cwt. for shipment, and which route is wholly within the state.

It may be said, for the purposes of this case, that the route over which the lime was shipped was about one-half the distance of the route just described. In apt time the St. Louis & San Francisco Railroad Company filed its petition in the said circuit court, accompanied by its bond, and the case was removed to this court. The state of Arkansas, without having acquiesced in the jurisdiction of the federal court, filed its motion in apt time to remand the case to the state court, assigning four grounds, the first of which need not be noticed, as follows: Second, that said case is not a controversy between citizens of different states, but between the state of Arkansas and a citizen of the state of Missouri; third, that it is not a suit of a civil nature, but is a case for the recovery of a penalty imposed by the statutes of the state of Arkansas; fourth, that it is not a controversy arising under the Constitution or laws of the United States or the treaties made under their authority. The first and last grounds need not be noticed.

The question presented and urged at the hearing was that the suit is not of a civil nature. The question, therefore, is: What is the nature of the action provided by section 6813, Kirby's Dig. Ark.? After a most careful and patient investigation of a wide range of authorities, I have reached the conclusion that the action, while civil in form, is in its nature criminal. This case, therefore, must be remanded to the state court, solely upon the principle decided in the

case of *State of Iowa v. Chicago, B. & Q. R. Company* (C. C.) 37 Fed. 497, 3 L. R. A. 554, and which case seems to have been acquiesced in and is in harmony with various cases, among others: *Moloney v. American Tobacco Co.* (C. C.) 72 Fed. 801; *State of Indiana v. Alleghany Oil Co.* (C. C.) 85 Fed. 870; *Ferguson v. Ross* (C. C.) 38 Fed. 161, 3 L. R. A. 322; *State of Texas v. Day Land & Cattle Co.* (C. C.) 41 Fed. 228.

I do not find it necessary to consider any of the other grounds in the motion to remand, and nothing in this case is decided, except that the suit is criminal in its nature, and not civil, and, therefore, not removable.

The case is remanded to the state court, at the costs of the St. Louis & San Francisco Railroad Company.

TEMPLETON v. KEHLER.

(District Court, E. D. Pennsylvania. October 29, 1909.)

No. 2.

BANKRUPTCY (§ 305*)—ACTION BY TRUSTEE TO AVOID PREFERENCE—JUDGMENT.

Where a trustee in bankruptcy recovers a verdict against a preferred creditor in a court other than the bankruptcy court, defendant is not entitled to have judgment withheld until he has proved his claim and a dividend in his favor has been declared by the bankruptcy court, and to have the amount deducted from said judgment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 466; Dec. Dig. § 305.*]

Action by Richard Templeton, trustee in bankruptcy of Frank J. Kehler, against H. Calvin Kehler. On motions for new trial and for judgment notwithstanding the verdict. Motions overruled.

George M. Roads, for plaintiff.

Abraham M. Beitler and G. E. Farquhar, for defendant.

J. B. McPHERSON, District Judge. This case presents the ordinary situation where an insolvent debtor transfers property in payment of an antecedent debt, and upon a review of the testimony I am unable to say that the evidence offered in support of the trustee's claim was too slight to be submitted to a jury. The motion for a new trial was practically abandoned on the argument, and is now overruled pro forma. The motion for judgment notwithstanding the verdict is also overruled for the reason just given, and to this order of the court an exception is sealed in behalf of the defendant.

The trustee is therefore entitled to judgment on the verdict in the usual course, unless an application that has been made by the defendant should be favorably considered. It is urged that although it may be true that the defendant accepted a preference, and that he must now surrender it, he is nevertheless entitled to prove his debt against the bankrupt, and that under the analogy of *Page v. Rogers*, 211 U. S.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

581, 29 Sup. Ct. 159, 53 L. Ed. 332, judgment should not be entered upon the verdict until the final account of the trustee in bankruptcy shall be filed, and should only be entered then for such amount as will remain after giving the defendant credit for such dividend as he may be awarded upon his debt. But in *Page v. Rogers* the suit was brought in the bankruptcy court that had jurisdiction of the trustee's accounts, and under such circumstances it was, of course, "entirely practicable to avoid the circuitous proceeding of compelling the defendant to pay into the bankruptcy court the full amount of the preference which he had received, and then to resort to the same court to obtain part of it back by way of dividend." Accordingly the Supreme Court went on to say:

"The defendant may be permitted, if he shall be so advised, to prove his claim against the estate of the bankrupt, and the bankrupt court may then settle the amount of the dividend coming to him, and the final decree may direct him to pay over the full amount of his preference, with interest, less the amount of his dividend."

Here, however, the tribunal in which Frank Kehler was adjudged a bankrupt is the District Court for the Western District of New York, while the proposed judgment will be entered or suspended in the District Court for the Eastern District of Pennsylvania. Evidently, under such circumstances, the result is likely to be expense and confusion, rather than greater simplicity of procedure, and I do not see the advantage of the course that has been suggested on behalf of the defendant. The plaintiff may therefore enter judgment on the verdict, leaving the defendant to prove his claim in the Western District of New York, if he shall be so advised, and receive his dividend there.

TEMPLETON v. KEHLER.

(District Court, E. D. Pennsylvania. October 29, 1909.)

No. 4.

BANKRUPTCY (§ 165*)—VOIDABLE PREFERENCE—DELIVERY OF PROPERTY BY INSOLVENT UNDER CONTRACT OF PURCHASE—DEDUCTION OF ADVANCE PAYMENT.

Defendant contracted for the purchase of cattle from a bankrupt, while the latter was insolvent and within four months prior to his bankruptcy, and made an advance payment thereon. The cattle were subsequently delivered, and he paid the remainder due. *Held*, that he was not a creditor of the bankrupt in any proper sense on account of the advance made, and that the deduction of the amount of such advance from the price of the cattle when payment was made on delivery was not the receiving of a preference, recoverable by the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 259; Dec. Dig. § 165.*]

Action by Richard Templeton, trustee in bankruptcy of Frank J. Kehler, against Charles R. Kehler. On motion by defendant for judgment notwithstanding the verdict. Motion sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

George M. Roads, for plaintiff.

Abraham M. Beitler and G. E. Farquhar, for defendant.

J. B. McPHERSON, District Judge. The facts in this case differ essentially from the facts in the suit against Calvin Kehler, 173 Fed. 574. There the debt was pre-existing and the payment was confessedly preferential, if the evidence was sufficient to show that the intent to prefer and the reasonable cause to believe in such intent were present. These are questions of fact ordinarily, and a jury must decide them if there is evidence to warrant the submission. But here there was no antecedent debt, and therefore no preferential payment could be made. The defendant was buying cattle from the bankrupt in the usual course of business, and had advanced money in part payment. The cattle were delivered (the price being concededly fair), and the defendant became the bankrupt's debtor for the balance of the price. Thereupon a settlement was made, and the defendant paid the difference in cash. To avoid the necessity of trying the case a second time, in case I should be wrong in the foregoing view, I submitted to the jury the questions whether the delivery of the cattle was either a fraudulent transfer under section 67, cl. "e" (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), or was a preferential payment under section 60, cls. "a" and "b"; but I believed at the trial, and I believe now, that no evidence had been offered that required submission on either point. The verdict in favor of the trustee means that in the jury's opinion the cattle were transferred to the defendant either fraudulently, or as a preferential payment of the \$925 which the defendant had advanced upon account of the purchase price. Upon the question of fraud, I repeat that no evidence justifying submission is to be found; and upon the question of preference the defendant was also entitled to binding instructions, because he was not the bankrupt's creditor in any proper sense, but is rather to be regarded as the bankrupt's debtor. He had ordered cattle in the usual course of business, and had paid part of the purchase price in advance. He could not pay the full price until the cattle should be delivered and the exact sum ascertained. When, therefore, the bankrupt delivered the cattle, and was paid the balance that could only then be determined, it seems clear to me that he was bound to give the defendant credit in the settlement for the money (\$925) that had been already advanced, and that he was not paying a debt to that amount by delivering the cattle, but was merely completing an executory sale by handing over the property and making settlement for the price.

Judgment notwithstanding the verdict may be entered in favor of the defendant.

Exception to the plaintiff.

UNITED STATES CONSOL. SEEDED RAISIN CO. v. CHADDOCK & CO.

(Circuit Court of Appeals, Ninth Circuit. November 3, 1909.)

No. 1,736.

1. APPEAL AND ERROR (§ 167*)—GROUNDS FOR DISMISSAL OF APPEAL—STIPULATION NOT TO APPEAL.

A stipulation by the parties to a suit that no appeal shall be taken from the decree of the trial court, if based on a valid and legal consideration, will be enforced by the appellate court, and an appeal, if taken, dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1008, 1009; Dec. Dig. § 167.*]

2. APPEAL AND ERROR (§ 167*)—DISMISSAL OF APPEAL—ENFORCEMENT OF STIPULATION NOT TO APPEAL.

An appeal dismissed, as in violation of a valid stipulation not to appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1008, 1009; Dec. Dig. § 167.*]

Appeal from the Circuit Court of the United States for the Northern Division of the Southern District of California.

Suit by the United States Consolidated Seeded Raisin Company against Chaddock & Co. From a decree dismissing the bill, complainant appeals. Motion to dismiss appeal sustained.

The appellant, as owner of the patent issued to George Pettit, Jr., and John D. Sprower, on February 14, 1899, for a fruit-seeding machine, brought suit in the court below against the appellee, alleging that the appellee had been making, using, and selling machines containing the said invention, and praying for an accounting and an injunction. The appellee answered, denying infringement, and alleging, among other defenses, that the appellant was equitably estopped to assert that the appellee's machine infringed its patent, for the reason that more than two years prior to the commencement of the suit the appellee, at the request of the appellant, allowed and permitted it to inspect the machines then and ever since used by the appellee, that said machines were carefully inspected and scrutinized by the appellant, and that thereupon the appellant informed the appellee that said machine so made and used by it did not in any respect infringe any of the rights of the appellant or their said patent; that, relying upon said statement and acquiescence, the appellee had continued to use the machines and had expended large sums of money in connection therewith. On the issues and the evidence taken in the court below the trial court found that claim 17 of the appellant's patent, being the claim which was in controversy, was valid, and that the appellee's machines fell within the terms thereof, but that by reason of the conduct of the appellant it was estopped to allege that the appellee had infringed its patent, and on the ground of estoppel solely the court dismissed the bill. Testimony was taken on the trial concerning an experimental use made by the appellee, more than a year after the commencement of the suit, of a new machine, made at the instance of E. L. Chaddock, one of the stockholders of the appellee, under an invention for which he subsequently obtained letters patent. The testimony was given by two witnesses, one of whom was the assistant secretary of the appellant, and the other was a manufacturer of raisin seeding machines, both of whom were invited by the appellee to inspect the machine. They testified that they did so, that the machine was operated for their inspection, and their testimony tended to show that it infringed the appellant's patent. The testimony so taken was received over the appellee's objection that it had no reference to any machine involved in the controversy. As to that machine, the decree of the court below recites as follows: "And it also appearing to the satisfaction of the court that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

use of the fourth machine, referred to in the testimony, being experimental, does not constitute an infringement of the patent in suit." The appellant appealed from the decree.

John H. Miller, William K. White, and Horace G. Platt, for appellant.

L. L. Cory, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The appellee has moved to dismiss the appeal on the ground that the appellant by its written agreement had relinquished its right to appeal from the decree. It is shown that after the cause had been argued and submitted in the court below, and before the decision thereof, the appellee, together with E. G. Chaddock, E. L. Chaddock, and John Chaddock, as parties of the first part, entered into an agreement with the appellant, as party of the second part, in which, after referring to the patents of the respective parties, it was recited that:

"Whereas, many conflicting claims have arisen between the holders and owners of said respective patents, and which have resulted in litigation, which is expensive and otherwise injurious to the business and interests of the respective parties hereto, and it is the desire of said respective parties hereto to make and enter into an arrangement whereby and during its continuance there would be an amicable arrangement and adjustment between them of their respective controversies, and in the hope of a final, just, and amicable settlement of all disputes and differences."

In the agreement it was covenanted that so long as the parties of the first part shall deal exclusively in, and shall purchase, sell, and handle, only seeded raisins seeded, processed, and packed by the party of the second part, and no other, the parties of the first part do lease and demise unto the party of the second part, for a term of three years, the Chaddock raisin seeding plant at an annual rental of \$15,000, provided, however, that, should the said suit then pending and undecided be decided in favor of the appellee, the annual rental should be \$20,000. Then follows this proviso:

"And provided, further, that the judgment which shall be rendered in said Circuit Court in said action or suit, whether the same shall be in favor of said plaintiff or of said defendant, shall be final, and shall not be appealed from or otherwise assailed, in any manner or mode whatsoever, by either or any of the parties hereto or thereto, except, only, that if by said judgment or decree it shall be held and adjudged that the patent belonging to said party of the second part, and concerning which the said action or suit is brought, is invalid, or that the same is not infringed upon by any machine, or machines, belonging to said Chaddock & Co., or by any machine described in and claimed by said letters patent granted to said E. L. Chaddock, above referred to, said party of the second part may appeal from said judgment, or take such other course with reference thereto, and for the protection of its rights in the premises, as it may be advised, and except, further, that if the decree or judgment rendered in said action or suit shall be in favor of said party of the second part, and shall be sufficient in its terms to cover a machine built under and in accordance with said patents held by E. L. Chaddock, and to hold that such a machine infringes the patent of said party of the second part, then and in that event said Chaddock & Co. may appeal from the said judgment or decree, or take such other course to obtain a review or correction of said judgment or decree as it may be advised."

The agreement is of great length, and contains numerous other provisions, but none bearing upon the question of the right to appeal. The right of the appellant to prosecute the appeal, in view of the terms of the agreement, depends upon the construction to be given to the decree. The appellant does not contend—and, indeed, the contention, if made, could not be sustained—that the decree holds its patent invalid; but it contends that by virtue of the decree it is adjudged that the appellant's patent is not infringed upon by the machines used by the appellee. We are unable to agree with this contention. There was no finding whatever upon the question of infringement. Having determined that an equitable estoppel arose from the conduct of the appellant, the court found it unnecessary to enter upon a discussion of the question of infringement. The decree says in substance to the appellant:

"It is immaterial whether the machines used by the appellee infringe upon your machine, for by your conduct you are estopped to allege infringement."

But the appellant points to the machine made under the letters patent granted to E. L. Chaddock during the pendency of the suit, and the experimental use which was made thereof, and insists that, inasmuch as the court held that such use of the machine was not an infringement of the appellant's patent, that finding, within the express terms of the stipulation, secures to it the right to appeal. To this it is a conclusive answer to point to the fact that in the decree of the court below there was no decision on the question whether that machine did or did not infringe the appellant's patent. The court did not hold that it was not an infringing machine, but held that its use by the appellee was not an infringing use, for the reason that it was only experimental. There was no decision that the machine itself, as constructed, was not an infringing machine. By the terms of the stipulation it was only in case that the court held that the appellant's patent was "not infringed upon by any machine belonging to or theretofore used by the appellee, or by any machine described in the claim by letters patent issued to E. L. Chaddock," that the appellant was to have a right to appeal. The purpose of the agreement was to end the litigation, and its purport is that the parties thereto were to abide by the decision of the court, unless thereby it should be decreed that the appellant's patent was invalid, or that the appellant's machines were so constructed, devised, or arranged as to avoid infringement thereof. In short, the appellant reserved the right to appeal only in case the decree affected the integrity of its patent rights. This, it is clear, the decision did not do.

While in some jurisdictions it has been held that a mere promise or agreement not to prosecute an appeal will not divest an appellate court of its jurisdiction (*Sanders v. White*, 22 Ga. 103; *Fahs et al. v. Darling et al.*, 82 Ill. 142; *Runnion v. Ramsay*, 93 N. C. 410), the contrary has been held in other jurisdictions; and it seems to be universally held that, where such an agreement is made upon a valid and legal consideration, either before or after trial, it will be enforced in an appellate court, and the appeal, if taken, will be dismissed (*Townsend v. Master-son, etc.*, 15 N. Y. 587; *Cole v. Thayer*, 25 Mich. 212; *Oliver v. Blair* [Cal.] 5 Pac. 917; *Saling v. German Savings Bank* [Com. Pl.]

8 N. Y. Supp. 469; Commonwealth v. Johnson, 6 Pa. 136; Wheeler v. Floral M. & M. Co., 10 Nev. 200; Hill v. Hermans, 59 N. Y. 396; Mackey, Executor, v. Daniel, 59 Md. 484; Emerick v. Armstrong et al., 1 Ohio, 513; Johnson v. Halley, 8 Tex. Civ. App. 137, 27 S. W. 750). In Townsend v. Masterson, etc., supra, it was said:

"It is insisted by the defendant's counsel that the jurisdiction of this court is limited to hearing appeals upon their merits, and that it cannot enforce stipulations made by the parties in the subordinate courts. But certainly the duty of hearing appeals involves the jurisdiction of determining whether a particular case is properly before us on appeal. It is perfectly competent for the parties to determine, in the preliminary steps of the litigation, whether they will place the question in dispute in a condition to be reviewed here. They may omit to except to the decision of the court before whom the primary decision is made, or, after excepting, they may waive or abandon the exception absolutely or to a modified extent. There is no reason, therefore, why they may not mutually agree that exceptions which have been taken shall only be effectual to sustain an appeal to the General Term of the same court."

The appellant makes the point that the objection to taking the appeal should have been presented in the court below, and that it comes too late when presented for the first time in this court. We find no substantial ground for so holding. The agreement was not on file in the court below, and the order allowing the appeal was made by the court apparently in ignorance of its existence. In accepting the service of the assignments of errors, counsel for the appellee reserved "all exceptions and objections to the taking of the appeal." There was no waiver, therefore, of the rights secured to the appellee by the agreement. The objection to the jurisdiction of the appellate court to entertain an appeal in such a case is properly addressed to that court. It is so held in the cases above cited.

The motion to dismiss must be allowed.

LILIENTHAL et al. v. CARTWRIGHT.

(Circuit Court of Appeals, Ninth Circuit. October 18, 1909.)

No. 1,664.

1. EVIDENCE (§ 458*)—CONTRACTS—INTENTION OF PARTIES.

In an action on a written contract, by which defendant, who owned a hop farm, agreed to sell to plaintiff the crop on such farm for the ensuing two years, the defense was that it was orally agreed, both before and after the contract was signed, that it should be void or should terminate in case he should sell his land, and that he did sell it. *Held*, that it was not error to admit evidence of a similar understanding at the time of the making of a contract two years before between the same parties, and that on the sale by defendant of a part of his land the contract was modified accordingly, where the jury were instructed that such evidence was not to be considered on the question whether the contract in suit was modified, but only to aid in determining the condition of the minds of the parties when it was made, and the probability that the modification claimed would be assented to by plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2083; Dec. Dig. § 458.*]

2. ESTOPPEL (§ 78*)—ACTION FOR BREACH—DEFENSES.

Defendant entered into a contract to sell to plaintiffs the hops raised by him on his farm for the ensuing two years. *Held*, in an action to recover damages for breach of such contract, that defendant was entitled to show as an estoppel that it was agreed when and after the contract was made that it should terminate and not be enforced in case he sold his farm, and that when he contemplated such sale he was assured by plaintiff of the same thing, and made the sale in reliance on such assurance.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204-210; Dec. Dig. § 78.*]

In Error to the Circuit Court of the United States for the District of Oregon.

Action by Albert Lilienthal and Philip N. Lilienthal, partners as Lilienthal Bros., against J. R. Cartwright. Judgment for defendant, and plaintiffs bring error. Affirmed.

On March 7, 1902, the plaintiffs in error, who were plaintiffs in the court below, entered into two contracts with the defendant in error, defendant in the court below, by the terms of which the latter agreed to complete the cultivation of about 35 acres of land in Harrisburg, Or., and harvest, cure, and bale the hops grown thereon for the two years of 1903 and 1904, and deliver the same to the plaintiffs between the 1st and 31st days of October of the respective years at the agreed price of 10 cents per pound. Each contract provided for the delivery of 30,000 pounds of hops grown on the premises described, and such hops should not be the product of fuggle vines, nor a first year's planting, etc. In 1903, and again in 1904, plaintiffs offered to perform their part of the contracts for the respective years by tendering payment therefor; but the defendant refused to perform his part of the contracts by the delivery of the hops. Thereafter plaintiffs brought two separate actions against the defendant to recover in each case damages for breach of the particular contract.

The defense in each case, as set up in the answer, was that after the contract was made, on the 7th day of March, 1902, "the plaintiffs represented and agreed to and with the defendant that if the defendant should sell the premises, or any part thereof, described in the said contract, that the said contract should be and become void and inoperative as to the land so sold, and then and there agreed with the defendant that he might sell the said lands described in the said contract, and that the defendant would be released by the said sale from any obligation to the plaintiffs under or by virtue of said contract." The defendant sold the farm in question on the 8th day of November, 1902, and did not thereafter cultivate the same, or raise any hops thereon, or have any interest in the crops that were raised thereon, and did not deliver any hops to the plaintiffs. It was alleged in the defendant's answer that plaintiffs ought not to be permitted to allege that the contracts described in the complaint were either of them in force at any time after the 8th day of November, 1902, or to allege or prove that the defendant was obliged, under the terms of said contracts, to deliver to the plaintiffs the hops raised upon the said premises, or any part thereof, or to allege or prove that the defendant was guilty of any breach of the terms or provisions of said contracts, or to allege or prove that the plaintiffs had been damaged in any sum whatever by the alleged breach of said contracts relied on in the complaint.

The cases were by order of the court consolidated and tried together before the same jury, resulting in a verdict for the defendant in each case. In the course of the trial the court admitted testimony, over the objection of the plaintiffs, tending to show that with respect to a prior agreement between the parties, entered into in December, 1900, respecting the sale of hops, the agent of the plaintiffs told the defendant that the contract would be void or at an end if he sold his land. The court also admitted testimony, over the objection of the plaintiffs, tending to show that before and after the signing of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contracts on March 7, 1902, the agent of the plaintiffs told the defendant that if he sold his land that would end the contracts for the delivery of the hops.

J. N. Teal and Wirt Minor, for plaintiffs in error.

M. L. Pipes, J. K. Weatherford, and John R. Wyatt, for defendant in error.

Argued before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The errors assigned may be reduced to two questions—the first relating to the admission of evidence tending to prove a statement alleged to have been made by the agent of the plaintiffs to the defendant in December, 1900, at the time of making prior contracts for the sale of hops, to the effect that the contract (referring to the original contract) would be void or at an end if the defendant sold the land; and, second, relating to the admission of evidence tending to prove statements alleged to have been made by the same agent of the plaintiffs to the defendant, substantially to the same effect, made both before and after the contracts for the years 1903 and 1904 were executed on March 7, 1902. Both of these questions arise in the application of the common-law rule against the admission of parol testimony to vary the terms of a written contract. The rule in the state of Oregon, as it has been enacted into law, is in the following words:

"When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases."

The exceptions are not material to the present case, and therefore need not be stated. With respect to the first question the court admitted the testimony to which objection was made, not as tending to vary any of the terms of the written contract, but for the single purpose of aiding the jury in determining the condition of the minds of the parties, or of the plaintiffs, and their disposition towards entertaining such a proposition, or assenting to consider the original contract void, should a sale of the premises be made by the defendant, and the testimony was so limited by the court in its instructions to the jury. The court said:

"I further instruct you that the written contract, in so far as it pertains to this controversy or has relation thereto, was concluded when the same was signed by Cartwright. All the terms of the contract were agreed upon at that time, and by concert of action of the parties reduced to writing, and when so formulated it is conclusively presumed to contain all that the parties intended to have introduced therein. No other agreement than such as is evidenced by the contract can the parties rely upon as being made prior to the time such signing was had."

The court further instructed the jury with respect to this testimony:

"I have permitted testimony to go to you touching conversations that might have been had between the parties, relative to the disposal of the land by Cartwright, prior to the time when the contract was concluded. This should be considered by you, not as tending to vary any of the terms of the written contract, for it cannot be so varied, but for the single purpose of aiding you in determining the condition of the minds of the parties, or of the plaintiffs, and their disposition towards entertaining such a proposition, or assenting to

considering the original contract void, should a sale of the premises be made by Cartwright. Such an arrangement, if one was had subsequent to the signing, must be substantiated and proven by what was done and said also subsequent to that time, and the defendant's case must be made on that basis, and none other."

The rule under which this testimony was admitted is analogous to the rule that admits parol testimony to show the situation of the parties at the time the writing was made and the circumstances under which it was executed. *Fire Insurance Association v. Wickham*, 141 U. S. 564, 576, 12 Sup. Ct. 84, 35 L. Ed. 860; *McElroy v. British American Assur. Co.*, 94 Fed. 990, 997, 36 C. C. A. 615; *North American Transportation Co. v. Samuels*, 146 Fed. 48, 55, 76 C. C. A. 506.

It appears from the evidence in the record that the circumstances under which the contracts in suit were made arose out of this situation of the parties: In the year 1900 the defendant was the owner of 55 acres of land, of which about 45 acres were in hops; that in December, 1900, he entered into five written contracts with the agent of the plaintiffs for the sale of the hops on this land for the following years; and the evidence tended to show that before the defendant signed these contracts he was told by the agent of the plaintiffs that the written contracts would not prevent him from selling the land—that the contracts would be at an end. It appears that he did sell some portion of the land—probably about 20 acres, though the evidence is not clear upon that point—and the original written agreements were surrendered up and new agreements executed in their place.

This testimony as to the statement of the plaintiffs' agent was admitted, not as tending to vary any of the terms of the written contracts, but as tending to show that a statement upon a collateral subject relating to the sale of the land was one that had been made before by the plaintiffs' agent, and under similar circumstances might reasonably be made the subject of a verbal agreement with respect to the contracts in suit. In this aspect we think the evidence was properly admitted.

With respect to the second question the defendant set up in his answer the verbal agreement with the agent of the plaintiffs to the effect that if the defendant should sell the premises, or any part thereof, described in the written contracts of March 7, 1902, then the said contracts should become void and inoperative as to the land so sold, and that in pursuance of such agreement and in reliance upon its terms defendant sold the land, and did not thereafter cultivate the same, or have any interest in the crops raised upon the land. The defendant relied upon the evidence of these facts as an estoppel. The evidence was admitted by the court, and, we think, properly.

The court instructed the jury upon this question as follows:

"Now, to advance another step in the course of the pleadings and trial, the defendant has set up by his answer that the parties, namely, himself and the plaintiffs, had an agreement or understanding between them, after the contract denoted by the writing had been concluded, that if the defendant should sell the land the written contract would be and become nugatory and void, and its performance would not be insisted upon. It was within the power and privilege of the parties to modify the contract, either by writing or verbally, after it had been concluded, and such modification would be binding as the original

contract. So it was within the power and privilege of the plaintiffs to agree or arrange with the defendant that he would be privileged to sell the land upon which the hops were to be grown, and that thereafter, if sold, the parties should consider the contract as at an end. And it is a question for you to determine whether such an understanding was had subsequent to the time of concluding the original contract. The defense thus set up proceeds upon the idea or ground of estoppel; that, such an understanding having been had, if you so find, the defendant acted thereon and sold the premises; and that, the defendant having been thus led to act through the agreement thereto by the plaintiffs, plaintiffs should not now be permitted to assert the contrary, and to insist upon the performance by defendant of any conditions of the original contract."

The law is here clearly and correctly stated. Was the testimony to which the defendant refers properly admitted? We think it was. The defendant was the owner of a tract of land upon which he had proposed to raise hops, and he had entered into an agreement with the plaintiffs for the sale of these hops for two successive years. Such an agreement might interfere with the sale of the land. Defendant testified that he said to plaintiffs' agent:

"Suppose I sell the rest of the land; the contract is void?"

To which the agent replied:

"Yes; that is the end of our contract. You don't have to deliver no hops only what's growed on that piece of ground."

The defendant further testified that subsequently he told the agent he was going to sell the property, that he had already made a deal, and that he would deliver no more hops, and the agent said "that it was all right." The plaintiffs' agent denied that he had any such conversation with the defendant; but whether any such conversation took place was, of course, a question for the jury.

If, however, defendant's testimony is true it tended to establish the fact that plaintiffs are now asserting a claim which they or their agent induced the defendant to believe they would not rely on, and upon the faith of which defendant placed himself in a position where he could not carry out his contracts. In *Cairncross v. Lorimer*, 3 Macq. 828, Lord Campbell said:

"The doctrine * * * is to be found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

In *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618, the Supreme Court of the United States refers to the case of *Faxton v. Faxon*, 28 Mich. 159, as an authority upon this subject. In that case a mortgagee holding several mortgages prevailed on a son of the deceased mortgagor, then intending to remove to a distance, to remain on the premises and support the family, by assuring him that the mortgages should never be enforced. The son supported the family, and the property grew in value under his tillage. After a lapse of several years the mortgagee proceeded to foreclose. He was held to be es-

topped by his assurances, upon which the son had acted. The Michigan court said:

"The complainant may have estopped himself without any positive agreement, if he intentionally led the defendants to do or abstain from doing anything involving labor or expenditure to any considerable amount, by giving them to understand they should be relieved from the burden of the mortgages. In *Harkness v. Toulmin*, 25 Mich. 80, and *Truesdale v. Ward*, 24 Mich. 117, this principle was applied, in the former case to the extent of destroying a chattel mortgage, and in the latter of forfeiting rights under a land contract, where parties were led to believe they were abandoned. There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect."

This defense is available in law. *Kellogg-Mackay-Cameron Co. v. Havre Hotel Co. et al.*, 173 Fed. 249.

The judgment of the Circuit Court is affirmed.

THOMAS v. WOODS et al.

(Circuit Court of Appeals, Eighth Circuit. September 11, 1909.)

No. 2,914.

1. BANKRUPTCY (§ 440*)—APPEAL AND REVISION OF PROCEEDINGS—MODE OF REVIEW.

The petition of a trustee in bankruptcy, filed in the bankruptcy court, to have certain adverse claims and liens on property belonging to the estate declared void, and for a sale of the property free and clear of the same, has all the elements of a suit in equity, and the decision therein is reviewable by the Circuit Court of Appeals on appeal, under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 293*)—JURISDICTION OF COURTS—PROPERTY IN OTHER JURISDICTIONS.

On the filing of a petition in bankruptcy, all property held by or for the bankrupt is brought within the custody of the court of bankruptcy, and upon adjudication that court is vested with jurisdiction to determine all liens or interests affecting it, which jurisdiction is coextensive with the United States.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 413; Dec. Dig. § 293.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

3. BANKRUPTCY (§ 3*)—CONSTITUTIONAL PROVISIONS—UNIFORMITY OF ACTS.

The constitutional requirement that a bankruptcy law shall be uniform throughout the United States means no more than that it shall by its terms be applicable alike to all of the states, and does not require uniformity in its operation on the varying rights of debtor and creditor under the laws of the several states. Such provision has no bearing on

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the right of dower of a bankrupt's wife, which depends entirely on the state laws.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 1; Dec. Dig. § 3.*]

4. **BANKRUPTCY (§ 143*)—DOWER RIGHTS OF BANKRUPT'S WIFE—LAW GOVERNING.**

The right of a bankrupt's wife to dower in lands owned by him is governed by the laws of the state in which the land is situated, and is not affected by the right of homestead and exemption given by the law of his domicile.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 217; Dec. Dig. § 143.*]

5. **DOWER (§ 2*)—NATURE OF ESTATE—MISSOURI STATUTE.**

Under Rev. St. Mo. §§ 2933, 2946 (Ann. St. 1906, pp. 1690, 1698), a wife is entitled to dower in lands acquired by the husband in that state, unless she has released the same, without regard to whether the parties are residents or nonresidents.

[Ed. Note.—For other cases, see Dower, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.*]

6. **BANKRUPTCY (§ 143*)—DOWER RIGHTS OF BANKRUPT'S WIFE—LAW GOVERNING.**

Bankruptcy acts are intended to deal only with the property of the debtor, which is subject to his debts and cannot affect his wife's dower interest, which by the law of the state can neither be alienated nor extinguished by him nor seized by his creditors. Bankr. Act July 1, 1898, c. 541, § 8a, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3425), providing that the death of a bankrupt shall not abate the proceedings, which shall be conducted in the same manner as though he had not died, "provided that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence," applies by its terms only in case of the bankrupt's death, and in that case the proviso, inserted out of an abundance of caution, is not intended to restrict the widow's dower rights, but to preserve such rights as may have been rendered doubtful by the prior proceedings, and where the bankrupt is still living such proviso does not prevent his wife from asserting her inchoate right of dower in his lands in accordance with the laws of the state in which they are situated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 217; Dec. Dig. § 143.*]

Riner, District Judge, dissenting.

Appeal from the District Court of the United States for the District of Kansas.

In the matter of the estate of William E. Thomas, bankrupt. From an order made on the cross-petition of Frank E. Lewis, trustee, Kate S. Thomas appeals. Reversed.

The Kansas City Coal & Coke Company was a corporation organized under the laws of Kansas by Charles J. Devlin and William E. Thomas, who held its entire capital stock. Its principal place of business was in Kansas City, Mo., where it maintained extensive coal yards situated upon the real property involved in this proceeding. The title to the property was taken in the name of Devlin and Thomas, each taking an undivided one-half interest. The corporation, Devlin, and Thomas have been severally adjudged bankrupts in the United States District Court for the District of Kansas, and their estates are now in the hands of trustees duly appointed in those proceedings. The trustee of the corporation, William S. Woods, filed a petition in the court of bankruptcy against the other trustees and parties claiming under Devlin and Thomas, alleging that the corporation was in fact the owner of the real

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

property, having paid the full consideration therefor, and that the title was taken in the name of Devlin and Thomas, as above mentioned, in trust for it. Devlin and Thomas, before they were adjudged bankrupts, made several conveyances of the lots, which are charged in the petition to have been given in fraud of the bankruptcy law. Mary A. J. Devlin, another of the defendants, is the wife of Charles J. Devlin, and it is alleged that she claims rights of dower in the property, the title to which stood in the name of her husband. The relief asked in the petition is that a decree be entered establishing the title of Woods as trustee, and adjudging that the defendants have no right, title, or interest in the property, and directing its sale, free and clear of all liens and claims whatsoever. The defendant Reeves, as trustee in bankruptcy for Charles J. Devlin, filed his answer, claiming title to the property, as did also Frank E. Lewis, as trustee in bankruptcy for W. E. Thomas. Lewis also filed a cross-bill, asking that his title to the property standing in the name of Thomas be established by judgment of the court. It was further averred in the cross-bill that the appellant here, Kate S. Thomas, the wife of W. E. Thomas, had commenced a suit in the state courts of Missouri to have her contingent right of dower in the property standing in the name of her husband adjudged and established, thereby clouding the title to the property and impairing its value as an asset of the estate. An injunction was asked restraining the further prosecution of this suit. Thereupon a citation was issued to Mrs. Thomas, requiring her to show cause why the injunction should not be granted. She appeared specially, and filed a plea denying the jurisdiction of the court, either over her person or the subject-matter of the controversy. This plea was heard and overruled. She then answered, again challenging the jurisdiction of the court, but setting up her claim of dower, and asking that, if the court should hold that it had jurisdiction, her dower interests might be preserved. The matter was heard upon this answer and the cross-bill, without the taking of evidence, and it was adjudged that the defendant Kate S. Thomas had no right to an inchoate dower interest, or otherwise, in any of the property mentioned in the cross-bill, and a permanent injunction was issued restraining her from further prosecuting the action in the state court. Against this decree Mrs. Thomas sued out the present appeal.

Inghram D. Hook (W. W. Hooper, on the brief), for appellant.

Denton Dunn (Charles Blood Smith, Henry D. Ashley, and William S. Gilbert, on the brief), for appellees.

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

AMIDON, District Judge (after stating the facts as above). At the outset we are confronted with the question which has become a part of nearly every bankruptcy cause in an appellate court, namely: Should the review have been sought by appeal or petition? The confusion existing on this subject has been frequently confessed by the courts. In *re McMahon*, 147 Fed. 684, 77 C. C. A. 668; *Coder v. Arts*, 213 U. S. 223, 232, 29 Sup. Ct. 436, 53 L. Ed. 772. The classification of matters in bankruptcy as "proceedings in bankruptcy" and "controversies arising in bankruptcy proceedings" is vague and in actual application has bewildered the courts and the legal profession. It is quite manifest that, when the decision of a trial court in a "bankruptcy proceeding" is brought under review in an appellate court, it presents a "controversy," and of necessity this is also a "controversy arising in a bankruptcy proceeding." The phrases, therefore, upon which this classification is based, are tautological. Again, the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St.

1901, p. 3418]) itself uses the phrase "proceedings in bankruptcy" in a double sense. Section 23 provides as follows:

"The United States Circuit Court shall have jurisdiction of all controversies at law and in equity as distinguished from proceedings in bankruptcy between trustees as such, and adverse claimants, concerning the property acquired or claimed by the trustees," etc.

Here the term "proceedings in bankruptcy" embraces "controversies arising in bankruptcy proceedings," as well as "bankruptcy proceedings proper," and sets them both over against plenary suits between trustees and adverse claimants (instituted by bill or complaint, with subpoena or summons), touching rights or property not in the custody of the court. In section 24b, however, the term "proceedings in bankruptcy," as construed by the courts, has been given a narrower meaning, and has been set over against "controversies arising in bankruptcy proceedings," as used in section 24a. Here it has been thought to mean any of the administrative acts intervening between the filing of the petition and the granting of the discharge, as distinguished from those "controversies arising in bankruptcy proceedings" on petition, which would have been the subject of plenary suits if the estate had not been in the custody of a court of bankruptcy. The confusion that has resulted from the attempt of the courts to apply this classification to actual litigation affords strong support for the decisions of this court that the methods of review provided by the bankruptcy act are not mutually exclusive but cumulative. In *re McKenzie*, 142 Fed. 383, 73 C. C. A. 483; *Dodge v. Norlin*, 133 Fed. 363, 66 C. C. A. 425; In *re Holmes*, 142 Fed. 391, 73 C. C. A. 491.

The present appeal, however, would have been proper under any interpretation of section 24 of the bankruptcy act. This proceeding was instituted by the trustee to have certain adverse claims and liens upon property belonging to the estate declared void and for a sale of the property free and clear of the same. It involves every attribute of a familiar suit in equity. It can be distinguished from such suit only by the fact that it was instituted by petition instead of bill, and the adverse parties were brought before the court by citation instead of subpoena. There are some cases which suggest that if such a proceeding is instituted by a petition, filed by the adverse claimant for the enforcement of his right, and the trustee is cited to answer such a petition, this constitutes "a controversy in a bankruptcy proceeding," which may be reviewed by appeal; but if the parties be reversed, and the trustee files a petition charging that the adverse claim or lien is void, and asking that the property be sold free and clear of it, and the adverse claimant is cited in to answer such a petition, this constitutes not a "controversy," but a "proceeding in bankruptcy proper," and can be reviewed as to matters of law only under section 24b. *Morgan v. First National Bank*, 145 Fed. 466, 76 C. C. A. 236; In *re McMahon*, 147 Fed. 684, 689, 77 C. C. A. 668. In our judgment such a distinction is wholly untenable. If enforced, it would deny to parties having adverse liens or claims upon property belonging to the estate the right to review the decision of the court of bankruptcy as to any matter of fact. The consequence of such a holding would be serious. Whether

there would be any right of review on questions of fact would depend wholly upon whether the proceeding was instituted by the trustee or by the adverse claimant. In either case the right involved would be the same, and the issue tried would be the same. The only distinction would be that the parties would be reversed upon the record. Surely what constitutes a "controversy," within the meaning of section 24a, must be determined by the nature of the right involved and the issue tried, and not by the accidental circumstance as to which party is actor and which defendant. Sound reason can be given why as to the purely administrative steps in a bankruptcy proceeding the decision of the trial court on questions of fact should be final. In *re Friend*, 134 Fed. 778, 67 C. C. A. 500. But no sound reason can be given why, in a controversy possessing every attribute of a suit in equity, an aggrieved party should not have the right of review as to questions of fact as well as of law in accordance with the established practice in equity. It ought not to be possible for the trustee to defeat such a right by being first to file a petition. Most of the confusion on this subject has arisen out of a misunderstanding of the decision in *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051. In that case the trial court found as a fact that at the time the petition in bankruptcy was filed the property in dispute was in the possession, not of the bankrupt, but of an adverse claimant. The Supreme Court held that this finding defeated the jurisdiction of the trial court. The property had been converted into money, and the trial court by its decision ordered the money to be turned back to the parties who were in possession of the property. This is the point at which the decision of the Supreme Court has been misunderstood. It has been generally thought that the trial court, by its judgment disposing of the fund, passed upon the rights of the parties. This, however, was not the case. It would have been its duty to order the fund turned over to the party who had possession of the property, even if the court decided that it had no jurisdiction of the controversy. The Supreme Court places the decision of the trial court upon that ground, for it says, at page 291 of 198 U. S., page 696 of 25 Sup. Ct. (49 L. Ed. 1051):

"The sale in the circumstances did not change the situation. The proceeds stood in place of the property, and the order returning the proceeds was equivalent to an order returning the property. This it was proper to do, whether the court had held that it lacked jurisdiction, or ruled in favor of petitioners on the merits."

As thus interpreted, the decision of the trial court never passed upon the merits of the controversy. The whole case as construed by the Supreme Court involved solely a question of jurisdiction. If that was its character, it presented simply a question of law which might be fully reviewed by petition. The Supreme Court has itself thus interpreted its decision in *First National Bank v. Title & Trust Company* in the recent case of *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772. Speaking of its former decision, the court there says:

"In that case there was an attempt on the part of the trustee to invoke an adjudication as to the title to property which the District Court found not to be in the possession of the trustee, notwithstanding the petition of the

trustee had averred possession, and it was held that when this fact appeared the District Court had no longer jurisdiction of the case, under the doctrine laid down in *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, and ought to have dismissed the case."

It is manifest that the Supreme Court, if the judgment in *First National Bank v. Title & Trust Company* had properly involved a decision as to the merits, would have decided that appeal was the proper method of bringing the question before the appellate court, for it sustained an appeal on a petition by a trustee to determine the rights of adverse claimants to property in the custody of the court in a later case reported in the same volume; namely, *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157.

We are of the opinion, therefore, that the case is properly before us on the appeal.

The objection of the appellant that the trial court was without jurisdiction of the property, because it was not situated in the district of Kansas, has no merit. Upon the filing of a petition in bankruptcy, all property held by or for the bankrupt is brought within the custody of the court of bankruptcy, and, upon adjudication, that court is vested with jurisdiction to determine all liens and interests affecting it. This jurisdiction is coextensive with the United States. In *re Wood & Henderson*, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046; In *re Granite City Bank*, 137 Fed. 818, 70 C. C. A. 316; In *re Muncie Pulp Co.*, 151 Fed. 732, 81 C. C. A. 116; *Guardian Trust Co. v. Kansas City Southern Railway Co.* (C. C. A.) 171 Fed. 43; *Dempster v. Waters-Pierce Oil Co.* (C. C. A.) 172 Fed. 353.

This brings us to the merits of the case. At all the times mentioned in the record, Mr. and Mrs. Thomas were citizens and residents of the state of Kansas, by whose laws the wife's right of dower has been abrogated. By the laws of Missouri, where the lands are located, the wife is granted a right of dower in all real property owned by the husband during coverture. Section 8 of the bankruptcy act is as follows:

"The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: Provided, that in case of death, the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence."

It is contended by appellee, and was held by the trial court, that under the proviso of this section the dower rights of the wife, in case of the bankruptcy of her husband, are restricted to those allowed by the laws of the state of the bankrupt's residence. Upon this interpretation of the statute, it was decided that Mrs. Thomas was not entitled to any dower interest in property situated in Missouri, although the laws of that state granted her such rights. We do not think this a sound view of the law of dower, or of section 8 of the bankruptcy act.

1. It is first urged in support of the decision that, if the laws of the several states on the subject of dower are made applicable to the estates of bankrupts, it will cause the bankruptcy act not to be uniform. That, in our opinion, is a mistaken view of the provision of the federal Constitution relating to bankruptcy. The uniformity

which it requires relates to the law itself, and not to its results upon the varying rights of debtor and creditor under the laws of the several states. The Constitution requires acts of bankruptcy to be "uniform throughout the United States." That requirement had its origin in the fear, which was at all times a controlling motive in the convention that framed the federal Constitution, that the powers which it conferred would be exercised by the party in control of the national government to oppress that section of the country which for the time being was opposed to such party. It belongs to the same class as the provision which requires revenue laws to be uniform. As Judge Love says in the case of *Darling v. Berry* (C. C.) 13 Fed. 659, 667:

"When a bankrupt, revenue, or naturalization law is made by its terms applicable alike to all the states of the Union, without distinction or discrimination, it cannot be successfully questioned on the ground that it is not uniform, in the sense of the Constitution, merely because its operation or working may be wholly different in one state from another. The circumstances and conditions existing in the states of this Union are infinitely various. No law which human ingenuity could possibly frame would be uniform in the sense of operating equally or alike in the various states, with their different conditions and diversified interests. The Constitution provides that 'all duties, imposts and excises shall be uniform throughout the United States.' Now, suppose one or more states should succeed in suppressing utterly the manufacture and sale of ardent spirits and malt liquors, then a federal tax upon these commodities would be entirely inoperative in such states. In such case millions might be collected under an excise law in Illinois, and not a cent in Iowa. The operation of such a law would then be anything but uniform in the two states; but would any court for that reason declare a general law imposing a tax of the kind unconstitutional? Again, a tariff law might be anything but uniform in its operation upon different states. It might foster the industry of a manufacturing state, and oppress that of a strictly agricultural state. But could it on this account be said to be not a uniform law within the meaning of the Constitution, and therefore void? * * * All that the Constitution intends is that Congress shall not pass partial revenue and bankrupt laws. It shall not prescribe one law for this state or section, and a different law for that state or section. The law must be general and uniform in its provisions, but its working and operation may be very different in different states, owing to their diverse conditions and circumstances. Congress can prescribe a uniform law, but it cannot create uniform conditions and circumstances in the various states of the Union."

Nothing can be added to the clearness and force of this language. In our dual form of government, when Congress legislates upon the subject of bankruptcy, it applies the system which it ordains to the rights of both debtor and creditor, as defined by the laws of the states. It could not make the results of a law of bankruptcy uniform, without establishing a comprehensive code embracing the entire subject-matter of civil law. It is manifest, therefore, that the requirement that a statute of bankruptcy shall be uniform has no bearing on the right of dower. That is a matter exclusively for state definition. See, also, *Hanover National Bank v. Moyses*, 186 U. S. 181, 190, 22 Sup. Ct. 857, 46 L. Ed. 1113.

2. It is next urged that the right of dower belongs in the same class as the right of exemptions and homesteads, which are confined by section 6 of the bankruptcy act to the state of the bankrupt's domicile. Their similitude is very slight. Both are in a general way for the protection of the family. There, however, their likeness ceases. The

homestead and exemptions are a part of the bankrupt's estate. They are both primarily to be claimed by him and set off to him. Their selection from his estate arises at the time when that estate is to be appropriated to the payment of the claims of his creditors. Dower, on the other hand, is no part of the bankrupt's estate. The wife derives no right from him either by grant or contract. As the Supreme Court says in *Randall v. Krieger*, 23 Wall. 137, 148, 23 L. Ed. 124: "It is wholly given by law." Congress has plenary power over the subject of exemptions, because they are part of the bankrupt's estate. It may, as in the present law, adopt the exemption laws of the several states, or it may, as in the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), adopt local laws in part, and supplement these with a schedule of its own. Its power to deal with the subject, however, arises out of the fact that exemptions are a part of the bankrupt's estate. This consideration shows that the right of dower does not belong in the same class. Again, the right of dower has nothing to do with the insolvency of the husband. It arises from time to time during the marriage relation as the husband acquires real property. If the wife has not released her right of dower, it is as much her own private, absolute property as if she had acquired it by purchase. That estate can no more be transferred to her husband's creditors than any other portion of her separate estate. At the present time in the United States, the wife, as to her property rights, is a third person, and her estate is no more affected by the insolvency of her husband than is the property of other third parties. In our judgment it would be beyond the constitutional power of Congress to provide that in case of bankruptcy the dower rights of the bankrupt's wife, as defined by the laws of the several states, ceased, and the real property owned by him passed to his trustee in bankruptcy discharged from such right of dower. Bankruptcy can only deal with what in law belongs to the bankrupt. It may annul his acts and the acts of his creditors which interfere with the just enforcement of its provisions. It cannot, however, annul an act of the Legislature of a state which previous to the statute of bankruptcy had vested an estate in the wife of the bankrupt. Its whole field of operation is circumscribed to getting in the estate which under the law belongs to the bankrupt, and distributing the same to his creditors. It cannot reach out and take property which under the law belongs to the wife, and apply it to the payment of the bankrupt's debts, any more than it could seize that portion of her property which she acquired by purchase or devise. Again, it does not follow that because the right of homestead and exemptions is confined in most of the states to the domicile of the claimant, such a restriction would be appropriate in regard to dower. Dower is not measured in value or quantity as homesteads or exemptions are. The amount of it is dependent solely upon the amount of real property of which the husband is seized. The debtor could not be allowed homesteads and exemptions under the laws of different states without securing a double allowance. The right must be restricted to the laws of some particular state, and the most natural restriction is the state of the claimant's domicile. Such considerations, however, do not apply to dower. Granting the

right in real property situated in different states does not duplicate the right. As already mentioned, it is measured by the extent of the husband's ownership of property, and the location of such property is material only as the right of dower is governed by the law of the state in which the land is situated.

We are unable to see how the decision in *Re Stevens*, Fed. Cas. No. 13,392, throws any light on the present case. There the bankrupt had filed a petition in bankruptcy in the Eastern district of Wisconsin. A part of his estate, consisting of a span of horses, harness, and wagon, while temporarily across the state line in Illinois, had been seized on a warrant of attachment. The filing of the petition in bankruptcy had the effect to dissolve this attachment; but the creditors petitioned the court of bankruptcy to allow the action in Illinois to proceed, assigning as a reason that under the exemption laws of Wisconsin the property in question would be exempt, while under the laws of Illinois it would not be. The court very properly held that the bankrupt's right of exemption must be determined by the state of his domicile; that the creditors could not invoke the laws of Illinois, because they granted less exemptions, any more than the bankrupt could have invoked them if they had granted larger exemptions than Wisconsin.

3. Some point is made of the fact that under the laws of Kansas the family secured a liberal homestead and exemptions. That has nothing to do, however, with the right of dower. The right of homestead and exemptions has existed in all of the states granting the right of dower, and in many of them these allowances are quite as liberal as they are in the state of Kansas.

4. That Mrs. Thomas has an inchoate right of dower in the property in question under the laws of Missouri is not controverted. Such a right is expressly secured to her by sections 2933 and 2946 of the Revised Statutes of 1899 of that state (Ann. St. 1906, pp. 1690, 1698), and continues until released by her deed in the manner therein specified. These statutes have been looked upon with favor by the highest court of that state, and so construed to carry out their manifest purpose. *Grady v. McCorkle*, 57 Mo. 172, 17 Am. Rep. 676; *Ellis v. Kyger*, 90 Mo. 606, 3 S. W. 23; *Davis v. Green*, 102 Mo. 170, 14 S. W. 876, 11 L. R. A. 90; *Hall v. Smith*, 103 Mo. 289, 15 S. W. 621; *Blevins v. Smith*, 104 Mo. 583, 16 S. W. 213, 13 L. R. A. 441; *Long v. Kansas City Stockyards Co.*, 107 Mo. 298, 17 S. W. 656, 28 Am. St. Rep. 413. The right of dower in real property is determined by the laws of the state in which the property is situated. *Story on Conflict of Laws*, §§ 424, 428, 445; *Kerr v. Moon*, 9 Wheat. 565, 6 L. Ed. 161; *Wilson v. Cox*, 49 Miss. 538; *Apperson v. Bolton*, 29 Ark. 418; *Washburn v. Van Steenwyk*, 32 Minn. 336, 20 N. W. 324; *Jones v. Geroch*, 59 N. C. 190; *Jennings v. Jennings*, 21 Ohio St. 56; *Atkinson v. Staigg*, 13 R. I. 725. The highest court of Missouri, from an early date, has construed the statutes of that state as securing the right of dower in real property within the state to nonresidents, the same as to residents. *Stokes v. O'Fallon*, 2 Mo. 32. Suppose a bankrupt residing in Missouri should die seised of real property in Kansas; would his widow, under the proviso of section 8 of the bankruptcy act, be

entitled to dower in that property? Plainly not, because the law of Kansas does not grant dower. No more should she, when the situation is reversed, lose her right of dower as to real property situated in Missouri. That right is fixed by the laws of the state in which the property is situated.

It is said by appellee that the right of dower is "a mere intangible, inchoate, contingent expectancy, and not an estate in lands, and does not rise to the dignity of a vested right." That is quite true. But this has been the quality of the right at all times, at common law and under statute. It is precisely such a right that is secured by the statute of Missouri, and it would be, in our judgment, a perversion of judicial power to make of the inherent qualities of the right a reason for destroying or impairing it.

It must be conceded, therefore, that the right exists, unless it has been taken away by the bankruptcy act. To determine whether that has happened, we ought to look first at the general scheme of that statute. The most conspicuous feature of the present bankruptcy act is a clear purpose to save to the bankrupt and his family every right possessed by them under the laws of the several states, and to grant to creditors no property or right which would not have been theirs if the bankruptcy act had not been passed. The courts have repeatedly referred to this as a feature distinguishing the present act from all previous statutes on the subject. It makes the law of the several states the measure of the rights to be protected and enforced, both as to the bankrupt and his creditors. In defining what shall pass to the trustee for the benefit of creditors, it designates "property which prior to the filing of the petition the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him." By the express provisions of the statute of Missouri, the wife's right of dower does not fall within this language. It being no part of the property which the trustee is to administer, it is difficult to understand how the right of dower can be affected by the bankruptcy act; and yet the whole purpose of the order now under review is to appropriate to the bankrupt's creditors the widow's right of dower, by selling the property freed from that right. But, again, the present bankruptcy act also approaches this subject negatively. It points out in section 67 all liens, transfers, and estates which are to be invalidated by the bankrupt act. If it had been the intent of the framers of the statute either to restrict or abolish the right of dower, we should have found the provision designed to accomplish that purpose in this section. It is not there. On the contrary, a most scrupulous care is evinced throughout the section to save all rights and liens obtained in good faith from the bankrupt. If rights resting wholly upon private negotiation are safe, can any reason be assigned why a right created by statute in furtherance of the public policy of a state should not also be secure?

In the light of these general considerations, let us approach section 8 of the bankruptcy act, which, according to appellee, destroys Mrs. Thomas' right of dower. In our judgment that right is safe upon either of four grounds:

(a) The principal clause of section 8 deals with the contingency of the death of the bankrupt during the pendency of the proceedings in bankruptcy. By a cardinal rule of interpretation, a proviso does not extend beyond the scope of the principal clause of the statute. The entire language and purpose of the section clearly indicates to our minds that this rule of interpretation should be applied in ascertaining its meaning. It relates only to estates in which the bankrupt dies during the pendency of the proceeding. This is not only the general subject-matter of the section, but is also clearly pointed out in the proviso itself as the contingency intended to be covered by it. "In case of death," are the first words of the proviso, and these words qualify all its other provisions. Such being the scope of the section, the estate here involved can be in no way affected by it, for the bankrupt is still alive.

(b) It was manifestly the belief of Congress that, in the absence of section 8, the bankruptcy proceeding would abate in case of the bankrupt's death. The property of the estate would in that event pass to the personal representatives of the bankrupt, to be administered according to local laws. In such a contingency, the widow's right of dower in real property, and the allowances to the family out of the personal estate, would be complete, would become immediately vested, and would take priority over the rights of creditors. Section 8 prevents the proceeding in bankruptcy from abating; but, by the proviso, Congress intended to save to the widow and children all that they would have obtained in case of its abatement. It cannot be denied that, if the present bankruptcy proceeding were to abate, Mrs. Thomas' right of dower in real property in Missouri would be complete.

(c) The proviso may be interpreted as having been used simply out of an abundance of caution. If that be its effect, it leaves all rights precisely as they would have been if the proviso had been omitted. It neither enlarges nor restricts those rights, but simply saves them. That is the interpretation which was put upon the language by the majority of this court in the case of *In re McKenzie*, 142 Fed. 383, 73 C. C. A. 483. If we adopt that interpretation, it leaves the right of dower just as it stood under the laws of the several states. The fact that the proviso is restricted by the clause "fixed by the laws of the state of the bankrupt's residence" would be immaterial. The entire proviso being used only out of an abundance of caution, the fact that its language is not as comprehensive as the right to which it refers would not restrict the right, because the intended effect of the proviso is simply to preserve rights as already existing. To say that the proviso was used for the purpose of removing a possible doubt as to whether existing rights were not to be affected by section 8, and yet hold that, because its language is narrow, the rights to which it refers are narrowed, is to deny in the conclusion what is assumed in the premise, namely, that the proviso is used out of an abundance of caution, and not for the purpose of affecting existing rights. It was expressly decided in *Porter v. Lazear*, 109 U. S. 84, 3 Sup. Ct. 58, 27 L. Ed. 865, that the omission from a bankruptcy act of any provision saving the right of dower "does not enlarge the effect of the assign-

ment, or of the sale in bankruptcy, so as to include lawful rights which belong, not to the husband, but to his wife." It was further decided that the proviso in the act of 1841, saving the right of dower, was "a mere declaration, inserted for greater caution." See, also, *Hanover National Bank v. Moyses*, 186 U. S. 181, 190, 22 Sup. Ct. 857, 46 L. Ed. 1113. If we adopt the interpretation of section 8 here outlined, there is no room for a contention that Mrs. Thomas' right of dower does not exist as defined by the laws of Missouri.

(d) At the time the bankruptcy act was passed, there were nine states of the Union, namely, Connecticut, Georgia, Mississippi, North Carolina, Tennessee, Vermont, New Hampshire, Delaware, and Florida, in which the right of dower applied, not to real property of which the husband was seised during the coverture, but only to such real property as he was seised of at the time of his death. There were also in force in many states statutes giving to the wife a right in the nature of dower in all personal property owned by the husband at the time of his death. In all of these states, if a bankrupt husband died while his proceedings were pending, it might very well have been contended that the wife's right of dower in his estate did not exist, because the legal title and possession of his property would have passed to his trustee. It was the view of Judge Adams in the *McKenzie Case* that the proviso of section 8 was intended to prevent such a result. That interpretation receives strong support from the foregoing facts. We recognize, of course, that Congress could not, in the bankruptcy act, enlarge the right of dower as defined by the laws of the several states; and if the right as thus defined was restricted to property of which the husband was possessed at the time of his death, Congress could not give the right to property not so situated. But, on the other hand, the bankrupt is dispossessed of his property by virtue of the bankruptcy act, and it was competent for Congress to define and restrict the force and effect of that act. The trustee in bankruptcy holds for the benefit of the bankrupt, as well as his creditors, and it was competent for Congress to declare that the title passing to him under its act should not impair the right of dower as granted by the laws of the several states. This would be in harmony with the general scheme of the act to give to the creditors only that which would have belonged to them if the bankruptcy act had not been passed, and to save to the bankrupt and his family everything that would have belonged to them as against the creditors in the absence of the bankruptcy act. If this be the correct interpretation of the proviso, Mrs. Thomas' right of dower is safe upon two grounds: (1) The entire purpose of the proviso being to preserve the right as defined by the laws of the several states, that purpose should control, and the last clause should not be seized upon to defeat it. (2) The proviso was intended to apply only to those states in which the right of dower is restricted to property of which the husband is seised at the time of death. Missouri is not in that class, as the widow's right of dower there extends to all property owned by the husband during the coverture. Therefore the proviso, under the view of its meaning which we are now considering, could have no effect upon real property in that state.

The proviso deals with two classes of rights: First, the widow's right of dower in real property; second, the allowances to the family out of the personal estate. This second class of rights is necessarily fixed by the laws of the state of the bankrupt's residence, for general rights in personal property follow the person of the owner and are determined by the laws of the state of his residence. The framer of the proviso used, in its last clause, language which was entirely appropriate to the allowances, and in part appropriate as to the right of dower. Having in mind several classes of rights, he made the not uncommon mistake of using language which was not quite comprehensive enough to cover all those rights under all conditions. If the proviso was a grant of rights, there would be reason in restricting the rights to its language; but, being intended to protect existing rights, it ought not to be given an interpretation which would destroy any part of those rights.

Real property is now, especially in the West, almost as much an article of trade as personal property. For this reason the right of dower, which used to be favored, has of late become odious. Courts, however, cannot allow the odiousness of the right to lead them to adopt a strained construction of a statute, for the purpose of abating what may possibly be regarded as a commercial nuisance. These are considerations for the Legislature alone.

The case was disposed of in the trial court upon cross-bill and answer, without the introduction of evidence. The only questions raised were questions of law. It must have been held that the wife of a resident of Kansas was not entitled to an estate of dower in real property situated in Missouri. We think that construction was wrong. But, if the interpretation which we have indicated should be accepted, it would not follow that Mrs. Thomas would be entitled to an estate of dower in the property here involved. If the averments of the original petition are true, Mr. Thomas held the property in trust for the corporation, and in that case his wife would not be entitled to dower rights therein.

The decree should be reversed, and the trial court directed to proceed in accordance with the views expressed in this opinion. It is so ordered.

RINER, District Judge, dissents.

IN RE BOTHE.

(Circuit Court of Appeals, Eighth Circuit. October 11, 1909.)

No. 95.

1. CHATTEL MORTGAGES (§ 47*)—VALIDITY—DESCRIPTION OF PROPERTY.

A chattel mortgage on property described only as "five wagons," when the mortgagor owned more than five wagons, is void for insufficiency of description.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 100; Dec. Dig. § 47.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. **BANKRUPTCY (§ 278*)—RIGHTS OF TRUSTEE—ENFORCEMENT OF EQUITIES OF SPECIAL CREDITORS.**

A trustee in bankruptcy represents all persons interested in the estate, and may enforce in the court of bankruptcy equitable rights existing in favor of certain of the creditors only.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 418; Dec. Dig. § 278.*]

3. **CHATTEL MORTGAGES (§ 197*)—MISSOURI STATUTE—EFFECT OF FAILURE TO RECORD.**

Under Rev. St. Mo. 1899, § 3404 (Ann. St. 1906, p. 1936), which provides that a chattel mortgage shall be void against any other person than the parties thereto unless possession of the property is taken by the mortgagee or the mortgage is recorded, as construed by the appellate courts of the state, creditors of a mortgagor who became such after the mortgage was given, but before it was recorded, have equities superior to those of the mortgagee, and the mortgage remains void as to them, although subsequently recorded, and although they have acquired no title to or lien upon the property.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 429-433; Dec. Dig. § 197.*]

Petition to Revise Decree of the District Court of the United States for the Eastern Division of the Eastern District of Missouri, in Bankruptcy.

In the matter of Lawrence Martin, bankrupt. On petition by George Bothe to revise an order holding a chattel mortgage invalid as to certain creditors. Petition dismissed.

On June 2, 1906, Lawrence Martin executed and delivered to George Bothe a chattel mortgage, conveying to him certain personal property, including five wagons, to secure him against liability on an indorsement then made for Martin's accommodation. The mortgaged property remained in the possession of the mortgagor, and the mortgage itself was not recorded, until June 4, 1907. Between the execution of the mortgage and its recording Martin became indebted to several persons for merchandise purchased of them, and subsequently on January 25, 1908, filed a petition upon which he was adjudicated a bankrupt. On February 5, 1908, Bothe filed a petition with the referee praying for the possession of the mortgaged property, claiming title thereto by virtue of his mortgage. Pending a hearing and determination of this petition, the court ordered a sale of the mortgaged chattels free of liens. This sale was made, and the proceeds were held subject to the same liens and preferential rights as the property itself had been. The mortgagee claimed them by virtue of his mortgage, and the referee and the court below decided that the mortgage was absolutely void in so far as it attempted to convey the five wagons, and as to creditors of the bankrupt who extended credit to the bankrupt after the execution of the mortgage, and before it was recorded, that it was also invalid in respect of all the property attempted to be conveyed. This is a petition by the mortgagee for review, challenging that decision.

Charles H. Franck (A. M. Frumberg, on the brief), for petitioner.
L. L. Leonard, for respondent.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). The court below was clearly right in holding the mortgage inoperative and void as to the five wagons. It appears without contradiction that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Martin had six wagons of various kinds at the time he executed the mortgage. The only description of those conveyed was "five wagons." There was no segregation of any particular five wagons from the larger number owned by Martin, and no means were disclosed, in the mortgage or otherwise, for determining which of them were intended to be conveyed. For want, therefore, of a sufficient description to identify the property intended to be conveyed, the mortgage was void as to the wagons.

The mortgage was recorded more than four months prior to the adjudication in bankruptcy, and therefore, so far as the bankruptcy act was concerned, it created a valid preferential right over all other creditors of the bankrupt. But by the law of Missouri (section 3404, Rev. St. 1899 [Ann. St. 1906, p. 1936]), where the mortgage was made, it became and was invalid against any other person than the parties thereto until it was recorded. No question of lawful or unlawful preference within the contemplation of the bankruptcy act is now presented. The sole inquiry is whether the property in question, prior to the bankruptcy proceedings, belonged to the mortgagee or to the creditors of the bankrupt who extended credit to him, after the execution of the mortgage and before it was recorded. No other creditors assert any claim to it.

The trustee in bankruptcy stands for and represents all persons interested in the estate of the bankrupt. In this case, doubtless moved so to do by the interested creditors, he seeks to assert an equitable right in favor of certain special creditors to a part of the bankrupt's estate as against the holder of a chattel mortgage purporting to convey it to one creditor. The rights of these special creditors rest on the principle of estoppel, and are no less enforceable in the bankruptcy court than they would be if they had their origin in written contract. Equitable rights, no less than legal, are there enforced. *Atchison, Topeka & S. F. Ry. Co. v. Hurley*, 153 Fed. 503, 82 C. C. A. 453, s. c. 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729. The mortgagee, Bothe, by leaving the property in the possession of the bankrupt and withholding the mortgage from the record, invited others to deal with the bankrupt on the assumption of his ownership of an unincumbered title to the property conveyed. Whether those so dealing with him were actually deceived or not is immaterial. The inevitable tendency was to mislead and deceive, and the presumption must be indulged that they were misled to their injury. *Landis v. McDonald*, 88 Mo. App. 335; *Harrison & Calhoun v. South Carthage Min. Co.*, 95 Mo. App. 80, 68 S. W. 963, and cases cited.

As between the mortgagee and those dealing with and extending credit to the mortgagor subsequent to the date of the mortgage and prior to the recording of it, there is an obvious equity in favor of the latter. It was doubtless in recognition of this equity that the provisions of section 3404 were enacted into positive law. That section has been the subject of much consideration by the appellate courts of Missouri; and this court, in the recent cases of *First Nat. Bank of Buchanan County v. Connett*, 142 Fed. 33, 37, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148, and *McElvain v. Hardesty* (C. C. A.) 169 Fed. 31, considered the

Missouri cases and undertook to follow the interpretation placed upon the statute by them. In the former, speaking by Judge Hook, we said:

"The Missouri statute provides that no mortgage of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be recorded in the county in which the mortgagor resides. The sweeping character of its provisions at once attracts attention. Under this statute it has been held that where possession is not taken an unrecorded chattel mortgage is fraudulent and void in law as to every one, excepting trespassers, parties to the instrument, and general creditors whose demands arose prior to the time it was given; nor as to such prior creditors is it valid if by proceedings in court or otherwise they have secured a lien upon the property before it is recorded. Such a mortgage is also utterly void as to simple contract creditors who extended credit after it was given, and who have secured no title or lien by purchase, execution, attachment, or otherwise. As to them the subsequent recording of the instrument is of no effect. It cannot be asserted against the enforcement of their demands."

We perceive no reason for departing from this deliberate declaration, and we accordingly adhere to the conclusion there expressed.

Detached expressions are found in *Harrison & Calhoun v. South Carthage Min. Co.* and *Landis v. McDonald*, *supra*, to the effect that, if "a prior creditor" fails to obtain some specific lien by attachment, execution, or otherwise on the mortgaged property before the mortgage is actually recorded, the mortgage is by the act of recording validated as to such creditor, and his right is subordinated to the rights of the mortgagee; and counsel for the mortgagee seize on expressions of this kind and claim that, because the special creditors in this case failed to take steps to fix a lien upon the mortgaged property before the mortgage was recorded, their rights were lost. We cannot give our assent to this claim. Until the mortgage was recorded it was absolutely void as to these special creditors. Their superior rights arose against the property of their debtor while the mortgage was thus void, and to hold that such rights were lost before they had an opportunity to assert them, before they even knew of the existence of the mortgage, is a palpable absurdity. We find nothing in the cases referred to to justify any such contention. The words "prior creditors," there referred to, clearly relate to creditors whose claims antedated the execution of the mortgage. This is apparent, not only from the opinions taken as a whole, but from other cases there cited and relied on. Such creditors, who parted with nothing on the faith of their debtor's ostensible ownership of unincumbered property, are required to take some step to fix a lien upon the mortgaged property prior to the recording of the mortgage in order to secure an equitable standing. Until then they have no equitable right or claim enforceable in a court of equity. On the contrary, creditors who extend credit to the mortgagor after the execution of the mortgage and before it is recorded have, as already seen, a clear equitable right, inhering in the transaction itself, superior to the mortgagee, and this right entitles them to relief without the necessity of fixing a lien as a prerequisite. This distinction, we think, is clearly recognized in the Missouri cases relied upon by counsel, and was distinctly recognized and applied by us in *First Nat. Bank of Buchanan County v. Connett*, where we said:

"Such a mortgage is also utterly void as to simple contract creditors who extended credit after it was given, and who have secured no title or lien by purchase, execution, attachment, or otherwise. As to them the subsequent recording of the instrument is of no effect. It cannot be asserted against the enforcement of their demands."

The trial court held that the proceeds of the property sold should be distributed ratably between the creditors whose claims accrued after the execution of the mortgage and before it was recorded, and also held that the claim of the mortgagee in this case had the same equitable standing as the other claimants, and should participate ratably with them in the distribution of the proceeds of the property. The trustee does not challenge that feature of the order, and hence it needs no consideration.

We think the mortgagee was accorded all the rights he had; and, finding no error in the proceedings in the trial court, this petition for review is dismissed.

ARKANSAS VALLEY SUGAR BEET & IRRIGATED LAND CO. v. FT. LYON CANAL CO.

(Circuit Court of Appeals, Eighth Circuit. October 11, 1909.)

No. 2,852.

1. STIPULATIONS (§ 14*)—RULES OF CONSTRUCTION.

A stipulation to settle controversies or to assist a court in deciding them ought not to be discouraged by a narrow and unreasonable construction that would defeat the manifest intention of one of the parties, acceded to by the other.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.*]

2. CORPORATIONS (§ 506*)—RIGHTS OF STOCKHOLDERS—WHEN NECESSARY PARTIES TO SUIT.

Under Rev. St. Colo. 1908, § 865, which provides that each stockholder of a corporation shall have the right to nominate directors to be voted for, and to vote the number of shares held by him for as many directors as are to be chosen, or to cumulate the same upon one or more candidates, and that directors shall not be elected in any other way, the right to elect directors is a right of the stockholders as such, as distinguished from the corporation, and the validity of a contract made by the corporation, giving another corporation the right to select a certain number of its directors, should not be determined in a suit to which the stockholders are not parties, otherwise than as represented by the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 506.*]

Appeal from the Circuit Court of the United States for the District of Colorado.

Suit in equity by the Ft. Lyon Canal Company against the Arkansas Valley Sugar Beet & Irrigated Land Company. From a decree for complainant, defendant appeals. Modified and affirmed.

Platt Rogers (John F. Shafroth and Frank E. Gregg, on the brief), for appellant.

Robert S. Gast (Alva B. Adams and H. L. Lubers, on the brief), for appellee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before HOOK and ADAMS, Circuit Judges, and PHILIPS, District Judge.

HOOK, Circuit Judge. This was a suit by the Ft. Lyon Canal Company to compel the Arkansas Valley Sugar Beet & Irrigated Land Company to comply with a contract by delivering to complainant annually from a reservoir a certain quantity of water for use in its irrigating system. According to a stipulation of the parties, made after the issues were joined, a decree was entered giving complainant what it desired and retaining jurisdiction of the cause for the determination of a defense set up in the answer. Upon further hearing a decree went against defendant as to the matter deferred, and it prosecuted this appeal.

The complainant was incorporated in 1897, under the laws of Colorado, for the purpose of owning and operating what was formerly known as the "La Junta & Lamar Canal System" and the distribution of water for the irrigation of lands lying under its ditches. The canal and appurtenant properties had been involved in litigation, and were in charge of a receiver appointed by the district court of Prowers county, Colo. The new company, the complainant, was organized with the approval of that court. Its shareholders were the owners of the water rights that had been granted, and it received possession of the canal system from the receiver at the court's direction. The canal extended from the headgate on the north bank of the Arkansas river for more than 100 miles through the counties of Otero, Bent, and Prowers, in the state of Colorado. On December 19, 1896, the Great Plains Water Storage Company was organized to develop certain reservoir sites for the storage of water to be used in another canal system in Bent and Prowers counties, and it was found advisable to use part of complainant's property. So, on October 29, 1897, a contract was entered into whereby the Storage Company secured the perpetual use jointly with complainant of that part of the latter's canal extending from the headgate at the river a distance of about 40 miles, in consideration of which the Storage Company enlarged and improved the same at a great expense. The contract also provided that in a certain contingency, which afterwards came to pass, the Storage Company should enlarge and complete for service a reservoir belonging to complainant and thereafter they should use it jointly, the complainant to have therefrom for its own use a fixed proportion of the water stored there. This contract, with some exceptions not material here, was in the same terms as a prior contract between the Storage Company and the receiver, who executed it upon the order of the state court. The defendant company, appellant here, is a New Jersey corporation, and is the successor in interest of the Storage Company.

It was set forth in the bill that, although the 40 miles of complainant's canal had been improved and defendant was enjoying the use of it, neither the defendant nor its predecessor, the Storage Company, had developed the reservoir, but, on the contrary, had diverted the waters which should have gone there into a reservoir of their own, and complainant was denied all use and benefit thereof. It was alleged that the development of its reservoir as agreed upon was essential to

complainant's business and was the principal consideration for the contract. The first decree of the trial court pursuant to the stipulation satisfied complainant in this particular by giving it an equal quantity of water from one of defendant's reservoirs. The matter left open for future determination was a defense based upon a provision of the contract that the part of the canal in question when enlarged, and the reservoir when developed and in use, should be in the joint control and management of the contracting parties, and for that purpose the Storage Company should have the right to designate two owners of rights to water under complainant who should be elected annually as two of the five members of complainant's board of directors. For two or three years no controversy arose over this provision, but finally a majority of complainant's shareholders refused to vote for the nominees of the Storage Company. Defendant urged this as a defense to complainant's demand for specific performance of the other provisions of the contract. As already observed, the decree of the trial court upon this matter was against the defendant, and its counsel say the question on this appeal is:

"Should the Ft. Lyon Canal Company and its stockholders elect as directors of said company two of the stockholders of said company designated by the appellant?"

The complainant argues that this question cannot now be entertained, because the first decree gave it the water it was demanding, and therefore fully disposed of the case, since defendant did not assert its grievance by way of cross-bill for affirmative relief. But the defendant in effect contended in its answer that it ought not in equity to be required to do more than it had already done, as long as complainant itself refused to abide by the contract; and we think the purpose of the stipulation was that complainant should have the much-needed water from the reservoir, subject, however, to the ultimate determination of the defense urged by defendant. By the first decree the court retained jurisdiction of the cause, and we have no doubt that, if the remaining question had been finally and rightly decided in defendant's favor, the continuance of complainant's right to water from the reservoir could have been made to depend upon its compliance with the decision. This was the spirit of the stipulation, and the court's procedure in the cause left room for its observance. A stipulation to settle controversies, or to assist a court in deciding them, ought not to be discouraged by a narrow and unreasonable construction, that would defeat the manifest intention of one of the parties, acceded to by the other. Obviously it was the intention here that there should be a decision upon the defense, and that in some appropriate way the decision should be made effective.

It is debatable, however, whether under the terms of the contract the defendant was entitled to demand the election of its nominees as members of complainant's board of directors before it had both enlarged the canal and developed the reservoir. There was default as to the latter when the suit was begun. Again, were it not complicated by the orders of the state court respecting the making of the contract, it would be an interesting question whether the provision relating to

the designation of directors is consistent with public policy. Complainant is not a mere business concern for private profit, but, in a limited sense, is a quasi public corporation, endowed by the Colorado law (Mills' Ann. St. §§ 616, 1716) with the power of eminent domain, and charged with the performance of specific duties. That a part of its governing board should, under mere contract to that effect, be dictated by another corporation, irrespective of any stockholding interest, at once attracts attention. Manifestly the relations between complainant and defendant as the successor of the Storage Company are such as to present points of conflict of interest. Their interests and the welfare of their respective stockholders are at times quite likely to be divergent. The present litigation furnishes an illustration of this, if any were needed. The pleadings show that, especially in times when the water supply is insufficient for the needs of all, acute differences are likely to arise. It is altogether right for corporations to contract for the joint control and management of properties upon which each has expended its funds and in the operation of which they are mutually interested; but it is not usually done by allowing one to dictate the selection of members of the other's board of directors, which under the law (Rev. St. 1908, § 865) has the management of its corporate affairs, its duties to the state and its own stockholders, and its business relations with other corporations. Such a course is quite distinguishable from the pooling by stockholders of their stock for a lawful purpose, or the creation of a voting trust for a limited time, such as have been upheld by some of the courts. The complainant owns and operates property and has many affairs in which the defendant has no interest growing out of the joint maintenance and use of part of the canal and the reservoir, yet the contract purports to give defendant the perpetual right to nominate two of its five directors. The effect in this particular case would be to give defendant, as the successor of the Storage Company, the power to dominate and control the complainant, so far as a board of directors can do so; for the record shows that, aside from the provision in the contract, the defendant was enabled, by a cumulative voting of stock which it controlled, to elect as members of complainant's board of directors two persons whom it had not nominated under the contract.

We think, however, these questions should not be determined in the absence of the stockholders. *Minnesota v. Northern Securities Company*, 184 U. S. 199, 235, 22 Sup. Ct. 308, 46 L. Ed. 499; *Weidenfeld v. Northern Pacific*, 129 Fed. 305, 63 C. C. A. 537. The statute of Colorado (Laws 1895, p. 150, c. 66; Rev. St. 1908, § 865) provides that each stockholder shall have the right to nominate directors to be voted for, and that he shall have the right to vote the number of shares held by him for as many directors as are to be chosen, or may cumulate the same upon one or more candidates. It is also specifically provided that the directors shall not be elected in any other way. Under such a statute the selection of the directors of a corporation belongs to the stockholders as such. It is in a sense an individual right in them, as distinguished from a power of the corporation in its single, aggregate capacity. A corporation is not in every case sufficiently a

representative of its stockholders to enable a court in their absence to pronounce judgment directly affecting their rights and interests. *Weidenfeld v. Northern Pacific*, *supra*. The right to vote for directors and the measure of it are specifically prescribed by the law under which complainant was organized, and do not proceed from any act, contract, or by-law of the corporation. In *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237, it was said:

"The exercise of this power having been regulated by the statute, the corporation cannot, by its by-laws, resolutions, or contracts, either give or take it away. Where the statute is silent in this respect, the election of the directors, like the election or appointment of subordinate officers, would be subject to the regulation and control of the corporation; but, the statute having expressly declared who shall be entitled to vote for directors, its provisions are imperative upon the corporation, constituting a part of the law of its being, and the corporation has no authority to extend or limit the right as regulated by the statute."

The clause of the contract before us is in effect a limitation upon the right conferred by the Colorado statute upon the stockholders, and when it is sought to be enforced, and its validity is drawn in question, it would seem that the stockholders themselves should be present otherwise than by the corporation which made the contract. That the stockholders may also have individually contracted respecting the matter does not affect this conclusion. It does not enlarge the representative character of the corporation, nor alter the necessity of the presence of those whose individual rights are to be affected. However, the denial of relief to defendant should be without prejudice to a future proceeding, in which the matter may be appropriately litigated and determined.

As so modified, the decree is affirmed.

COLORADO & S. RY. CO. v. TUCKER.

(Circuit Court of Appeals, Eighth Circuit. October 11, 1909.)

No. 2,762.

RAILROADS (§ 333*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—DUTY TO STOP, LOOK, AND LISTEN.

A man who in the daytime walked upon a railroad crossing immediately in the way of an engine, which was backing toward the crossing at a speed of five or six miles an hour, and which was in plain sight as it approached, with nothing to obstruct his view, is as matter of law chargeable with contributory negligence, which precludes recovery for his death so caused.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1080–1083; Dec. Dig. § 333.*]

In Error to the Circuit Court of the United States for the District of Wyoming.

Action by Lola D. Tucker, administratrix, against the Colorado & Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

O. L. Dines (Tyson S. Dines, Elmer E. Whitted, and Charles W. Burdick, on the brief), for plaintiff in error.

William B. Ross, for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and PHILIPS, District Judge.

HOOK, Circuit Judge. John McNamara was run over and killed by an engine of the railway company at a railroad crossing of a street in the city of Cheyenne, Wyo. His administratrix sued the company and recovered judgment. There was a defense of contributory negligence. At the close of the evidence the company moved for a directed verdict, and the denial thereof by the trial court presents the only question we find it necessary to consider.

There were two theories as to the place where deceased got upon the track and what he was doing there; but, as the verdict of the jury was against the company, we shall adopt that of the plaintiff, and also assume there was negligence in failing to give proper signals of the approach of the engine. Two side tracks, and a main line between them, running in a northerly and southerly direction, crossed the city street substantially at right angles. They were a part of the yards of the company. About four minutes before the accident the engine went northward on the west side track to a point 75 or 100 feet north of the street, and after coupling to some cars backed with them towards the crossing. The deceased approached the crossing from the northwest on a cross-lot path, and, though no one saw him step upon the track, it is quite clear that when he did so he was instantly struck by the tender of the engine and run over. No witness testified whether he looked and listened just before stepping on the track, so the presumption of care which arises from the natural instinct of self-preservation is invoked in support of the judgment. But those who saw him as he neared the immediate vicinity of the crossing said he was paying no attention to the engine and cars, and there was nothing whatever to obstruct his view northward along the track for at least a block. The engine and cars were approaching slowly, five or six miles an hour, and were in plain view. It was between 1 and 2 o'clock of a January afternoon, and though the snow upon the ground may have required careful attention in walking, and there was some wind, every witness whose view was not obstructed by fixed physical objects, and who looked, saw the engine and cars at a greater distance than deceased was from them. One witness who saw them plainly was more than 200 feet away. Those who observed the deceased as he neared the crossing noticed no effort on his part to detect the danger. The conclusion is unavoidable that he did not perform his duty before going on the track; for, had he looked, he could not have failed to see, and he was complete master of his movements.

There is no merit in the argument that the engine was a road engine, as distinguished from the type specially designed for switching service, that deceased saw it headed north and moving in that direction, that he had reason to believe it would continue in its course, and that he was therefore lulled into a sense of safety. All the inferences that

might reasonably be drawn from such premises will not, standing alone, excuse a pedestrian from adopting those simple precautions for his safety which experience has shown to be so necessary and which the law has imposed as a duty. We think the case is controlled by the many others of like character decided by this court: *Railway Co. v. Cundieff* (C. C. A.) 171 Fed. 319; *Railway Co. v. Williams* (C. C. A.) 170 Fed. 1020; *Railroad Co. v. Munger* (C. C. A.) 168 Fed. 690; *Tramway Co. v. Cobb*, 164 Fed. 41, 90 C. C. A. 459; *Railway Co. v. Stepp et al.*, 164 Fed. 785, 90 C. C. A. 431; *Springer v. Railway Co.*, 161 Fed. 801, 88 C. C. A. 619; *Railway Co. v. Donovan*, 160 Fed. 826, 87 C. C. A. 600; *Rich v. Railway Co.*, 149 Fed. 79, 78 C. C. A. 663; *Railway Co. v. Clarkson*, 147 Fed. 397, 77 C. C. A. 575; *Railroad Co. v. Chapman*, 140 Fed. 129, 71 C. C. A. 523; *Railway Co. v. Andrews*, 130 Fed. 65, 64 C. C. A. 399; *Railway Co. v. Hardy*, 94 Fed. 294, 37 C. C. A. 359; *Garner v. Trumbull, Receiver*, 94 Fed. 321, 36 C. C. A. 361; *Railway Co. v. Caulfield*, 63 Fed. 396, 11 C. C. A. 552; *Railroad Co. v. Ives*, 63 Fed. 791, 11 C. C. A. 433; *Railway Co. v. McArthur*, 53 Fed. 464, 3 C. C. A. 594.

The judgment is reversed, and the cause remanded for a new trial.

AMERICAN SMELTING & REFINING CO. v. KARAPA.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1909.)

No. 2,981.

1. MASTER AND SERVANT (§ 263*)—PLEADING—GENERAL DENIAL SUFFICIENT.

A general denial constitutes a good reply to averments in an answer of plaintiff's contributory negligence and his assumption of the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 263.*]

2. TRIAL (§§ 418, 420*)—DEMURRER TO PLAINTIFF'S CASE WAIVED BY SUBSEQUENT EVIDENCE FOR DEFENDANT.

The defendant waives a demurrer to the plaintiff's evidence, or a denial of its motion for judgment on the ground that the plaintiff's evidence establishes no cause of action, by the subsequent introduction of evidence to the merits on its own behalf.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 980-983; Dec. Dig. §§ 418, 420.*]

3. APPEAL AND ERROR (§ 263*)—EXCEPTION INDISPENSABLE TO REVIEW.

It is indispensable to the review in a federal appellate court of a ruling upon a request for an instruction to the jury that it should have been challenged by an exception.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.*]

4. APPEAL AND ERROR (§ 977*)—RULINGS ON MOTIONS FOR NEW TRIAL DISCRETIONARY AND NOT REVIEWABLE.

When a federal trial court has jurisdiction to grant or refuse a new trial, its order on the subject is discretionary, and it is not reviewable in an appellate court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.*]

(Syllabus by the Court.)

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the District of Colorado.

Action by John Karapa against the American Smelting & Refining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William B. Vates, for plaintiff in error.

M. J. Galligan, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. The plaintiff in error complains of a judgment against it for damages alleged to have been inflicted upon the defendant in error, one of its servants, by its failure to exercise reasonable care to guard a narrow pathway upon which its employé was placed at work. The complaint set forth in detail the character of the place, the nature of the negligence, and the alleged fact that the defendant in error was caused thereby to step off the pathway into an opening 12 feet deep, and was thereby seriously injured. The plaintiff in error, by its answer, denied these averments, and alleged that the injuries of its servant were caused by his contributory negligence, and that he had assumed the risk of working in the place from which he fell. To this answer the defendant in error interposed a reply, wherein he denied each and every allegation contained in the answer. Two of the specifications of error are that this reply was insufficient; but it fairly met the issues it was interposed to present, and these specifications cannot be sustained. A general denial in a reply of allegations in an answer of the plaintiff's contributory negligence and of his assumption of the risk is sufficient.

There is a complaint that the court overruled the motion of the Smelting Company, made at the close of the case of the defendant in error, that the court should direct a verdict in its favor on the ground that the evidence was insufficient to sustain any other conclusion. But the company subsequently introduced evidence upon the merits of the issues in the case, and a defendant in a trial waives his demurrer to the plaintiff's evidence by the subsequent introduction of evidence to the merits in his own behalf. *Insurance Company v. Cran- dal*, 120 U. S. 527, 530, 7 Sup. Ct. 685, 30 L. Ed. 740; *Railroad Company v. Mares*, 123 U. S. 710, 713, 8 Sup. Ct. 321, 31 L. Ed. 296; *United States Fidelity & G. Co. v. Board of Com'rs*, 145 Fed. 144, 150, 76 C. C. A. 114, 120; *Barnard v. Randle*, 110 Fed. 906, 907, 49 C. C. A. 177, 178; *Insurance Company v. Frederick*, 58 Fed. 144, 147, 148, 7 C. C. A. 122, 126; *Insurance Company v. Heiserman*, 67 Fed. 947, 15 C. C. A. 95; *Jefferson v. Burhans*, 85 Fed. 924, 927, 29 C. C. A. 487, 490.

Five of the specifications of error challenge the refusal of the court to give five specific instructions; but no exception was taken to the refusal of the court to give any of them, and hence the questions they suggest are not presented for the consideration of this court. It is indispensable, to a review in the courts of the United States of any ruling of the trial court upon a request for an instruction to the jury,

that it should be challenged by an exception taken and recorded at the time, to the end that the attention of the trial judge may be sharply called to the question presented thereby, and that a clear record of his action and its challenge may be made. *Hutchins v. King*, 1 Wall. 53, 60, 17 L. Ed. 544; *Pomeroy's Lessee v. State Bank of Indiana*, 1 Wall. 592, 602, 17 L. Ed. 638; *Newport News & Miss. Valley Co. v. Pace*, 158 U. S. 36, 37, 15 Sup. Ct. 743, 39 L. Ed. 887; *Tucker v. United States*, 151 U. S. 164, 170, 14 Sup. Ct. 299, 38 L. Ed. 112; *Potter v. United States*, 122 Fed. 49, 55, 58 C. C. A. 231, 237; *Southern Pacific Co. v. Arnett*, 126 Fed. 75, 81, 61 C. C. A. 131, 137.

After the verdict the plaintiff in error made a motion for a new trial in the court below on the grounds that the verdict was contrary to the evidence and that it was contrary to the law, and it assigns as error the refusal of the court to set aside the verdict on either of these grounds and its entry of final judgment pursuant to the verdict. But the court below had plenary jurisdiction to grant or to refuse the motion for a new trial, and to enter or to refuse to enter the judgment pursuant to the verdict. And in the national courts an order granting or refusing to grant a new trial, which the court has the power to make, is discretionary with the court, and is not reviewable in a federal appellate court (*Chicago, Milwaukee & St. P. Ry. Co. v. Heil*, 154 Fed. 626, 629, 83 C. C. A. 400, 403; *City of Manning v. German Ins. Co.*, 107 Fed. 52, 54, 46 C. C. A. 144, 146; *Southern Pacific Co. v. Maloney*, 136 Fed. 171, 69 C. C. A. 83), and there was no error in the entry of the judgment pursuant to the verdict.

All the specifications of error have now been considered, and, as none of them can be sustained, the judgment below must be affirmed.

It is so ordered.

F. B. VANDEGRIFT & CO. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. August 20, 1909.)

No. 43 (1,683).

1. CUSTOMS DUTIES (§ 44*)—SIMILITUDE—RAMIE SLIVER.

Ramie sliver is dutiable as cotton sliver by similitude, under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 302, 30 Stat. 175 (U. S. Comp. St. 1901, p. 1655).

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 148; Dec. Dig. § 44.*]

2. CUSTOMS DUTIES (§ 44*)—SIMILITUDE—"SIMILAR IN MATERIAL"—"SIMILAR IN QUALITY"—"SIMILAR IN TEXTURE"—"SIMILAR IN USE."

Within the meaning of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), ramie sliver resembles cotton sliver (1) in "material," because it is a vegetable fiber; (2) in "quality," because it has reached the same degree of purity, or freedom from objectionable substances; (3) in "texture," because the fibers are in the same form; and (4) in "use," because, like cotton sliver, it is spun into yarn and thread, so as to be manufactured into fabrics.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 148; Dec. Dig. § 44.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 173 F.—39

3. COURTS (§ 90*)—COMITY—WEIGHT OF DECISION BY COURT OF SAME RANK.

While it is desirable that there should be uniformity of decision upon the same question, there rests upon the court the duty of determining by its own investigation the matter at issue; and, though it may have been decided in one way by a court of similar authority in another jurisdiction, such decision is not of binding force, though possessing certain persuasive value, determined by the strength and logic of its statement.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 311; Dec. Dig. § 90.*]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For decision below, see 164 Fed. 65.

W. Wickham Smith (Francis Fisher Kane, on the brief), for importers.

Jasper Yeates Brinton, Asst. U. S. Atty., and J. Whitaker Thompson, U. S. Atty.

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

YOUNG, District Judge. This case comes before us upon an appeal from the judgment of the Circuit Court for the Eastern District of Pennsylvania, affirming the decision of the Board of General Appraisers on the classification of merchandise invoiced as "ramie sliver," classified for duty by the Board of General Appraisers under paragraph 302, Schedule I, § 1, and section 7, of the tariff act of 1897 (Act July 24, 1897, c. 11, 30 Stat. 175, 205 [U. S. Comp. St. 1901, pp. 1655, 1693]), by similitude to cotton sliver, against the protest of the importers. The merchandise was originally assessed for duty by the collector of customs at 45 per cent. ad valorem, under paragraph 347, as a manufacture of ramie not specially provided for. Upon appeal to the Board of General Appraisers, it appeared that during the interim precisely similar merchandise had been made the subject of an elaborate opinion by the Board of General Appraisers in New York, later affirmed by consent by the Circuit Court in what is known as the Eckstein Case (In re Albert Eckstein, G. A. 5,822 [T. D. 25,710]), holding that the merchandise was not a manufacture, but was dutiable at the same rate of duty, to wit, 45 per cent., by similitude to cotton sliver, and upon the authority of this decision the Board of General Appraisers sustained the classification of the collector in the case at bar.

In the case at bar, upon the appeal to the Circuit Court for the Eastern District of Pennsylvania, Judge McPherson, after reciting the decision of the Board of General Appraisers and the decision in the Eckstein Case, concluded as follows:

"This decision of the board was affirmed by the Circuit Court for the Southern District of New York (T. D. 26,462), and, although the ruling of the court was entered by consent, the decision was acquiesced in during the last three years. The present proceeding is, therefore, an indirect attack upon the judgment then entered by Judge Townsend, and, if successful, would result in the imposition of one rate of duty when the merchandise in question is brought into this district, and of a different rate when it is brought into the Southern

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

district of New York. It is hardly necessary to point out the undesirability of such a result. This has already been done by the Court of Appeals for the Third Circuit in two cases (*Hill v. Francklyn*, 162 Fed. 880, 89 C. C. A. 570, T. D. 29,074, and *Murphy v. United States*, 162 Fed. 871, 89 C. C. A. 561, T. D. 29,032), in each instance affirming the decision of Judge Holland, reported in T. D. 28,856 and T. D. 28,819, respectively. If, therefore, the ruling in *Eckstein's Case* is to be dissented from, I think the proper tribunal to announce such a view is the Court of Appeals, and for this reason I shall follow the formal judgment of the Circuit Court for the Southern District of New York, adding merely that, if the similitude section is applicable, the rate determined thereby is to be preferred to the rate fixed by section 6. *Hahn v. United States*, 100 Fed. 635, 40 C. C. A. 622. The decision of the Board of General Appraisers is affirmed."

The specifications of error raise a single question: Did the learned judge err in adopting the decision of the Circuit Court for the Southern District of New York, and in holding the merchandise in question dutiable by similitude to cotton sliver? The learned judge was clearly right in saying that it is desirable that different decisions should not be made as to the rate of duty upon the same articles in the different districts. There rests undoubtedly upon a court the duty of determining by its own investigation whether or not the article should bear a certain duty. This is saying no more than that each court will decide the question for itself, unless the appellate court has determined the question for it; but that it has been decided in a certain way in one jurisdiction should have weight, because of the desirability of having uniformity of decision upon the same question, and the decision itself has a certain persuasive value, determined by the strength and logic of its statement, and this is especially true of the case at bar. While, therefore, we would not feel ourselves bound by a decision of a court of another jurisdiction upon the same question, we are satisfied in this case that the learned judge made no error in following the decision in the *Eckstein Case*.

The real question in this case was: Is ramie sliver to be charged with a duty of 45 per cent. ad valorem, provided for by paragraph 302, which fixes for cotton sliver that rate, because under section 7 it is provided:

"That each and every imported article not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned."

We are of opinion that ramie sliver is in similitude with cotton sliver and should bear the same duty, because it resembles in material, quality, texture, and use cotton sliver. It is similar to cotton sliver, in that it is a vegetable product, or, as stated in the statute, of vegetable fiber. It is similar in quality, in that it has reached the same degree of purity, if the word is applicable, as cotton sliver. Its treatment has been to get rid of the gummy substances and produce something comparatively free from the impurities or substances that must be discarded to make it fit for further treatment in manufacture. Its tensile strength is greater than that of cotton; but in texture cotton sliver and ramie sliver are practically the same. It is the crude straightening out of the fiber in layers, just as cotton sliver is. As to its use,

it can certainly be and is spun into yarn, a finer reduction of the sliver, then into thread by continuous manufacture, so as to finally reach a proper degree of purity and fineness, so that it can be manufactured into fabrics—a similar process to that through which cotton passes from the sliver. In all these ways and respects it seems to us to resemble cotton sliver. The opinion of the Board of General Appraisers seems to us to show very clearly and specifically that ramie sliver belongs by way of similitude to the article known as cotton sliver.

The finding of the Circuit Court, affirming the decision of the General Appraisers, should be sustained; and the judgment of the lower court is therefore affirmed.

SIMERSON v. ST. LOUIS & S. F. R. CO.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1909.)

No. 2,957.

1. MASTER AND SERVANT (§ 252*)—NEGLIGENCE OF FELLOW SERVANTS—KANSAS RAILROAD STATUTE.

Gen. St. Kan. 1905, §§ 6312, 6313, which make railroad companies liable for injuries to or the death of employes through the negligence of fellow servants, 'provided that a notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by, or on behalf of, the person injured to such railroad company within eight months after the occurrence of the injury,' create a new liability and confer a new right not before existing in the state, both conditioned, however, on the giving of the stated notice, which is an essential condition precedent to the right to maintain an action on such statute; and the necessity of such notice is not obviated by the fact that the action is commenced within eight months after the injury occurred.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. § 252.*]

2. TRIAL (§ 169*)—DIRECTION OF VERDICT—GROUNDS OF MOTION.

The objection that a plaintiff did not give a notice which was an essential condition precedent to the right to bring the action need not be pleaded, but may be made on motion for a directed verdict at the close of the proof.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 169.*]

In Error to the Circuit Court of the United States for the District of Kansas.

Action by Annie Simerson against the St. Louis & San Francisco Railroad Company. Judgment for defendant on directed verdict, and plaintiff brings error. Affirmed.

P. C. Young, for plaintiff in error.

R. R. Vermilion (W. F. Evans, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and CARLAND, District Judge.

ADAMS, Circuit Judge. This was an action by the widow of John Simerson, on behalf of herself and her two minor children, for dam-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ages occasioned by the death of her husband, caused by the negligent acts of his co-employés while they were working together as a switching crew in the yards of defendant railroad company in Neodesha, Kan. The Circuit Court at the close of plaintiff's case, it not having appeared, among other things, that any notice of injury had been given to the railroad company prior to the institution of the suit, directed a verdict for the defendant. Plaintiff prosecutes error.

In the view we take of this case, only one of the several questions argued need be decided, and that is whether under the laws of Kansas this suit was maintainable without a prior notice to the railroad company of the injury sustained. This suit was brought in 1906 under the provisions of section 6312 of the General Statutes of Kansas of 1905. This section embraces the fellow-servant law of 1874 (Laws 1874, p. 143, c. 93), as amended by the addition of the proviso by the act of March 4, 1903 (Laws Kan. 1903, p. 599, c. 393), and, as amended (Laws 1905, p. 566, c. 341), is in the following words:

"Every railroad company organized or doing business in the state of Kansas shall be liable for all damages done to any employé of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés, to any person sustaining such damage: Provided, that notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within eight months after the occurrence of the injury."

Section 6313 discloses that the prior section is applicable to a case where the person injured dies and damages resulting from his death are claimed by others. Prior to these enactments the rule of nonliability of the master to the employé for the carelessness of a fellow servant, originally declared in *Priestly v. Fowler*, 3 Mees. & Welsb. 1, and first applied in this country in *Murray v. South Carolina Railroad Co.*, 1 McMul. (S. C.) 385, 36 Am. Dec. 268, and *Farwell v. Boston & Worcester R. Co.*, 4 Metc. (Mass.) 49, 38 Am. Dec. 339, prevailed in the state of Kansas. Before then the death of an employé occasioned by the negligent acts of his fellow servant created no liability whatsoever against the employer. These enactments, therefore, in so far as railroad companies and their employés are concerned, created a new liability and conferred a new right before then unrecognized in that state. The Legislature, which created the liability and conferred the right, could, of course, determine and fix their bounds and subject them to conditions. If it saw fit to impose a condition or limitation upon the incurrence of the liability or the enjoyment of the right, it rested exclusively in its sovereign will to do so. These most obvious reflections have found expression in many cases unnecessary to be mentioned, and particularly in *Lange v. Union Pac. R. Co.*, 126 Fed. 338, 62 C. C. A. 48 and *Denver & R. G. R. Co. v. Wagner*, 167 Fed. 75, 92 C. C. A. 527, decided by this court, and *Swisher v. Railway Co.*, 76 Kan. 97, 90 Pac. 812, decided by the Supreme Court of the state of Kansas.

It seems to us very plain that the liability created by the Kansas statute in force when Simerson was killed and the right to assert that liability were conditioned upon the giving of the notice specified in

the statute. The Legislature in most apt words conditioned, not the remedy, but the incurrence of the liability itself, upon the giving of a certain notice to the railroad company against whom liability should be asserted. Whether the specified condition was reasonable or unreasonable, the requiring of it was clearly within the competency of the Legislature. But its reasonableness is obvious. The large number of employes of most railroad companies, their distribution over wide areas of territory, the frequency of accidents occasioned by their carelessness at places far removed from general offices, well justified the requirement of a notice of the time and place of the injury, in order that the company might ascertain the true facts of the case while fresh in the memory of witnesses, and before they should be scattered so as to be unavailable; and, of more consequence still, in order that the company might have an opportunity to intelligently consider and settle the claims without incurring the expense of court proceedings. All these and other considerations which will readily occur to the mind well warranted the Legislature in making a preliminary notice of the time and place of the injury a condition precedent to liability. By the plain language of the statute the giving of the notice is as necessary an element of the creation of liability as the negligence of the fellow servant itself is. The proof of the one is therefore as indispensable to constitute a cause of action as the proof of the other.

But it is said that the present suit was brought within the time the notice was required to be given, and is itself a sufficient compliance with that requirement. To this we are unable to give our assent. The plaintiff's right to recover depended upon her right at the inception of the suit, and, if the right was conditioned upon the existence of any fact, its existence should have been pleaded and proved, or the right was not made to appear. *American Bonding & Trust Co. v. Gibson County*, 145 Fed. 871, 76 C. C. A. 155. In *Veginan v. Morse*, 160 Mass. 143, 35 N. E. 451, in a case in which the requirement of notice was held to constitute a condition precedent to the right to bring an action, it was held, Holmes, Judge, now Associate Justice of the Supreme Court, delivering the opinion of the court, that the commencement of the action without having first given the required notice availed nothing, and that such suit could not be maintained. See, also, *Thompson v. Southern Coal Co.*, 15 N. S. Wales, L. R. 162, and its citations. Cases are called to our attention where the requirement of a demand before suit is maintainable is held to be complied with by the institution of the suit itself; but cases of this kind are generally controlled by statutes which determine the character of the demand and do not condition the right itself. They are, therefore, inapplicable to our present inquiry. Other cases are called to our attention which arise under statutes which do not make the giving of a notice a condition precedent to the accruing of the right, but rather akin to the statute of limitations which affect the remedy. They are likewise inapplicable to the present case.

The contention that the defendant could not avail itself of the want of notice in this case without a special plea setting it up is untenable. The motion for a directed verdict at the close of the proof, on whatever ground it may have been argued, raised a question of law whether,

giving full force and effect to all the facts proven, a cause of action had been made out under the law. *Denver & R. G. R. Co. v. Wagner*, *supra*.

It results that the judgment of the Circuit Court was right, and must be affirmed.

THE FOLMINA.

(Circuit Court of Appeals, Second Circuit. July 21, 1909.)

No. 281.

COURTS (§ 384*)—FEDERAL COURTS—CIRCUIT COURTS OF APPEALS—DETERMINATION OF CAUSE.

Where facts have been found by the Circuit Court of Appeals and stated to the Supreme Court as a basis for asking its instructions, the court will not, after such instructions have been obtained, re-examine upon the identical evidence already considered controverted questions of fact which have been advisedly determined.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1021; Dec. Dig. § 384.*]

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Action by Gustav A. Jahn and William J. Griffith against the steamship *Folmina* for damage to cargo. Decree (143 Fed. 636) for claimant, and libelants appeal. Reversed.

This is an appeal from a decree of the District Court, Eastern District of New York, dismissing a libel filed to recover damages for injury sustained by a shipment of rice carried on the steamship *Folmina* from Kobe, Japan, to New York, in 1901. In May, 1907, this court certified to the Supreme Court two questions or propositions of law, concerning which it desired the instruction of that court for its proper decision of the case, and made the following statement of the facts on which such questions of law arose:

"The steamship *Folmina* sailed from Kobe, Japan, for New York, with a large shipment of rice on board, in No. 3 hold, under a bill of lading which exempted the carrier from 'the act of God, * * * loss or damage from * * * explosion, heat, or fire on board, * * * risk of craft or hulk or transshipment, and all and every the dangers and accidents of the seas, rivers, and canals and of navigation of whatever nature or kind.' It further provided that the ship 'is not liable for * * * sweat, rust, decay, vermin, rain spray.' The rice was in good order when put on board, but when discharged in New York a large part of it stowed on the starboard side of the hold was found damaged. The area of injury was downward from the first six tiers of bags to the bottom of the hold, which was dry, forward from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. The damage was caused by water and consequent heat.

"A majority of the court are satisfied that the damage was caused by sea water and that it was not shown that the vessel encountered sufficient stress of weather to warrant the inference that it came in because of the action of external causes. There was no evidence tending to show any negligence, fault, or error on the part of the ship's officers or crew. The cargo was well stowed and ventilated. The *Folmina* was a steel steamship of the highest class in Lloyd's Register. Before starting for Japan she was in dry dock at New York,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and was there surveyed by Lloyd's surveyor. Some time before she had been in dry dock at Cardiff, where some repairs were made to the rudder, rudder quadrant and a ventilator. The master testified to the general good condition of the steamer at the time she sailed from Kobe. During and after delivery of the cargo, the main deck, the between deck, the pipes leading to or connected with No. 3 hold, and the shell plating in the wing of No. 3 hold were carefully examined by the officers of the ship, by surveyors representing the libelants and their underwriters, and it was afterwards examined by competent and experienced surveyors representing both parties. The decks, side plating, and rivets of the ship were found to be sound, intact, and free from leaks. No evidence (other than the mere circumstance that the damage was by sea water if that be considered evidence), was found that there had been leaks in any part of the frame, structure, side plating, riveting, pipes, or appurtenances of the ship, through which water might have reached that part of No. 3 hold where the damage was done. No adequate means of access of sea water were found, nor any defect in the steamer which then appeared to be seaworthy."

The questions of law arising upon the facts so stated were as follows:

"(1) Whether damage to the cargo of an apparently seaworthy ship through the unexplained admission of sea water, in the absence of any proof or fault on the part of the officers or crew of the ship, is of itself a sea peril within the meaning of the bill of lading exception above quoted?

"(2) Whether the ship is relieved from liability in consequence of said exception?"

In February, 1909, the Supreme Court answered in the negative the first question so certified, but did not answer the second question. In March, 1909, the claimant presented to this court a petition for a rehearing, which was granted, and a reargument had.

Wallace, Butler & Brown, for appellants.

Convers & Kirlin (J. Parker Kirlin and John M. Woolsey, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge (after stating the facts as above). The Supreme Court has ruled that the unexplained admission of sea water into an apparently seaworthy ship is not of itself a sea peril within the meaning of the exceptions in the bill of lading. Upon the facts stated to the Supreme Court, therefore, it necessarily follows that the *Folmina* is liable. The cargo of rice was injured while in her custody as a carrier through the action of sea water. It was not shown that the sea water came in through the action of external causes. The only exemption in the bill of lading claimed to cover damages so caused was that relating to perils of the sea. If, then, this court is to base its decision upon the statement of facts which it has already made, the only course is to reverse the decree appealed from. The appellee, however, contends that upon this rehearing this court should re-examine the question whether sea water in fact caused the damage. It urges with much force that the damage was caused by sweat and not by sea water. And if the question were an open one, it may well be doubted whether a majority of the court, as at present constituted, would find that sea water did cause the damage.

But we cannot regard the question as now an open one. This court has found as a fact that sea water caused the damage, and upon that

finding has applied for and obtained the instructions of the Supreme Court. We do not now determine whether in a case where it clearly appears that a statement of fact accompanying a question certified to the Supreme Court was made through mistake or inadvertence, or in a case where new evidence has been received subsequently to the making of such statement, this court would have power to change the facts so found after the Supreme Court has answered the question, and render its decision upon the basis of the altered facts. That which we do now hold is that, where facts have been found and stated to the Supreme Court as the basis for asking its instructions, this court will not, after such instructions have been obtained, re-examine upon the identical evidence already considered controverted questions of fact which have been advisedly determined. And, applying this rule to the present case, this court must decline to accede to the contention of the appellee that it reconsider the question, upon the same record as before, whether sea water caused the damage.

The decree of the District Court is reversed, with costs, and the cause remanded, with instructions to enter a decree for the libelants for their damages, interest, and costs.

VICTOR TALKING MACH. CO. v. HAWTHORNE & SHEBLE MFG. CO.

(Circuit Court, E. D. Pennsylvania. November 2, 1909.)

No. 175.

BANKRUPTCY (§ 156*)—ASSETS—RIGHT OF TRUSTEE AS TO PENDING ACTION.

Where, pending a suit in equity for infringement of a patent against a corporation, the defendant is adjudged a bankrupt, the complainant is entitled to file a supplemental bill, making its trustee a party defendant, that he may be bound by the decree, so far as that result may properly follow; whether or not he will make a defense being a matter to be determined by him and the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 156.*]

In Equity. Suit by the Victor Talking Machine Company against the Hawthorne & Sheble Manufacturing Company. On motion for leave to file supplemental bill. Motion granted.

See, also, 168 Fed. 554.

Horace Pettit, for the motion.

R. Stuart Smith, opposed.

J. B. McPHERSON, District Judge. This is a suit to redress the infringement of a patent. The bill prays for an account of profits, the delivery of the infringing apparatus for the purpose of destruction, and the usual injunction. The defendant appeared and answered, and took part in the examination of the witnesses that were called to make out the complainant's prima facie case. Shortly after the prima facie case was closed, the defendant was adjudged a bankrupt upon adverse proceedings, and a trustee was duly elected. The complainant now asks leave to file a supplemental bill to make the trustee a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

party to the suit, and the application is resisted on the ground that the suit for infringement seeks redress for a tort, with which the bankrupt's estate has no concern, since a claim for damages founded upon a tort, unconnected with a contractual liability, cannot be proved against the assets and is not affected by the discharge. *Re Boston, etc., Iron Works* (C. C.) 23 Fed. 880; *Re United Button Co.* (D. C.) 140 Fed. 495. It is therefore contended that the trustee should not be compelled to appear in such a suit and spend the money of the estate in litigation, which may be prolonged and expensive, and can in no way benefit the creditors. It will be observed, however, that the present motion does not attempt to compel the trustee to make an active defense. It merely asks permission to make him a party, leaving him free to take such action thereafter as he may be advised, or as the bankruptcy court may direct. Certainly he is not bound to defend the suit, if the interest of the estate will not be affected by the litigation; but I can see no good reason for declining to make him a party of record, in order that he may be bound by the decree, so far as that result may properly follow. For example, part of the relief prayed for—the delivery of infringing apparatus to be destroyed—may apply to some of the bankrupt's property that has come into his hands; and in other respects, also, it is impossible to decide upon this motion whether or not the bill may injuriously affect the estate in his charge. In a given case it is readily conceivable that a decree for the complainant might seriously injure a valuable patent belonging to the bankrupt but not directly involved in the suit, and it might therefore be desirable to defend the action. This and like matters are for the trustee's consideration in the first instance, and he may then take whatever steps may seem most advantageous. The order that is now to be entered will only permit the complainant to make him a party. What else, if anything, he should be compelled or permitted to do, is a matter for future consideration by the proper court.

There is nothing novel about the pending motion. In Story's *Equity Jurisprudence* (10th Ed.) § 342, the author says:

"So, if the interest of a defendant is not determined, and only becomes vested in another by an event subsequent to the institution of the suit, as in the case of alienation by deed or devise, or by bankruptcy or insolvency, the defect in the suit may be supplied by supplemental bill, or a bill in the nature of a supplemental bill, whether the suit is become defective merely, or it is abated, as well as become defective. For in these cases the new party comes before the court in exactly the same plight and condition as the former party, is bound by his acts, and may be subject to all the costs of the proceedings from the beginning of the suit. But the distinction is constantly to be borne in mind between cases of voluntary alienation and cases of involuntary alienation, as by the insolvency or bankruptcy of the defendant. In the latter cases, the assignee must be made a party; in the former, he may or may not, at the election of the plaintiff."

In 3 Daniell's *Chancery Pleading & Practice* (Perkins' Ed.) Appendix, p. 2078, a form is given of a supplemental bill "against the assignee of a bankrupt defendant," the object of which is to make such assignee a party to the action. See, also, *Chester v. Life Ass'n* (C. C.) 4 Fed. 487; 1 *Foster's Federal Practice* (3d Ed.) § 187; 2 *Bates, Fed. Eq. Prac.* § 645; *Walker on Patents* (4th Ed.) § 625; 21 *Encyclopedia of Pleading & Practice*, p. 38, § 2.

Rule 57 of the equity rules promulgated by the Supreme Court is similar in effect:

"Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in parties), or for any other reason a supplemental bill or a bill in the nature of a supplemental bill may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court," etc.

And section 11, subsec. "b," of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]), provides in terms that:

"The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt."

It is clear, therefore, I think, that the complainant is entitled to have the trustee made a party to the pending bill, but that the trustee cannot be compelled to make an active defense, unless directed to do so by the district court. That tribunal is vested with complete authority to determine the advisability of such defense, and will no doubt act upon any proper application made by the trustee. Collier (7th Ed.) p. 221. It is therefore ordered that the complainant have leave to file the supplemental bill that was presented with the motion, and to serve it upon the trustee; but no order will be made requiring him to answer until he has had an opportunity to obtain direction from the bankruptcy court.

In *Weston, etc., Co. v. American Instrument Co.* (No. 213, October Sessions, 1908) 169 Fed. 659, permission was given by Judge Holland last May to file a supplemental bill making a trustee party to the record.

The motion is granted.

WILSON v. FRANK RIDLON CO. et al.

(Circuit Court, D. Massachusetts. October 25, 1909.)

No. 304.

PATENTS (§ 328*)—INVENTION—TENDER FOR TROLLEY ROPES.

The Wilson patent, No. 597,159, for an automatic tender for trolley operating ropes, makes but a single change in the device of patent No. 563,531 to the same patentee, which consists in making a stop spring connection between the end of the coil spring which actuates the rope reel and the axle, instead of a permanent connection, which mode of connection was old for analogous purposes, and the patent is void for lack of invention.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by Charles F. Wilson against the Frank Ridlon Company and others for infringement of patent. On final hearing. Bill dismissed.

J. S. Rusk, for complainant.

Allen Webster, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

COLT, Circuit Judge. This bill alleges infringement of the Wilson patent, No. 597,159, granted January 11, 1898, for an "improvement in automatic tenders for trolley-operating ropes."

The improvement covered by the claim in issue is for a slip connection between the inner end of the tension spring and the axle with which it is engaged. The main defense is want of patentable novelty.

The patent says:

"My invention relates to an improvement in automatic tenders for trolley-operating ropes, with the object in view of simplifying and rendering more reliable the device for which United States letters patent No. 563,531 were granted to me on the 7th day of July, 1896. * * *

"To obviate any liability of breaking or disarranging the reel-actuating spring, G—as, for example, by winding it in the reverse direction from that in which it should be wound—I attach it to the axle, b³, in the following manner: In the axle, b³, there is formed a V-shaped notch, b⁴ (see Fig. 4), and the inner end of the spring, G, is provided with a hook, g², which, when the spring, G, is wound in the proper direction, catches in the notch, b⁴, as shown in Fig. 4, and holds the end of the spring against slipping around the axle; but, if the spring should be unintentionally or intentionally wound in the opposite direction, the hook, g², would free itself from the notch, b⁴, and slip around the axle, and thereby relieve the strain and prevent the spring from breaking."

The claim in issue is as follows:

"2. The trolley-tender, comprising a reel for receiving the trolley-arm operating rope, means for regulating the rotary movement of the reel and a coil-spring for actuating the reel, the said spring having one of its ends fixed to the hub of the reel and its opposite end engaged with the axle from which the reel rotates, the connection between the spring and the axle being such that the end will be held fast when the spring is drawn in one direction and set free when the spring is drawn in the opposite direction, substantially as set forth."

All the elements in this claim are found in the prior Wilson patent, No. 563,531, except the last, which relates to the connection between the inner end of the tension spring and the axle.

In Wilson's prior patent the inner end of the tension spring was permanently attached to the axle. In the patent in suit all Wilson did was to bend over the inner end of the tension spring in the form of a hook and cut a notch in the axle, whereby the spring is held fast when drawn in one direction, and slips around the axle when drawn in the other direction.

The patentable novelty of claim 2 rests solely upon this difference of connection between the tension spring and the axle.

To connect a spring with a shaft, by bending over the end of the spring and making a notch in the shaft, or by other similar means, so that the spring will be held if pulled in one direction, and will slip around the shaft if pulled in the other direction, was so common and well known in the arts at the date of the Wilson patent that I am unable to find any invention in making such a connection in the tension spring of a trolley catcher.

A slip-spring connection almost identical in form with that described in the Wilson patent in suit is shown in the Maynard patent of 1875 relating to mainsprings for watches.

Another similar slip-spring connection is found in the Rieder patent

of 1880 relating to velocipedes. The specification of the Rieder patent says:

"Upon the center of the axle is formed a projection or catch, 5, as shown in Figs. 1 and 2, and around this part of the axle is placed the coil spring, L, which spring is placed within the drum, G. The outer end of this spring is secured to the drum, while the inner end of the spring is provided with a suitable projection, 6, to engage with the catch on the axle when the drum is moved in one direction; but when the drum is moved in the other direction this projection slips idly past the catch, 5, on the axle."

Another similar slip-spring connection is exhibited in the Bradford patent of 1888 for a fishing reel. The specification of the Bradford patent says:

"The described engagement of the inner end of the spring with the shaft by the interlocking of the hook, K¹, of the spring with the slot or pocket, j, in the shaft, permits the automatic disengagement of the spring from the shaft in case the shaft is rotated backwardly."

Among the other patents in the record showing slip-spring connections are Paillard, 1882, musical box; Karrer, 1881, musical box; Shiver, 1878, spring motor; Weeden, 1881, mainspring collet for watches.

The fundamental purpose of these slip-spring connections is the same as that set forth in claim 2 of the Wilson patent, namely, to so connect the spring with the axle "that the end will be held fast when the spring is drawn in one direction and set free when the spring is drawn in the opposite direction," thus protecting the spring against undue strain, disarrangement, and liability to break.

Mr. Livermore, complainant's expert, admits that the only novel feature in claim 2 over the prior Wilson patent is the connection between the tension spring and the axle:

"The construction forming the subject of claim 2 of the Wilson patent sued upon differs from the construction shown in Wilson's prior patent, No. 563,531, in the element or feature of construction involved in the connection of the reel-actuating spring with the axle upon which the reel rotates."

Mr. Livermore also admits that this slip-spring connection was old in the arts, and that, if Wilson had framed a separate claim for this feature, it would have been anticipated:

"I consider it unnecessary to discuss each of the several prior art structures in detail, as I do not regard those prior art structures which contain a one-way slipping connection between the spring and axle as differing substantially in the construction of said connection from that element or component of the trolley-catcher of the Wilson patent sued upon, which consists in the connection between the spring and axle such that the end of the spring will be held fast when the spring is drawn in one direction and set free when the spring is drawn in the opposite direction."

And, further, he says:

"If the Wilson patent had in fact contained a claim directed to this feature merely as a spring connection for a coiled spring in a mechanical contrivance of any kind, I should regard the subject-matter of such supposed claim as being anticipated by the construction shown in the Maynard patent as an example of all the prior art structures in evidence in this case, other than the trolley-catcher forming the subject of Wilson's prior patent, No. 563,531."

It is contended, however, that there is patentable novelty in the combination covered by the claim in issue. The answer to this contention is that all the elements except the slip-spring connection, enumerated in claim 2, co-operating in the same way, were old in the prior Wilson patent; that Wilson simply added to these old elements a slip connection; and that the construction of the slip connection, its mode of operation, and the result it accomplishes, as set forth in the patent, are substantially the same as the old and well-known slip connections of the prior art.

For these reasons claim 2 must be held invalid for want of invention.

A decree may be entered dismissing the bill, with costs.

GEORGE L. VOSE MFG. CO. et al. v. G. C. HUDSON CO.

(Circuit Court, D. Rhode Island. October 8, 1909.)

No. 2,687.

PATENTS (§ 328*)—ANTICIPATION—BRACELET.

The Hudson patent, No. 448,617, for a bracelet, consisting of a resilient hoop with the ends inserted in grooves in a center piece, is void for anticipation.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by the George L. Vose Manufacturing Company and others against the G. C. Hudson Company. Decree for defendant.

Henry Marsh, Jr., for complainants.

Wilmarth H. Thurston, for respondent.

BROWN, District Judge. The bill charges infringement of letters patent No. 448,617, granted to Thomas C. Hudson March 17, 1891. As the patent expired March 17, 1908, the suit is continued merely for the purpose of an accounting.

The specification states:

"My invention relates to the class of bracelets in which the band can be expanded to allow of the bracelets being passed over the hand.

"The object of my invention is to secure a bracelet the band of which can be expanded, having a box or central section capable of being highly ornamented and constructed to secure and conceal free ends of the band."

The patent has a single claim:

"A bracelet consisting of a resilient hoop having a stop or enlargement at one or both ends and an ornamental box or center provided with a concealed groove, and a slit at one or both ends smaller in area than the groove, constructed to receive the end or ends of the hoop and permit of the enlargement of the hoop and its automatic contraction, as and for the purpose set forth."

The complainants' bracelet consists of a hoop and of a part into which the ends of the hoop are inserted. This part, called in the patent the "central section," is hollow, and the movement of a free end, or of free ends, of the hoop within the central section permits the expansion of the bracelet. The patentee doubtless contemplated that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

central section should completely inclose the groove. The drawings show central sections of two forms—one tubular, and one flattened. In the tubular form one end of the hoop is secured, being soldered at one end of the central section, while the other end of the hoop is free, but with a stop on its end, which prevents it from being withdrawn from the central section. In connection with the flat central section there are shown free ends of the hoop within the box, which ends have stops to prevent withdrawal from the central section; each of the free ends being capable of movement to permit the expansion of the bracelet.

In the patent to C. R. Bugbee, No. 295,108, dated March 11, 1884, is shown an elastic band which corresponds to the resilient hoop of the complainant, and a central section into which the ends of the elastic band are inserted; one or both of these ends being provided with a stop to prevent its withdrawal from the central section. Like the patent in suit, the Bugbee patent provides that either one or both ends of the elastic hoop may be movable.

It is quite clear that, considered in respect to the mechanical means for confining the ends of the elastic hoop and for securing expansion and contraction, the Bugbee patent is a complete anticipation. In the Bugbee patent appear features of construction not shown in the drawings of the patent in suit. The central section is slotted lengthwise, and in this slot are knobs or pins which can be operated by the fingers. It is suggested in the patent that these pins can be ornamented by a stone setting; but mechanically considered they are merely handles which aid in expanding the bracelet. They are obviously unnecessary, since the Bugbee bracelet, like the complainants', may be easily expanded by pushing it over or pulling it off the hand. They are correctly regarded by defendant's expert as mere additions to an otherwise complete expanding bracelet.

The fact that the Bugbee bracelet contains these additional elements, the slot and the pins or handles, does not lessen the force of defendant's argument that from a mechanical point of view the Bugbee bracelet is a complete anticipation of the bracelet of the patent in suit.

The defendant's bracelets do not contain a central section which completely incloses the ends of the hoop. When the bracelet is off the hand, the free ends can be clearly seen, since the groove in which the ends of the hoop play is then exposed. When on the wrist, however, the outer portion of the central section serves to screen the ends of the hoop. The defendant contends that the term "concealed groove," in the claim of the patent in suit, is a limitation to a groove which is completely inclosed, thus completely concealing the ends of the band at all times. Complainants, however, say that this is an unnecessarily narrow construction, and that the mere cutting away of the under part of the complainants' central section or box would not avoid infringement.

Though this contention is the subject of considerable argument, it does not seem of special importance. The language is capable of either interpretation, but the case does not depend upon the adoption of either.

Complainants' expert, Mr. Schofield, in his testimony in rebuttal,

states that upon comparison of the Hudson patent with the prior art he finds as follows:

"I find as new the removal of the projecting pins for operating the band, and the substitution of a continuous plate, capable of being highly ornamented, for the slotted plate of the Bugbee patent."

The removal of the projecting pins would not affect the operation of the Bugbee bracelet, and the difference between Bugbee's slotted plate and the continuous plate of the patent in suit in capacity for ornamentation is a matter too unsubstantial to constitute a patentable difference.

As I am of the opinion that the patent in suit is void for anticipation by the patent to C. R. Bugbee, No. 295,108, it becomes unnecessary to consider the other patents cited by the defendant, namely, No. 331,033, to H. E. Chadwich, November 24, 1885; No. 134,735, to T. L. Cornell, June 4, 1873; No. 133,291, to A. O. Baker, November 26, 1872.

The bill will be dismissed.

AUERBACH v. INTERNATIONALE WOLFRAM LAMPEN AKTIEN GESELLSCHAFT.

(Circuit Court, S. D. New York. October 28, 1909.)

1. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—PROCESS—SERVICE BY PUBLICATION—NEW YORK STATUTE.

Under Code Civ. Proc. N. Y. § 1780, which denies the right to sue a foreign corporation in certain cases unless the plaintiff is a resident of the state, as construed by the courts of the state, on an application in such a case for an order for service by publication under Code Civ. Proc. N. Y. § 439, an averment of such residence in the moving papers is jurisdictional, and it cannot be supplied by amendment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2625; Dec. Dig. § 668.*]

Service of process on foreign corporations, see notes to *Eldred v. American Palace-Car Co. of New Jersey*, 45 C. C. A. 3; *Cella Commission Co. v. Bohlinger*, 78 C. C. A. 473.]

2. APPEARANCE (§ 9*)—WHAT CONSTITUTES GENERAL APPEARANCE—NEW YORK STATUTE.

Under Code Civ. Proc. N. Y. § 421, which provides that a defendant's appearance must be made by serving a notice of appearance or a copy of a demurrer or answer, the service of a notice of removal of a cause to the federal court, made by attorneys for a defendant, does not constitute a general appearance by the defendant.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 50; Dec. Dig. § 9.*]

Action by Julius Auerbach against the Internationale Wolfram Lampen Aktien Gesellschaft. On motion to vacate order for service by publication. Motion sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Fraser & Usina, for the motion.
Foulds & Galland, opposed.

WARD, Circuit Judge. Motion by defendant, who appears specially for that purpose only, to vacate an order directing service of the summons by publication, which was made in the state court before the cause had been removed into this court.

Section 432 of the Code of Civil Procedure provides that service of a summons upon a foreign corporation shall be made upon the president, vice president, treasurer, assistant treasurer, secretary, or assistant secretary, or any officers performing corresponding functions under another name, or upon a person duly designated by the corporation to receive service. If no such persons can with due diligence be found, and the corporation has property within the state, or the cause of action arose therein, service of the summons may be made upon the cashier, a director, or managing agent within the state. Section 439 provides that an order for the service of the summons upon a foreign corporation by publication may be made upon a verified complaint showing a sufficient cause of action and proof that the plaintiff has been or will be unable with due diligence to make personal service of the summons.

The defendant objects that the plaintiff in his affidavit did not expressly state any effort to serve the summons on a vice president, assistant secretary, or assistant treasurer. But I am quite satisfied, on all the papers, that there was no such officer within the state, and that the plaintiff has used due diligence in the premises.

The defendant next objects that section 1780 of the Code of Civil Procedure prohibits an action against a foreign corporation in cases of which this is one, unless the plaintiff is a resident of the state, and that neither the complaint nor any of the papers on which the order of publication was made stated that to be the fact. Such an averment as a ground for an order of publication under section 439 has been held by the courts of the state of New York to be jurisdictional, the want of which cannot be cured by amending the complaint. *Ladenburg v. Bank*, 87 Hun, 274, 33 N. Y. Supp. 821; *Foster v. Regulator Co.*, 16 Misc. Rep. 147, 37 N. Y. Supp. 1063; *Bogert v. Otto Gas Engine Works*, 28 App. Div. 463, 51 N. Y. Supp. 118. I feel that I ought to follow these authorities, and therefore sustain this objection.

But the plaintiff contends that this defect, if it is one, is immaterial, because the defendant has actually appeared generally in the action, by virtue of the fact that its attorneys served on the plaintiff's attorneys a notice of removal of the cause into this court, signed by them as attorneys for the defendant. The act of removal by attorneys does not itself amount to a general appearance, even though no reservation is made as to the character of their appearance in the petition. *Wabash Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431. I do not think the mere notice from them that they have removed the case amounts to more, especially as such a notice would not be a general appearance in the state courts; section 421 of the Code of Civil Procedure providing as to appearance:

"The defendant's appearance must be made by serving upon the plaintiff's attorney within twenty days after service of the summons exclusive of the day of service, a notice of appearance or a copy of a demurrer or of an answer."

Motion granted.

UNITED STATES ex rel. NICOLA v. WILLIAMS.

UNITED STATES ex rel. GENDERING v. SAME.

(District Court, S. D. New York. October 29, 1909.)

1. CITIZENS (§ 7*)—MARRIAGE OF ALIEN WOMAN TO CITIZEN.

The marriage of a woman who is a subject of the Turkish Empire with an American citizen makes her a citizen of the United States, and the fact that after her marriage, and before she reaches the United States with her husband, she may have contracted some disease which would have excluded her as an alien, will not warrant her exclusion.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. § 6; Dec. Dig. § 7.*

Citizenship of married women, see note to Hopkins v. Fachant, 65 C. C. A. 5.]

2. HABEAS CORPUS (§ 23*)—IMMIGRATION—REVIEW OF DECISIONS OF DEPARTMENT.

Where the right of a person to enter the United States, claimed on the ground of citizenship, is denied by the immigration officers, and depends wholly on a question of law, such question may be reviewed by the courts on a writ of habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 23.*

Jurisdiction of federal courts, see note to In re Huse, 25 C. C. A. 4.]

3. CITIZENS (§ 7*)—MARRIED WOMAN—NATURALIZATION OF HUSBAND.

Petitioner, who was a citizen of Holland, married an alien in New York, but afterward deserted him and returned to Holland with a paramour. Before she returned to this country her husband became a naturalized citizen of the United States. *Held*, that as, under the law both of Holland and the United States, the wife's citizenship is that of the husband, she became a citizen of the United States on the naturalization of her husband, and that her status and right to enter this country on her return were not affected by the fact of her desertion.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. § 6; Dec. Dig. § 7.*]

Habeas corpus proceedings, on relation of Thakla Nicola and Bertha Gendering, respectively, against William Williams. Petitioners discharged.

These are two cases involving much the same question. In the first case a naturalized citizen left this country and went to Syria, a part of the dominions of the Sultan of Turkey, and there married the relator, a subject of that potentate. After living some time in that country with her, he now brings her to the United States, and she has been stopped by the immigration authorities on the ground that she is suffering from trachoma, a disease which concededly would exclude her, if she be an alien. The question, therefore, arises as to whether she is a citizen, and so entitled to admission.

In the second case the relator immigrated into this country from Holland, and subsequently married a Dutchman, who was likewise an alien, and with whom she lived in the city of New York. Thereafter she left her husband and began living with a paramour. Subsequently she and her paramour went back to Holland, and while she was there her husband became a naturalized citizen of this country. She now seeks to return, and is stopped at Ellis Island on the ground that she is being imported for an immoral purpose.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Carell & Henkel, for relator Nicola.

Kahn & Hegt, for relator Gendering.

Henry A. Wise, U. S. Atty., for Commissioner of Immigration.

HAND, District Judge. Under several state authorities the marriage of a woman in a foreign jurisdiction to a citizen of this country is within section 1994, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1268). *Halsey v. Beer*, 52 Hun, 366, 5 N. Y. Supp. 334; *Headman v. Rose*, 63 Ga. 458; *Kane v. McCarthy*, 63 N. C. 299; *Burton v. Burton*, *40 N. Y. 359. This body of authority should, I think, be conclusive upon me, in spite of the fact it is not strictly binding, even if it did not satisfy me in principle. However, I am satisfied on principle that both these women are citizens. Assuming that no sovereign can change the allegiance of the subject of another, while the subject is not within the territorial jurisdiction of the first, in these cases the native sovereign of each woman has relinquished her allegiance. Under the law of the Ottoman Empire, of which the relator in the first case was a subject, the relator's marriage with a citizen of this country changes her allegiance. This is clearly implied from the Turkish Nationality Law of January 26, 1869 (article 7):

"La femme Ottomane qui a épousé un étranger peut, si elle devient veuve, recouvrer sa qualité de sujette Ottomane, en faisant la déclaration dans les trois années qui suivront le décès de son mari. Cette disposition n'est toutefois applicable qu'à sa personne; ses propriétés sont soumises aux lois et règlements généraux qui les régissent."

This received construction in the Circular Addressed to the Governors General of the Vilayets of the Empire, March 26, 1869, in which is the following:

"Comme la femme Ottomane qui épouse un étranger cesse d'être sujette Ottomane, l'Article 7 lui accorde la faculté de recouvrer, si elle devient veuve, sa nationalité originaire, en le déclarant à l'autorité Ottomane dans les trois ans qui suivront la mort de son mari." Martens, *Nouveau Recueil General de Traites*, Deuxieme serie, Tome XIX, pp. 658, 659.

It is urged that our own act does not cover the case, but that only she may be naturalized who might at the time be admitted as an alien. The words are "who may herself be lawfully naturalized." I cannot change the words to "admitted and naturalized." Certainly they refer to the classes as defined by the naturalization law. If an alien woman is once admitted, and then marries, would it be an answer to her claim of citizenship that she had trachoma when she married? If not, then it cannot be the case when she acquires the same right while out of the country. Besides, there is no pretense that she had trachoma when she was married, and at that time she could have been admitted. That is the point of time that counts, and at that time each sovereign consented to the transfer of allegiance. It cannot be that our consent was dependent upon her physical presence here.

As to jurisdiction, I think that in spite of *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, the rule governs of *Gonzales v. Williams*, 192 U. S. 1, 24 Sup. Ct. 171, 48 L. Ed. 317. It is true that in that case the court alludes to the change in the statute; but the words of the act of 1894 were in substance precisely like those

of the act of 1903. Where allegiance depends wholly upon a question of law, the court must review that question and decide upon it.

Therefore let an order go releasing the relator from custody.

In regard to the Gendering Case, I need add but little. The law of Holland is the same as the law of Turkey in regard to the acquisition by a woman of a new allegiance through marriage. "Law relating to Netherlands Citizenship," 1893, art. 7:

"Netherlands citizenship shall be forfeited by * * * (2) Marriage in the case of a woman." From "Law of Naturalization," Prentiss Webster, 1895, p. 260.

The only remaining question is whether the fact that the woman had left her husband and was living with a paramour changed this result. The adultery of the spouse in no sense terminates the marriage relation, which endures until it is dissolved by a competent tribunal. It is not material whether the woman acquired a new domicile or not. Even change of domicile of the spouses did not affect the relation. In this case the allegiance of the husband determines that of the wife by consent of both sovereigns. If the wife's infidelity in this case changed the relation, so must it in the case of any other infidelity. Certainly nothing is added by the fact that she has openly lived with her paramour and with him left the country. She remains *sub dominio mariti*, however she may disregard her obligations.

Therefore let an order also go in the Gendering Case releasing the relator from custody.

NORTHERN UNION GAS CO. v. MAYER et al.

(Circuit Court, S. D. New York. August 16, 1909.)

GAS (§ 14*) — SUIT TO ENJOIN ENFORCEMENT OF STATUTE FIXING PRICE — DISTRIBUTION OF EXCESS PAYMENTS IMPOUNDED.

Order settled for distribution of excess payments for gas made by consumers and deposited by the company with a special master under a prior order.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 14.*]

In Equity. On settlement of order.

Cortlandt Betts, for complainant.

George S. Coleman, Robert C. Taylor, and Francis K. Pendleton, Corp. Counsel, for defendants.

LACOMBE, Circuit Judge. The order directing disposition of the undistributed balance of excess charges for gas, deposited with the special master by this company, is filed herewith. 171 Fed. 602. Inasmuch as it has been stated that it will be appealed from, no action will be taken under it for a week, and, in the event of an appeal being sued out in the interval, none will be taken until the appellant shall have had an opportunity to be heard.

When the special master's request for instructions was under advisement, it was thought that any persons who had heretofore paid ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cess charges for gas and, despite the extensive advertisement of the progress of repayment which the news columns of the various daily papers have contained, had given no indication of a desire to recover them during the period allowed by the state statutes for the recovery of money thus disposed of, would in all probability never make application. It was not expected that they would appear 10 or 20 years hence. There was no intention to cut them off summarily; but it did seem desirable that some time limit should be placed on the industry, frequently by misrepresentations, persuades the poor and ignorant to part with their claims for a few cents and then prosecutes them vigorously for dollars. Since, however, the language used in the opinion might be misconstrued, it has been somewhat modified in the order.

Suggestion has been made that these funds are in the registry of the court. The order proposed by the corporation counsel apparently so treats them. This is a mistake. They never were covered into the registry, because no private consumer was a party to the suit, the city of New York paid no excess charges, and the court expressly refused to make any order which should affect him. "Any consumer who might be asked to pay the old rate was left by the order entirely free to decline to pay it." All payments of excess over that rate were entirely voluntary, so far, at least, as any action of this court was concerned. *Consolidated Gas Co. v. Mayer* (C. C.) 146 Fed. 151; *Richman v. Consolidated Gas Co.*, 186 N. Y. 213, 78 N. E. 871; *Central Trust Co. v. New Amsterdam Gas Co.* (C. C.) 167 Fed. 983. The original order enjoined only the Attorney General and the district attorney from instituting and prosecuting actions to recover the cumulative penalties prescribed by the gas act of 1906 (Laws N. Y. 1906, p. 235, c. 125). It was thought that these provisions were void under decisions of the Supreme Court, a conclusion which has since been approved by that court. *Willcox v. Consolidated Gas Co.*, 212 U. S. 53, 29 Sup. Ct. 192, 53 L. Ed. 382.

The amount of the bond is not stated in the order, because the undistributed balance is being gradually reduced on notification from consumers of change of address. It is now less than \$18,000. The amount can be fixed when the bond is prepared.

PUSEY & JONES v. PENNSYLVANIA PAPER MILLS. (1.)

(Circuit Court, M. D. Pennsylvania. October 1, 1909.)

No. 19, May Term, 1906.

1. RECEIVERS (§ 194*)—ACCOUNTING AND COMPENSATION—COUNSEL FEES.
The accounts of a receiver and the manner of keeping them considered and approved, and allowances made for his services and counsel fees.
[Ed. Note.—For other cases, see *Receivers*, Dec. Dig. § 194.*]
2. RECEIVERS (§ 92*)—MANAGEMENT OF PROPERTY—CONDUCT OF BUSINESS.
A receiver is not chargeable with a loss resulting from his conduct of a business, where it was done under directions of the court at the instance of parties in interest, and the loss was not due to any fault of his

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in management, and the business was kept track of and discontinued when it became apparent that it was not profitable.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 169; Dec. Dig. § 92.*]

In Equity. On exceptions to the account of James B. Watson, receiver. Account confirmed as corrected.

See, also, 163 Fed. 672; 173 Fed. 634.

S. B. Price, for exceptants.

Harry S. Knight, for receiver.

ARCHBALD, District Judge. The exceptions will be taken up and disposed of in their order.

1. It would have been well for the receiver to have charged himself with the inventory, and to have taken credit, according as it was disposed of, which would have enabled those interested to keep better track of it. It is said that this was not practicable, because of the manner of running the business, which the court sanctioned, and, if this be so, that is the end of it. At all events it is not vital. That the receiver has accounted for all that came into his hands from that source, there can be no question, and that is all in any event that can be asked of him.

2, 3, 4, 5, and 6. These exceptions all relate to the subject of receiver's certificates, but, except the last two, are of no particular significance. In order to try and put the property into working shape, the receiver was authorized to borrow money to the extent of \$30,000 and issue receiver's certificates. Complaint is made that the account is not so stated as to disclose whether the funds obtained were in fact applied to this purpose, expenditures on improvement account being mingled with operating expenses. But this only goes to the form of the account, and the way these expenditures are kept track of, as to which, it is said, the same as with regard to the inventory, that the only practicable course was followed. At the most, if the exceptions were sustained, it would merely call for a restating of the account, in order, if possible, that it might be more informing. But this does not seem to be necessary. Full opportunity was given to examine the receiver with regard to just how the money obtained on the certificates was expended, without anything being elicited to call what he had done in question. Conceding that certificate holders were interested to see that the money raised went into the property, it being ordered for that purpose and affecting their security, as nowhere near enough was bid at the sale to cover the certificates, the diversion would have to be large to be of any materiality, and, if it was, there would be no difficulty in detecting it. In either alternative the subject is of no consequence. But the fact is, as shown by the account, that some \$5,600 over and above the \$30,000 authorized was expended in betterments, which the exceptants in fact complain of, so that the receiver was in no way derelict in this respect; in addition to which, an effort is made in the account to point out as clearly as possible, item by item,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the expenditures chargeable to the receiver's certificates, which specifically meets the objection that this is not indicated.

7. The objection that the receiver has not charged himself with the rent received from the lease of the mill, authorized with the Pennsylvania Paper Company, is due to a misconception. An examination of the account shows that both the rent paid and the materials and supplies sold to that company are fully given. The receiver might have made a separate statement of the debits and credits bearing on this point, which would perhaps have made things clearer, but he was not bound to do so, and it does not render the account objectionable that he did not.

8 and 9. The balance of \$1,238.80, due to Struthers & Wells, on construction work, was expressly approved by the court in the foreclosure decree. But even if open to objection notwithstanding that, there is nothing suggested to call in question the propriety of its allowance. It is due for improvements made at the mill, which went to enhance the value of the plant, and so to increase the security of the receiver's certificates, of which the holders ought not to complain. And the fact that the amount expended exceeded the original estimate is of no consequence, so long as it was necessary to accomplish what was set out to be done, of which I am fully satisfied. Nor, as an unsettled debt of the receivership, are the certificate holders in a position to question it, as I have endeavored to point out elsewhere.

10. There is no objection, as I understand it, to the receiver's having retained counsel to defend against the mechanic's lien of the Newhall Engineering Company, entered in the common pleas of Columbia county, on which a scire facias was issued and brought to trial. There was no one else in shape to contest it, the Pennsylvania Paper Mills Company being bankrupt; and, as the result of the contest, the claim was reduced from \$17,000 to \$8,000, to the material advantage of all parties. The only question, therefore, is as to the amount to be allowed to counsel in this connection. Mr. Ikeler was paid \$100 as a retainer, and \$500 more is asked for, to be divided between him and Mr. Knight. The case took a week to try, and something more than that to prepare for, and the amount in controversy involved some responsibility. It seems to me, however, that \$500 in all is a fair allowance for these services. In some jurisdictions, perhaps, this amount would be regarded as meager. But, all things considered, it is about right, in my judgment here, and will be allowed accordingly.

For general services in the course of the receivership, \$2,500 is further asked for Mr. Knight and Mr. Scarlett. Mr. Scarlett appeared at the beginning of the case, and is said to have been consulted to a certain extent subsequently. But, so far as I can see, he has done nothing appreciable beyond that. Separating the allowance to him from that going to Mr. Knight, \$500 ought to cover it. The services of Mr. Knight, however, have been extended and arduous, both in the way of counsel and the procuring of orders in court from the time the receiver was appointed in March, 1906, until the account was filed in December, 1908, some two years and nine months later; for which \$2,000 is certainly not out of the way, as things are reckoned.

It is true that \$800 has already been allowed and paid him. And he is to receive \$250, as just stated, on account of the defense of the Newhall claim, which would run the amount up to over \$3,000, and seem somewhat more than it ought to be. Under the circumstances, I think the \$800 should be taken as a payment on account of the \$2,000 now allowed, and not in addition to it, limiting the aggregate counsel fees in the case to \$3,000, which is quite a substantial total. It is to be noted that the \$350 allowed to Mr. Knight, as attorney for the special master who conducted the foreclosure sale, is not included in this, but may be properly considered in judging of what altogether he gets out of the transaction.

11. There can be no valid objection to the receiver's expenses. These were made necessary by his varied duties, and represent actual cash disbursements, which he could hardly be expected to pay out of his own pocket. Nor is anything suggested to in any way impeach their integrity. The compensation to be allowed him depends on the character and extent of the services rendered, as well as the responsibility assumed in the care and management of the property. There has been paid to the receiver on this account \$1,300, and \$2,500 more is asked for, in addition to which there is a fee of \$150 for conducting the foreclosure sale as special master, making a total, all told, of \$3,950. The receivership extended over a period of two years and nine months, and the duties involved were by no means light or simple. Taking all that is asked, it would amount to about \$120 a month on an average, which is as little as could be expected for any one of sufficient ability to meet the requirements of the position. It is to be remembered that, in taking such a place, a person has to put aside his ordinary pursuits and be subject to all manner of demands upon his time and attention, in a matter which is merely temporary, and can add nothing of permanent advantage to him, if, indeed, it does not prove an actual detriment. There is also the possibility of being held liable for mistakes, involving serious responsibility, which no one ought to be asked to assume without being correspondingly compensated.

12 and 13. These exceptions do not go to anything in the account, the burden of their complaint being simply that the business was not conducted by the receiver at a profit, running behind, instead of making something. This is not a fact, although it is true that the receivership as such was a failure, and had better never have been entered upon. No one regrets this more than the court, the sequel justifying the reluctance with which it was agreed to in the beginning. But whatever mistake was so made, the receiver, of course, is not responsible. He did the best that he could, taking the advice of those on whom he had the right to rely, and among them Mr. Egolf, one of these very exceptants, and going to the court also for directions. The trouble was, he was attempting the impossible. The property of the defendant company as a paper plant was a failure, and had been from the outstart, and there was no chance to make anything out of it—at least, not by a receivership. It is said that the receiver was bound to see that he did not fall behind, and that, if he ran at a loss, without

taking pains to know it, he is liable. *Gutterson v. Lebanon Iron & Steel Co.* (C. C.) 151 Fed. 72. But while this may be true, there is nothing to show that he did not take due precaution to know the condition of the business as he went along, or that he kept on at a loss after the fact had been brought home to him. The mistake, if any, was not so much in running the plant, as in undertaking to make it over. The receiver was encouraged to do this, however, by those who were supposed to know, and is not to be blamed for it. Nor have the certificate holders any standing to complain upon that score, the mill having been operated for less than a month after the first certificates were negotiated, and the money raised on them being expressly authorized for the purpose of making improvements. There is much more that could be said in justification of the management of the receiver, but it is not necessary. It is easy to complain when things go wrong, but, so far as the receiver is concerned, there is no just cause for it in the present instance.

14. The plant had to be kept insured, without which the receiver, in case of loss, would clearly have been chargeable. The policies taken out overran the receivership. But that could not very well be helped, the end being uncertain, and it has since been adjusted, and a rebate of \$391.20 secured, by which the amount claimed on this account will be reduced; which answers every objection.

15. It is charged that the receiver allowed the taxes to become overdue, and should therefore be held responsible for the added penalty. It would have been well, of course, if they had been paid in time, and if they were not, through neglect, the consequence suggested should follow. But the trouble was that the receiver had no money with which to pay at the time, and there was no way to get it. He could not be expected, of course, to raise it by a pledge of his individual credit.

16. Objection is made to the amount due for engineering services. But these were incurred in the attempt to make over the plant, which was undertaken at the instance of those who were interested. And while, as said above, it was a mistake to attempt it, it is too late to discuss that now, and no blame attaches to the receiver on account of it.

17. In accepting the bid of Struthers & Wells for putting in the wash tanks and blow pit, the receiver acted under the advice of Mr. Egolf, who, as the largest individual holder of receiver's certificates, is one of the principal exceptants. But, leaving him out, it is of no consequence that there was a lower bid. The question was, who was the best bidder, as well as the lowest; and the reasons given for selecting Struthers & Wells, which it is not necessary to go over, entirely justified it.

18. The right of the receiver to compensation is attacked because the business, as it is said, was conducted negligently, and without regard to the interest of creditors; it being suggested, among other things, that the court was not fully advised of the facts when the receiver's certificates were applied for. There is not a particle of evidence to sustain these charges, and they might well be passed over in silence, except that it would not be just to the receiver. Not only is he vindicated in what has been said above, but the records of the case show that

he was careful to an eminent degree in looking after the interests of all parties concerned, undertaking nothing without first fully advising himself upon the subject, and reporting the matter to the court so as to be authorized to do it. It is no fault of his if his efforts to put the property upon a sound basis did not prove successful.

19. This exception harks back again to the failure of the receiver to charge himself with the inventory, it being at the same time complained that the construction and operating accounts are mingled. All this has been considered above, and no further comment is called for.

20. There is nothing in this that requires notice.

21. The credit claimed for the services of watchmen, \$929.55, is said to be excessive. But, while this amount seems large, watchmen were necessary, and the receiver has explained what he was compelled to pay, with which I am entirely satisfied.

22. Objection is made that the expenses of the receivership are not entitled to priority over receiver's certificates. But that, if not concluded by the foreclosure decree, is to be considered upon distribution, where it is fully discussed. The settlement of the receiver's account, with which we are now engaged, is another matter.

The exceptions to counsel fees are sustained to the extent indicated, and the allowances therefor are reduced accordingly. The amount due for insurance is also to be credited with the rebate secured. The other exceptions are overruled, and the account is confirmed as corrected.

PUSEY & JONES v. PENNSYLVANIA PAPER MILLS. (2.)

(Circuit Court, M. D. Pennsylvania. October 25, 1909.)

No. 44, October Term, 1908.

1. RECEIVERS (§ 128*)—RECEIVERS' CERTIFICATES—EXPENSES OF RECEIVERSHIP—PRIORITY.

An order of a court of equity which has assumed the management of property through its receiver, authorizing the issuance of receivers' certificates, to be a first lien on the property, must be construed to give them priority over other liens only, and cannot be held to prevent the court from first paying the expenses of the receivership from the proceeds of the property when sold.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 219; Dec. Dig. § 128.*]

Nature of certificates, see note to *Postal Telegraph Cable Co. v. Vane*, 26 C. C. A. 350.]

2. RECEIVERS (§ 128*)—INSOLVENCY PROCEEDINGS—DISTRIBUTION OF FUND—PRIORITIES—STATE TAXES.

Taxes due the state of Pennsylvania on the property of a corporation which by Act Pa. June 1, 1889 (P. L. 437) § 31, are made a lien from the time they are due and payable out of the proceeds of any judicial sale in preference to any judgment or lien, are payable from the proceeds of the company's property when sold in foreclosure proceedings in advance of either liens or receivers' certificates.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 219; Dec. Dig. § 128.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MECHANICS' LIENS (§ 291*)—ENFORCEMENT—EFFECT OF JUDGMENT.

Under the law of Pennsylvania a judgment on a mechanic's lien is conclusive of the indebtedness and the amount due, but leaves open the question of the validity and standing of the lien which may be contested by other lienholders.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 608; Dec. Dig. § 291.*]

4. MECHANICS' LIENS (§ 246*)—ENFORCEMENT—RIGHT OF OTHER LIEN CREDITORS TO CONTEST—EXCLUSIVENESS OF STATUTORY REMEDY.

The remedy given by Act Pa. June 4, 1901 (P. L. 442) § 23, which authorizes any person interested to intervene in an action on a mechanic's lien and contest the validity of such lien, is not exclusive, and does not debar other lien creditors from contesting the validity of such lien in another court which has the distribution of the fund produced by a sale of the property.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 431; Dec. Dig. § 246.*]

5. MECHANICS' LIENS (§ 25*)—CONSTRUCTION AS DISTINGUISHED FROM REPAIR OF BUILDING.

Where the pulp mill of a paper company was destroyed by fire, contracts for rebuilding the same and installing machinery therein to adapt it to the use of a new and different process, the building being separate from the other buildings of the company and while operated in connection therewith being capable of independent operation, relate to the building of a new structure and not to the repair of an old one, within the meaning of the Pennsylvania mechanic's lien law of June 4, 1901 (P. L. 431).

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 26; Dec. Dig. § 25.*]

6. MECHANICS' LIENS (§ 132*)—TIME FOR FILING STATEMENT OF LIEN—EXTENSION BY ADDITIONS TO REMEDY DEFECTS.

Where, on the original completion and equipment of a pulp mill by the contractor, it failed to develop the capacity contemplated, the subsequent doing of work and putting in of new and additional appliances in an attempt to bring it up to such capacity, the fault not being that of the contractor, operated to extend the time for the filing of a mechanic's lien for the entire work, even though some of the new appliances were placed in a separate building, being designed to supplement those within the building.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 200; Dec. Dig. § 132.*]

7. MECHANICS' LIENS (§§ 136, 186*)—STATEMENT OF LIEN—DESIGNATION OF BUILDING—MANUFACTURING PLANT—SEPARATE BUILDINGS OF—CURTLAGE.

Under the Pennsylvania mechanic's lien law (Act June 4, 1901 [P. L. 432] § 2), which provides that "every structure or other improvement, and the curtilage appurtenant thereto, shall be subject to a lien," etc., the lien given is on the particular structure into which the labor or materials go, and its curtilage, and the fact that a new building upon its erection becomes a part of a manufacturing establishment does not extend the lien for materials to all the buildings which make up the plant, old as well as new. A statement of lien for the construction of such building is therefore invalid, unless limited to the new building alone, so that others may be advised of its extent by the record.

Nor is this affected by the fact that the curtilage may properly include the whole plant, and if too much is claimed may be cut down by the court to what it should be; the question being one of specification and extent of lien and not of curtilage, which has first to be disposed of.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 215, 315; Dec. Dig. §§ 136, 186.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. MECHANICS' LIENS (§ 168*)—TIME OF COMMENCEMENT—BEGINNING OF WORK—PREPARATORY CLEARING AWAY OF RUINS OF FIRE—WORDS AND PHRASES—“VISIBLE COMMENCEMENT OF THE WORK UPON THE GROUND.”

Under the Pennsylvania mechanic's lien law (Act June 4, 1901 [P. L. 437] § 13), which provides that such liens, in case of original construction, relate back and take effect “as of the date of the visible commencement upon the ground of the work of building the structure or other improvement,” the mere delivery of materials on the ground or the tearing down of the ruins of a previous building destroyed by fire to clear the ground is not sufficient to fix the date of the lien, but so much must be done of a permanent character, as by the making of a substantial part of the excavation for foundations, as will apprise observers that a building is in progress.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 300; Dec. Dig. § 168.*]

9. RECEIVERS (§ 128*)—DISTRIBUTION OF FUNDS—MARSHALING OF LIENS—WAIVER OF PRIORITY BY SUPERIOR LIEN IN FAVOR OF AN INFERIOR.

That the holders of a mortgage, entitled to precedence over mechanics' liens, waived their right to priority in favor of receiver's certificates which were subsequent to such liens, does not entitle the mechanics' liens to priority of payment over the receiver's certificates from the proceeds of the property, where the fund for distribution is insufficient to pay the mortgage.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 219-222; Dec. Dig. § 128.*]

10. RECEIVERS (§ 128*)—CONFLICT OF DISTRIBUTION—WAIVER BY SUPERIOR IN FAVOR OF INFERIOR—PRIORITY AS BETWEEN RECEIVERS' CERTIFICATES, MECHANICS' LIENS, AND FIRST MORTGAGE.

In Pennsylvania, where the lien of the first creditor is superior to that of the second, but inferior to that of the third, and the lien of the second is superior to the third, the first creditor will take the fund because of his superiority to the second, by reason of the superiority of the second over the third. Where, therefore, a mechanic's lien was inferior to a first mortgage to secure a bond issue, and the right of bondholders were waived in favor of receivers' certificates made by order of court a first lien on the property, the fund, if not sufficient to satisfy the mortgage, will be awarded to the receivers' certificates.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 219-222; Dec. Dig. § 128.*]

In Equity. Suit by Pusey & Jones against Pennsylvania Paper Mills. On distribution of proceeds of foreclosure sale. Priorities of liens determined.

See, also, 163 Fed. 672; 173 Fed. 629.

S. B. Price, for receiver's certificate holders.

W. H. Rhawn, for first mortgage bond holders.

Sheldon Potter and C. W. Miller, for Newhall Engineering Co., mechanic's lien claimants.

R. O. Brockway, for Beach Haven Brick Co.

A. W. Duy, for the Commonwealth of Pennsylvania.

Harry S. Knight, for receiver.

ARCHBALD, District Judge. The amount realized by the foreclosure sale of the defendant's property was \$35,600. The costs of sale, as fixed by the master's account, including local taxes paid, are \$1,217.48, which leaves \$34,382.52 to be distributed. Upon this, claim

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

is made for: (1) The unsettled expenses of the receivership; (2) taxes due to the commonwealth; (3) receiver's certificates; (4) mechanics' liens of (a) the Newhall Engineering Company, and (b) the Beach Haven Brick Company; and (5) first mortgage bond holders. This more than exhausts the fund, and calls for a determination of the validity and order of priority of the different claims.

The unpaid expenses of the receivership, which preceded the foreclosure, as settled by the receiver's accounts, amount to \$8,264.25, the items of which there appear. These expenses are ordered to be paid by the foreclosure decree as a preferred matter, next after the costs of sale and of suit, but are nevertheless contested by the receiver's certificate holders, on the ground that such certificates were made a first lien on the property, subject only to the rights of the mechanic's lien claimants—the lien of the first mortgage bond holders having been waived—and cannot now, as it is said, be disturbed. Assuming that the question is open, notwithstanding the foreclosure decree, as it clearly is not (*Grant v. Insurance Co.*, 106 U. S. 429, 1 Sup. Ct. 414, 27 L. Ed. 237), there is no occasion to modify what is there adjudged. The court having taken the property into its hands to administer, by means of a receiver, may certainly provide for payment out of it of the costs of so managing and administering upon it, save only so far as this interferes with existing liens. It was by virtue of this that a loan of money on receiver's certificates was authorized, and the same power which entitled the court to order this and secure it by a lien on the property enables it also to take care of the expenses incurred outside of that, in the courts of the receivership, which in this respect stand no differently and are of equal obligation. If without power to order the one, it was without power to order the other, the contention of the receiver's certificates being self-destructive. It is said, however, that the court made the certificates a first lien on the property, and that, having contracted for this, it cannot afterwards let in anything to impair its own decree. But the court cannot bargain away its powers, if indeed it can be held to have done so. It is not like the attempt to give priority to receiver's certificates over vested or existing liens, with which, particularly in case of a private business corporation, it cannot of course interfere. By the order entered in the present instance, authorizing the issuing of \$30,000 of receiver's certificates, to which the mortgage bond holders assented (the rights of mechanic's lien claimants who did not, being saved), the certificates were made a first lien on the property of the company, and, according to this, they will now be respected and enforced, but not to the prejudice of what it was found necessary to do in the interest of all parties concerned, including the certificate holders themselves, as called for by subsequent events. The court, in so pledging the property of the company, cannot be held to have tied its hands or stripped itself of authority to deal with it to this end. If that was not expressed in the order, it was implied. As said by Judge Jenkins, in *Anderson v. Condict*, 93 Fed. 349, 353, 35 C. C. A. 335, 339:

"It is not presumable that the court would divest itself of the power to pay the expenses of operations which it had assumed. That would be an act of *felo de se*."

What, it may well be asked, would have become of the receiver's certificates, if it had so left them in the lurch? The priority given them by the order had relation to their standing with respect to other incumbrances, and was not with the idea of preferring them over administration expenses, subsequently incurred, which may therefore properly be first paid out of the proceeds of this sale, as provided in the foreclosure decree.

Four years' taxes were due to the commonwealth, on bonds and stock, at the time the receiver was appointed; and on June 15, 1908, an account was settled for them against the company, by the Auditor General, to the amount of \$288, on which a statement of lien was entered, July 21, 1908, in the office of the prothonotary of the county, as provided by statute. These taxes became a lien from the time they were due, and are payable by law out of the proceeds of any judicial sale, in preference to any judgment, mortgage, or other claim on the property, even though entered before them. Act Pa. June 1, 1889, § 31 (P. L. 437). They are therefore payable now in advance of the mechanics' liens and receiver's certificates, and possibly also of the administration expenses, as to which, however, it is not necessary to express an opinion, there being enough in any event to take care of both. These taxes bear interest at 12 per cent. from 30 days after they were settled, which, calculated up to September 29, 1908, the day of sale, makes them amount altogether to \$294.30.

The disposition of the rest of the fund depends on the validity and standing of the two mechanics' liens which have been mentioned. Both have been reduced to judgment, so that the amount on them is removed from controversy, the claim of the Newhall Engineering Company being fixed at \$8,000, with interest from June 6, 1908; and that of the Beach Haven Brick Company at \$225.50, with interest from July 24, 1908. Both are alleged to be defective in form, as well as filed too late, and in any event to be postponed to the first mortgage and the receiver's certificates. These questions depend on a number of considerations, and are not altogether easy of solution, calling, in consequence, for a somewhat extended discussion.

As just stated, the judgments recovered on the mechanics' liens are conclusive of the amount due on them, and so also are they of whether the work was done satisfactorily and in accordance with the contract, these being matters going to the merits, and concerning only the immediate parties. But whether the statement of lien conforms to the requirements of the statute, or was entered in time, and to what date, if any, it relates back, affect the character and standing of the lien, and are therefore open to inquiry. This is settled by a number of decisions, only one or two of which need to be referred to. *Norris' Appeal*, 30 Pa. 122; *Safe Deposit Company v. Iron & Steel Co.*, 176 Pa. 536, 35 Atl. 229. Nowhere is the law better stated, except in one particular, than in *Nolt v. Crow*, 22 Pa. Super. Ct. 113, where the controversy was between a mechanic's lien on which judgment had been obtained, and an apparently earlier mortgage:

"Apart from the alleged delay in filing," as it is there said, "the principal ground on which the mechanic's lien is assailed is that the contract for the work, which embraced 86 buildings, was entire, and not divisible; that full performance has not been shown; and that without full performance there

can be no recovery or right to a lien. The measure of performance is a matter that concerns only the parties to the contract. The owner may waive any feature of it which is designed merely for his benefit. He may, for instance, waive delay in performing, failure to complete, or defects in the quality of the work or materials. It is sufficient if the claimant has done to the satisfaction of the owner anything for which the law gives a lien. He is not bound to perform his contract, nor is the owner required to hold him to it, merely to serve the purpose of those who are not parties to it. If other incumbrancers may impeach his lien on the ground of incompetent performance, they may with equal right impeach it for failure to perform within the stipulated time, or for defects in the work or materials. The owner may stand on the letter of the contract, and hold the claimant to its terms, if he so chooses, but strangers to the contract have no such right."

This is a clear and comprehensive statement of the law, the correctness of which is beyond dispute. The opinion, however, goes on to say:

"And whatever the right of other incumbrancers to contest the builder's right to a lien, while it remains in the form of a claim filed, it is barred by judgment on the claim. In the absence of fraud or collusion, such judgment is conclusive of the right to a lien. It is, however, conclusive only of this; it has no effect in fixing priority of lien, as against other incumbrancers, and is not even *prima facie* evidence of the matters essential to priority."

The conclusiveness of the judgment upon the right to a lien, which is so apparently upheld, was not necessary to the decision, which was only concerned with the right of other incumbrancers to question the right of the claimant to a lien, because the contract had not been performed, and that part of the opinion was repudiated upon this ground by the same court in the later case of *Prudential Trust Co. v. Hildebrand*, 34 Pa. Super. Ct. 249, where the right of such contesting creditors to inquire not only as to the matter of priority, but to go deeper and question the very validity of the lien, was asserted and maintained in its entirety. Everything is open, therefore, in the present instance, but the amount due and the matter of performance, and so far as necessary will be considered here.

Neither are the parties concluded by not invoking the remedy given by section 23, Act June 4, 1901 (P. L. 442), which is to be found in the margin.¹ It is true that the act of 1901 is supposed to afford a com-

¹ "Any party having a lien against, estate in, or charge upon the property included in such claim, may file his petition, under oath or affirmation, averring that the date mentioned in the claim as the time when the structure or other improvement was commenced is incorrect, or that the claim is filed against more land than should be justly included therein, or that for any reason the claim is postponed to the rights of the petitioner, and praying an appropriate decree; whereupon the court shall grant a rule upon such claimant to show cause why the relief prayed for should not be allowed, and shall stay proceedings on the claim pending the hearing of the rule, should justice so require. At the instance of others than those personally served with the *scire facias*, such rule shall be allowed, though judgment be recovered on the claim. The court shall from the pleadings, aided as to the material disputed facts, if any, by depositions, or by hearing at bar, make such order or decree as the facts shall warrant. Like proceedings shall be had if the petition shall aver that the claim is for any reason invalid, has been paid, waived or released, or should not legally or equitably be allowed as a claim against the property; but the material disputed facts in such cases, if any, shall at the request of either party, be tried by a jury without further pleadings. When such request is granted by the court, the fact thereof shall be entered on the judgment index as a *lis pendens*, with the same effect as if a writ of *scire facias* had duly issued upon said claim."

plete system in itself on the subject of mechanics' liens (*Todd v. Gernert*, 223 Pa. 103, 72 Atl. 249), and, all prior statutes having been repealed, to be in effect a new enactment. It is also true that, where a special remedy is provided by statute, it is, as a rule, exclusive; and that the right of any party interested to intervene, and have the judgment of the common pleas as to whether a mechanic's lien for any reason is invalid, is given by this section. There are considerations, however, by which it is to be regarded as cumulative and permissive, rather than exclusive, or at least that it is not binding in the present case. It has always been open to other lien creditors to contest on distribution the validity of a mechanic's lien, in form or substance. *Thomas v. James*, 7 Watts & S. (Pa.) 381; *Lauman's Appeal*, 8 Pa. 473; *Knabb's Appeal*, 10 Pa. 186, 51 Am. Dec. 472; *Sicardi v. Keystone Oil Co.*, 149 Pa. 139, 24 Atl. 161, 163. And this right has been recognized and enforced, the same since the act as before it. *Dunbar v. Washington Foundry*, 210 Pa. 58, 59 Atl. 434; *Prudential Trust Co. v. Hildebrand*, 34 Pa. Super. Ct. 249. It was expressly declared indeed in the latter case that the section of the act in question had no effect upon it. A clear intent ought, therefore, to appear to substitute the one for the other, in order to have this provision of the act exclusive, which is not to be found in it. Where the right or the interest of a party, or the defense which he wishes to set up, can only be asserted with effect by intervening and being made a party to the lien or the proceedings upon it, as, for instance, when he seeks to strike down the lien on the merits, the statute no doubt must be followed; but not outside of that. A fund in court is still to be disposed of according to what is made to appear, which affects the standing and validity of such lien as respects other claimants. A lien void on its face, for example, is not to be enforced, merely because no steps have been taken in the common pleas to contest it; and it is particularly inappropriate where the contestants, as here, are receiver's certificate holders, whose lien was created by the order of this court, and who look to it to define and defend it, and who cannot be expected to submit to another court the matters upon which this depends.

The character of the structure, on account of which mechanics' liens are claimed, whether in effect a new building or merely an alteration or repair of an old one, is material, the statement of lien being required to conform to this, and being fatally defective, if filed for an original construction, where the work was merely by way of repair (*Wharton v. Investment Co.*, 180 Pa. 168, 36 Atl. 725, 57 Am. St. Rep. 629); and in the latter case also, having to be filed within three instead of six months (Act 1901, § 10), and taking effect only from the date of filing (section 13). The facts by which its character here will be made to appear are as follows:

The plant of the Pennsylvania Paper Mills was an old one, having been in operation for a long period of years prior to the transactions in question, and consisted of a number of more or less separate buildings, located on a tract of land of about nine acres, at Catawissa, Pa., with a dam or pond adjoining, covering five acres more, by which it was supplied with water; all being essential and devoted to the one use of making paper pulp and paper. In 1902, the pulp mill, a frame

building at the rear of the boiler house, and containing the evaporator and incinerator, was destroyed by fire. The roof of the causticising plant, which was a part of the main building of the paper mill proper, was also destroyed, although the building itself, below the roof, was not injured; and neither was the building in which the digesters were installed, nor the place where the choppers were. While the operation of the plant was interfered with by the fire to a certain extent, the manufacture of paper at the paper mill proper was continued for about a year afterwards, and up to the time when the arrangement was made with the Newhall Engineering Company, July 3, 1903, for the rebuilding of the pulp mill. In rebuilding this mill, a change was made from ground wood pulp to soda pulp, and the plan of the mill was modified accordingly, being designed to embrace all the departments required in the manufacture of soda pulp—including a room where the logs were reduced to chips and screened; a digester room, in which the chips were cooked; a washhouse, in which, after being cooked, the pulp was washed, screened, and prepared for use in the paper mill; an evaporator room, in which the liquor was reduced sufficiently to be put into the incinerator; an incinerator room, in which the liquid was burned to a black ash; and an alkali or causticising room, in which the soda received its final preparation. There were two contemporaneous contracts made with the Newhall Company, by one of which they were engaged as engineers to furnish plans and estimates for the construction and equipment of the pulp mill and superintend the execution of the work on a commission basis, and, by the other, they were to make and supply at a specified price certain apparatus, of their own special designing, to go into the mill, consisting of an evaporator, with the necessary outfit, a causticising plant, and two wash tanks of a given capacity. These contracts were carried out, although not begun for a year afterwards, the paper mills company not being ready for it. The required buildings were designed, and their construction and equipment supervised, by the Newhall Engineering Company, and the specified apparatus supplied, the Pennsylvania Paper Mills Company furnishing the materials for the buildings and doing the work through an independent contractor. The work of rebuilding was begun the latter part of June or the first of July, 1904, and completed about January 1, 1905, the machinery which the Newhall people were to furnish being fully installed prior to April 1, following, and the whole plant being completed, and put in operation, making pulp, the latter part of that month, and so continuously operated from the spring of 1905 to the fall of 1906, when it was shut down for the purpose of making further changes.

In rebuilding the pulp mill, two things were sought to be effected: To adapt it to the use of jack pine, which could be obtained near at hand, and to give it a capacity of 15 tons of pulp daily. This was understood by the Newhall Engineering Company, and the designs which they made, and the machinery which they furnished, were supposed to have that in view, and to be effective for its accomplishment. The results secured, however, did not come up to expectations, and were in fact far from satisfactory. The mill could not be made to

turn out the desired amount, and changes were accordingly suggested to try and remedy it. Among these, two additional washers were supplied and put in by the Newhall people in August and September, 1905, being installed in a small building adjoining the washhouse, specially erected for the purpose; and four steel tanks, some two or three weeks later, which were set up in one end of the boiler house, a brick and frame building adjoining; and also an extra filter press, which was put in the latter part of November; besides other appliances made necessary in the same connection. Except for these changes, the work of the Newhall Engineering Company was complete in April, 1905. But on account of them, the representative whom they had on the ground to supervise the construction was not finally withdrawn until the next December.

The soda pulp mill, to which these observations apply, was entirely separate as a building, as well as a department, from the general paper mill establishment. While it adjoined the paper mill proper, there was no structural connection between them, and each could be operated independently of the other. The woodhouse, also, although connected operatively with the pulp mill, was a distinct building; while the incinerating, the causticising, the evaporating, and the digesting department, making up the pulp mill, were all under one roof, being simply separated by division walls between them.

There can be no question, upon this showing, that the work of erecting the soda pulp mill after the fire was not a mere matter of restoration or repair, but constituted an entirely new and substantial structure, for which a lien, upon that basis, directly lay. It was not confined to patching up or making good the inroads of the fire on a building the material portion of which remained intact. This may have been true as to the causticising department, the roof of which was burned, but not as to the pulp mill, of which the prior structure had been wiped out. While some small portion of the old wall was utilized, the work had practically to proceed from the foundation up. A whole new building, equipped with new and different machinery, and devoted to a different and distinct process, arose out of the ruins, which, although separate and apart from the paper mill proper, was necessary to the economical manufacture of paper at that plant, and for want of the successful operation of which the company in the end went down. The case is not like that of *Porter v. Weightman*, 29 Pa. Super. Ct. 488, where one section of a continuous building, composing a chemical factory was torn down and rebuilt. The work there was simply incorporated in the existing building, which could not be cut up, as it is said, for the purposes of lien. It was not, as here, where there was an entire new structure, not simply in its main mass, but from the ground up. The case is not one, therefore, calling for a lien for alterations and repairs, as argued. The lien was properly filed as for a new building, and is to that extent good.

The lien of the Newhall Engineering Company was also filed in time. There is no question with regard to that of the Beach Haven Brick Company. It is true that the pulp mill was completed and in running order as early as April or May, 1905, and that it was operated from that time on in connection with the rest of the paper plant; and

that the appliances put in afterwards were supplied by the Newhall people, in the effort to have it produce 15 tons of pulp a day, as promised and planned, which it never did. It is claimed, on the one hand, that the failure to accomplish this was due to the jack pine used, which was highly resinous, making the liquor viscid and refractory; and, on the other, that it was the fault of the apparatus, designed by the Newhall people, which would not work as it ought to; the appliances put in to remedy this not being effective to continue the lien, as it is contended. No doubt, after the completion and acceptance of a building, work done or material furnished to make good defects in the original construction will not extend the time within which a lien may be filed. *Thoma and Blandy's Estate*, 76 Pa. 30; *McKelvy v. Jarvis*, 87 Pa. 414; *Homeopathic Association v. Harrison*, 120 Pa. 28, 13 Atl. 501; *Harrison v. Homeopathic Association*, 134 Pa. 558, 19 Atl. 804, 19 Am. St. Rep. 714. And the same is true of additions and alterations, no part of the original plan, which are introduced to remedy imperfections therein. *Diller v. Burger*, 68 Pa. 432; *Ryman's App.*, 124 Pa. 635, 17 Atl. 180; *Collum v. Paint Co.*, 185 Pa. 411, 39 Atl. 1009. But that is not this case. The additions here were in line with the original plan to have a pulp mill of 15 tons daily capacity, and in order to try and bring it up to that. The jack pine was an experiment, and the Newhall people were not held responsible for the failure to get results out of it. It is not as though the extra appliances were by way of substitution for others which had been condemned and taken out because of imperfect construction. More of the same character were simply added, in order to increase the capacity of those already there, so as to take care, if possible, of the material which they had to deal with. It is true that these were furnished at cost, but not without at least that much charge, as though embraced in what had been previously put in, there being no adverse significance in this partial gratuity. As so viewed, the work was therefore a single whole, covered by the one engineering contract which bound together, from beginning to end, the different things done under it. *Hofer's App.*, 116 Pa. 360, 9 Atl. 441. And it was so recognized by the immediate parties, the Newhall Company not being in a position to demand payment, nor the paper mills company to make settlement with them, until the last piece of machinery was furnished. And the lien, having been filed within six months afterwards, was in time, and, so far as that is concerned, is not open to question. It is said that the additional washers were installed in a small building adjoining the pulp mill, specially erected for the purpose, and that the four special tanks were similarly set up by themselves in one end of the boiler house, all being outside of the pulp mill, with which they had thus no immediate structural connection. But they were tied to it functionally as aids to the process carried on there, and, having been furnished in order to complete and perfect it, may therefore be properly regarded as continuing the work and preserving the right of lien until it was so brought to a conclusion.

Unfortunately, however, for the mechanics' liens, they should have been filed against the soda pulp mill by itself, and not against the entire

paper mill plant, as they are, and on this account they are fatally defective. It is clear from what has been already said that the pulp mill, while a part of the general establishment, and essential in a way to its successful operation, as a structure was distinct, capable of being separately liened, and bound to be so treated as to work done and materials furnished for and about its individual construction. And that both liens fail in that respect, there can be no question.

Taking up the Newhall lien first, the claim is declared to be "for the planning and superintending the construction of a soda pulp mill, consisting of a wash house, digester house, caustic house, incinerator house, and wood house, and planning and superintending the installation of machinery and apparatus for the soda pulp mill, and also furnishing machinery and apparatus" therefor. By direct averment, therefore, judged by the work claimed to have been so done, the right of lien was confined to the structure into which it went, and the property, against which it was laid, should have been restricted accordingly. This, however, is not the case. Quoting from the statement of lien, it is there said: "The following is a description of the property against which the lien is claimed: * * * All those two certain tracts of land situate in the borough and township of Catawissa, Columbia county, Pa.; one of them with the pulp and paper mill plants, being a soda pulp mill, consisting of a wash house, a digester house, a caustic house and incinerator house, a wood house, and also the paper mill, consisting of offices, a boiler house, a beater house, a paper machine room, a machine shop, and all other buildings and improvements thereon erected, and all machinery and fixtures of every kind therein contained, situate in said borough of Catawissa, bounded and described as follows:"—a full description of the tract being given by metes and bounds, and said to contain 9 acres and 39 perches; the second tract containing 5 acres and 13 perches, and forming the site of the dam or pond which furnished water to the works, being similarly set out at large. To this, as matter of description, both as to land and buildings, no exception can be taken. The only question is whether the claim of lien is not thereby carried outside of its legitimate bounds.

The lien given by the law to mechanics and materialmen, for work done and materials furnished for and about the erection and construction of a building or other improvement, is a lien on the particular structure into which such work and materials enter, and not, except by way of curtilage, to anything outside of that, such lien being conferred, by way of compensation, for that which is so directly contributed to it. "Every structure, or other improvement, and the curtilage appurtenant thereto," says the statute (Act June 4, 1901, § 2), "shall be subject to a lien," etc. And a substantial addition is put upon the same footing, such addition, and the structure of which it becomes a part, being made similarly subject (section 3). Parrish and Hazard's App., 83 Pa. 111. Where several buildings or improvements are constructed as a single manufacturing or business enterprise, such as an iron furnace, a salt works, an oil refinery, and the like, a lien may be filed against all, as constituting a single whole. *Short v. Miller*, 120 Pa. 470, 14 Atl. 374; *Titusville Iron Works v. Keystone Oil Co.*, 130 Pa. 211, 18 Atl. 739; *Linden Steel Co. v. Imperial Refining Co.*, 138

Pa. 10, 20 Atl. 867, 869, 9 L. R. A. 863; *Sicardi v. Keystone Oil Co.*, 149 Pa. 139, 24 Atl. 161, 163; *Linden Steel Co. v. Manufacturing Co.*, 159 Pa. 238, 27 Atl. 895; *Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614, 43 N. E. 876. But the fact that a building, upon its erection, becomes a part of a manufacturing establishment, does not extend the lien for materials furnished in its individual construction to all the buildings which make up the plant. *Dalles Lumber Co. v. Wasco Manufacturing Co.*, 3 Or. 527. The lien in such case is limited to the particular building involved, and the claim of lien must be filed against it alone, and not against the entire premises, old buildings as well as new. *Jones on Liens*, §§ 1310, 1311; *Wharton v. Douglas*, 92 Pa. 66; *Long v. McLanahan*, 103 Pa. 537; *Girard Storage Co. v. Southwark Co.*, 105 Pa. 248. And a statement of lien filed in disregard of this is necessarily and essentially bad. *St. Clair Coal Co. v. Martz*, 75 Pa. 384; *Ely v. Wren*, 90 Pa. 148. As said by Brown, J., in *Todd v. Gernert*, 223 Pa. 103, 72 Atl. 249, considering the present statute:

"A claim may be filed for labor or materials furnished to a 'structure,' but no permission is given to file a single one against several structures."

And it was accordingly held, in that case, that a lien could not be sustained against three separate dwellings in a row, upon the allegation that they formed one plant. Neither is the necessity for restricting the claim of the lien to the building involved affected by the provision of the statute (section 3) that the curtilage appurtenant to the structure or improvement may include other structures, whether newly erected, altered, or changed, forming part of a single business or residential plant. This is not a question of curtilage, but of extent and specification of lien, and the two are not to be confused. The structure controls the curtilage, which is confined in every instance to what is reasonably necessary for the purposes for which it was built. And the structure is therefore to be clearly indicated in the statement of lien filed, not only that the appropriate curtilage may be allowed, but also that other lien creditors may be advised to what extent in this, as well as in other directions, it is entitled to go. The lien extends primarily to the building, and only incidentally to the land. *Wigton's App.*, 28 Pa. 161. And the statement of lien is to be correspondingly confined. Where it goes beyond this and includes other structures, against which there is no claim, it cannot stand. A claimant cannot enter a lien against several buildings, and expect to sustain it by showing a right of lien against one. The only question, therefore, in the present instance, is whether this was in fact done.

That the pulp mill was a separate and distinct structure there can be no doubt. This clearly appears from what has been already said, and is recognized also in the statement of lien. Not only is it there declared (paragraph 11), to be "a new erection and construction," but the different departments of which it was made up (paragraph 5) are described. It may be that the process to be carried on in it, as a matter of business, was indispensable to the economical manufacture of paper at the plant, and that, as already intimated, because of its unsuccessful operation, the company ended in the hands of a receiver.

And it may be also, in view of this, that the whole establishment, paper mill as well as pulp mill, could be regarded as the appropriate curtilage, being reasonably necessary for the purpose for which it was built. Section 3. It is also true, if this were found to be the case, that the specification of too large a curtilage would not vitiate the lien, it being within the power of the court, at any stage of the proceedings, to decide what was right. *Harbach v. Kurth*, 131 Pa. 177, 18 Atl. 1062; *Sicardi v. Keystone Oil Co.*, 149 Pa. 139, 24 Atl. 161, 163. But, as before said, this is not a matter of curtilage, but of lien, which has first to be disposed of before the other comes up. And the claim of lien here is clearly too broad, being made against the whole plant, and not against the pulp mill only, as it should have been. It is said that the eighth paragraph of the lien, on which this is predicated, which is quoted above, is merely concerned with a description of the property on which the pulp mill is situated, and was not intended to specify the structure against which the lien was filed, which is otherwise sufficiently indicated as the soda pulp mill, about which, according to the lien, the work was done. But the statute (Act April 17, 1905, P. L. 172), with which this paragraph of the lien evidently undertakes to comply, not only calls for a description of the real estate on which the structure is situated, but also for such a description of the structure itself as may be necessary for its identification; and the only description of that character, which we have here, includes all the buildings and improvements comprising the plant. Nor is this helped out by the final paragraph of the lien, where such curtilage is claimed as is reasonably necessary for the purposes of the pulp mill, against which, as it is said, the lien is filed. This is not the place, where parties interested are required to look for a designation of the structure liened; nor is a mere recital, such as this, enough to control the positive averment which had gone before. Even if it were more significant, however, than it is, if left in uncertainty between the two as to what structure is meant, the lien is bad, it not being for others to say which statement is to prevail. Mechanics' liens are secret liens, and must get on the record right, other lien creditors and purchasers being entitled to have something on which they can rely. But that it was beyond peradventure the intention to file the lien against the whole plant, the notice of lien, filed in supposed pursuance of the statute, gives the premises against which this was to be done, as the two tracts of land which have been referred to "with the pulp and paper mills plants thereon." The lien of the Newhall Company, therefore, being essentially claimed against the whole paper mill establishment, while entitled to be enforced against the soda pulp mill alone, for the construction and equipment of which the labor and materials were supplied, the statement of lien is fatally defective, and cannot be allowed.

The Beach Haven Brick Company's lien is, if possible, in even worse plight. Like the other, it is distinctly filed against the whole paper mill plant, made up of the two tracts of land described; the structure erected on the one, as it is said, being "a large brick paper manufacturing plant, consisting of a fiber mill, ground wood mill, and paper mill plant." There is thus no pretense of confining it to the pulp mill, into which the brick which were supplied went, a lien against the whole

property being unmistakably claimed, to which, under no circumstances, was there any right.

But assuming that these conclusions are not correct, and that the mechanics' liens are good as they stand, they are nevertheless not entitled to anything out of the fund. The difficulty is that the first mortgage is a superior lien, which relegates them to the rear, and lets in the receiver's certificates ahead, in favor of whom the bondholders waived their rights.

Mechanics' liens, in case of original construction, relate back and take effect, according to the statute (section 13), "as of the date of the visible commencement upon the ground of the work of building the structure or other improvement." This calls for something of such a marked and substantial character as to attract attention and convey notice that a new structure or improvement has been begun. 27 Cyc. 217. The mere placing of lumber or materials on the ground has been held not to be enough (*Middletown Savings Bank v. Fellowes*, 42 Conn. 36; *Kansas Mort. Co. v. Weyerhaeuser*, 48 Kan. 335, 29 Pac. 153), nor the staking out of the building or line of foundations (*Kelly v. Rosenstock*, 45 Md. 389; *Hagenman v. Fink*, 19 Pa. Co. Ct. R. 660); contra, *Lombaert v. Morris*, 2 Del. Co. R. 457. Nor the clearing of the land of brush and stumps and putting it in a condition to begin work on the building proper. *Central Trust Co. v. Cameron Iron and Coal Co.* (C. C.) 47 Fed. 136 (*Acheson and Reed*, JJ.). And this excludes the demolition of a building, or the clearing away of the debris after a fire, being taken as the visible commencement of a new erection, unless it is more significant than it usually is. Neither is this otherwise, even though the contractor may have a lien for the demolition as a part of the construction contract, as in *Whitford v. Newell*, 2 Allen (Mass.) 424; *Bruns v. Brann*, 35 Mo. App. 337. Cf. *McCristal v. Cochran*, 147 Pa. 225, 23 Atl. 444; *Craig v. Commercial Trust Co.*, 211 Pa. 7, 60 Atl. 317. Nor is it affected by the fact that the act of 1901 allows a lien for the removal of a building; which refers to the bodily transfer of it from one place, and the setting of it up in another, and has no application to the taking down of a structure to permit of a new one in its stead. The excavation for the foundation of the new structure is the accepted test of its commencement, to which mechanics' liens relate. *Pennock v. Hoover*, 5 Rawle (Pa.) 291; *Moroney's App.*, 24 Pa. 377; *Parrish and Hazard's App.*, 83 Pa. 111; *Henning v. Fry*, 23 Pitts. Leg. J. 125. And even this must have so far progressed as to be readily observed. A mere scratching of the ground is not enough. The suggestion that a mechanic's lien goes back to the first spade struck into the earth, or the first shovelful of dirt turned, is rhetorical but not sound. "The removal of the sod, the turning over of the soil, or such other equivocal acts as would not fairly indicate the purpose to build, do not constitute the commencement of the building. To satisfy the law, so much must be done of a permanent character as will apprise observers that building is in progress." *Jacobus v. Mut. Ben. Life Ins. Co.*, 27 N. J. Eq. 604.

The only thing in the present instance to carry the mechanic's lien back of June 29, 1904, when the first mortgage was filed, is the evi-

dence that Gorry, the contractor for the construction of the pulp mill, did half a day's work on June 23, tearing down the back part of the mill ruined by the fire, and cleaning off the brick, preparatory to using them again. A couple of digesters had been delivered by the Newhall Engineering Company at that time, and were then on the ground. But that is all. The foundation trenches were not dug until later, and had not been started when Fegley went there, July 1, not having been staked out, according to Thomas Lynn, until July 4. And, confirmatory of this, it is testified by Schreuder, the representative of the Newhall Company, that the cleaning away of the débris was all that had been done when he came there, July 2. It is true that in a letter from Beckley, the president of the paper mills, to the Newhall Company, June 25, it is stated that the contractor had started in to clear away the old buildings preliminary to erecting the new, and that they were therefore to go ahead with their plans. But assuming that this was so, and that preparatory work of this character had been done, it does not make out that the work of rebuilding, within the meaning of the law, had been begun. Like the delivery of machinery or material on the ground, the mere cleaning up of the ruins of the fire did not necessarily import that the construction of a new building was going on. It was an equivocal act, entirely consistent with the mere repair or straightening up of the property, and therefore conveyed no such notice as was required. Until the excavation for the foundations was begun, there was thus, clearly, no visible commencement of the building on the ground, and, this not having been entered upon until after the first mortgage was filed, it was too late to affect the lien thereby acquired.

It is said, however, that, even if the mechanics' liens are postponed to the first mortgage, the receiver's certificates get no benefit from this, the waiver by the bondholders in their favor not being able to interfere with the mechanics' liens or to advance the receiver's certificates over their heads. It is no doubt true that the liens of the mechanics and materialmen, having attached to the property, could not be put aside in the interest of subsequent lien creditors, except by their own act. But that does not exactly present the case. Until the first mortgage has been satisfied, which the fund in court will not begin to do, the mechanic's lien claimants are not entitled to a dollar, and, as this is the necessary result if the mortgage is enforced, they have no possible interest in the distribution by which to come in. Nor does it give them any better standing than the bondholders have waived their rights in favor of the receiver's certificates, to which the mechanics' liens by themselves would be superior. The first mortgage stands as a complete bar to anything going to the mechanics' liens, which have no larger rights because, instead of taking it themselves, the bondholders have agreed to stand aside. In *Wilcocks v. Waln*, 10 Serg. & R. (Pa.) 380, a mortgage was superior to a judgment in favor of the United States, which became a preferred claim, as to everything else, by reason of the insolvency of the judgment debtor, and was therefore entitled to payment in advance of a judgment which was ahead of the mortgage. But it was held that the judgment of the United

States not being entitled to the money, as against the mortgage, and the mortgage being inferior to the judgment ahead of it, the situation was controlled by the position of the mortgage, and the fund was to be distributed in consequence to the prior judgment. As the United States could not take the money, it is said, it was nothing to them into whose hands it should go, when they were out of the field, the other competitors being left to fight it out between themselves. So in *Manf. & Mech. Bank v. Bank of Pa.*, 7 Watts & S. (Pa.) 335, 42 Am. Dec. 240, there was a first mortgage which was bad as to subsequent judgments for want of record, but was good, by reason of notice, as to an intermediate second mortgage, and it was held that the first mortgage was entitled to payment in preference to the judgments. The latter could not come in, as it was pointed out, until the second mortgage was satisfied, which could not be until the satisfaction of the prior lien of the first mortgage, of which it had notice. The rule is thus given in *Thomas' App.*, 69 Pa. 120:

"Where the lien of the first creditor is superior to that of the second, but inferior to that of the third, and the lien of the second is superior to the third, the first creditor will take the fund because of his superiority to the second, by reason of the superiority of the second over the third."

It is said, however, that the first place here is secured to the receiver's certificates by the agreement of the bondholders, and that *Miller's App.*, 122 Pa. 95, 15 Atl. 672, is against the advancing of an inferior lien to a position of superiority in that way. But *Miller's Appeal* speaks of the difficulty, not the inability, of doing this. And the receiver's certificates were made a first lien on the property by the order of the court, and not by the consent of the bondholders alone. But however that may be, it all comes back, after all, to this, that, occupying a preferred place over the first mortgage as the receiver's certificates do, and the mechanics' liens being entitled to nothing until the first mortgage has been paid, the distribution of the fund is a question between the receiver's certificates and the first mortgage bond holders, with which the mechanics' liens have no concern.

Let a decree be drawn making distribution of the fund in accordance with the views so expressed.

THE COLORADO.

THE STEAM LIGHTER NO. 24.

(District Court, S. D. New York. November 1, 1909.)

COLLISION (§ 39*)—EVIDENCE.

Collision off Governor's Island between an ocean going steamer bound to sea and a steam lighter proceeding up the channel to Weehawken. *Held*, that the collision was entirely owing to faults of the lighter: (1) In changing to the starboard after having obtained a safe place for naviga-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion on the westerly side of the steamer, and (2) in failing to blow a navigating signal at the proper time.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 39; Dec. Dig. § 39.*

Signals of meeting vessels, see note to *The New York*, 30 C. C. A. 630.]
(Syllabus by the Judge.)

In Admiralty. Action by the New York Central & Hudson River Railroad Company against the steamship *Colorado*, and cross-action by the Mallory Steamship Company against the New York Central Steam Lighter No. 24. The libel against the *Colorado* dismissed, and decree rendered against the steam lighter.

Wallace, Butler & Brown, for the No. 24.

Wheeler, Cortis & Haight, for the *Colorado*.

ADAMS, District Judge. These cross libels grew out of a collision which took place in the evening of January 31, 1908, between the New York Central steam lighter No. 24 and the steamship *Colorado*. The former was bound from Bush's Docks, South Brooklyn, loaded with general merchandise, for Weehawken, New Jersey. The latter was bound from pier 15, East River, to sea, on a regular voyage to Mobile, Alabama. The vessels came together at some point between Governor's Island and Bedloe's Island, the *Colorado* striking the No. 24 on her port side, about abreast of the forward part of the pilot house, and causing such damage that the latter sank very quickly. The *Colorado* went to anchorage almost immediately. The damages are alleged to have been about \$35,000 to the No. 24 and about \$12,000 to the *Colorado*.

The libel of the No. 24 alleges that her regulation lights were properly set and burning brightly and that when she was off the southwesterly extremity of the wall south of Governor's Island and heading on a course toward the North River, the red side light and masthead light of the *Colorado* were seen about 3 points off the starboard bow of the lighter; that the steamship was then off Castle William and heading for about Liberty Island; that the No. 24 then gave one blast of her whistle to indicate that she was directing her course to starboard for the purpose of passing under the stern of the steamer in order to permit the steamer to maintain her course and speed as the privileged vessel; that to accomplish this manœuvre the wheel of the lighter was promptly ported and under its influence her heading was so changed that her port side was exposed to the port side of the steamer and if the course of the latter had been maintained the vessels would have passed in safety port to port; that the steamer made no reply to this signal; that after the course of the No. 24 had been changed so that the vessels were proceeding port to port, the master of the No. 24 observed that the steamer was not maintaining her course but was changing it and swinging rapidly toward the lighter; that thereupon in order to prevent, if possible, the threatened collision the master of the No. 24 gave bells to the engine room for extra full speed ahead, which order was promptly obeyed, gave danger blasts and ported the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

wheel further, changing the course of No. 24 so that she headed toward the Governor's Island wall; that notwithstanding the signals given by the No. 24, the Colorado kept on at full speed, opened her green light and swinging rapidly toward the No. 24 struck her a crushing blow about amidships on the port side, cutting deep into the vessel, causing her to sink shortly afterwards; that the collision occurred about 5:50 p. m., to the eastward of the center of the channel between Governor's Island and Bedloe's Island, which channel is a narrow channel; that the tide was flood, the night clear and there was a fresh breeze from the north.

The libel then proceeds as follows:

"Third: Said collision and the damages resulting therefrom occurred without fault or neglect on the part of said New York Central steam lighter No. 24 or of those in charge of her navigation, and were wholly due to and caused by the faults and negligence of the steamer Colorado and of those in charge of her navigation in the following among other particulars, in that

(1) Said steamer although she had said steam lighter on her own port side, did not hold her course and speed, but on the contrary changed her course to port and in the direction of said steam lighter. (2) Said steamer, having the said steam lighter on her own port bow, did not give a single blast of her whistle as a signal of her intention to cross the course of said steam lighter, nor any signal to inform said steam lighter of her change of course. (3) Said steamer failed to maintain her course and speed, but on the contrary changed her course without giving any signal of her intention so to do to the No. 24 and obtaining the consent of the lighter thereto. (4) Said steamer did not slow, stop or reverse her engines in sufficient season to avoid collision but on the contrary maintained full speed until the collision. (5) Those in charge of said steamer maintained no proper or sufficient lookout. (6) Said steamer having by her improper change of course become the burdened vessel, did not keep out of the way of the No. 24. (7) Said steamer did not proceed through the narrow channel between Governor's Island and Bedloe's Island in the starboard or westerly half thereof, although it was safe and practicable for her so to do, but on the contrary attempted to proceed through the port or easterly half of said narrow channel, contrary to the provisions of the Inland Rules and to the dictates of good seamanship. (8) Said steamer was in charge of incompetent persons, and in such other and further particulars as the libellant may be able to point out on the trial."

The libel of the Colorado alleges that she left pier 15, East River, on her voyage, with the captain and quartermaster on the bridge, and the first officer and a competent lookout stationed forward; that the tide was flood, the night dark, lights being plainly visible; that the Colorado proceeded slowly down the East River and ported her wheel to pass south of the Battery; that while rounding the Battery, the Colorado passed several vessels on her port hand and in doing so worked pretty well over toward the anchorage buoys; that the vessel was then starboarded to straighten the course down toward the Narrows and the Colorado was swinging to port slowly when a white light, which afterwards proved to be on the No. 24, was sighted about 2 points on the port bow; that no side lights were visible, and from this fact, and the movement of the white light, the master of the Colorado judged that the lighter was headed away from him and toward the western side of the harbor; that shortly afterwards the white light then showing almost directly ahead, the Colorado blew a signal of 2 whistles but received no answer; that as the vessels approached, the master of the Colorado was able to distinguish the hull of the lighter

through his glasses and then saw that she was bound up toward the North River and on a course about parallel to that of the Colorado, but to the westward of her; that the lighter was still showing nothing but the single white light, but when she had approached still closer the master of the Colorado caught the glimmer of a green light, which looked as if the light was shining upon some obstruction; that as the lighter was on the Colorado's starboard hand and as the Colorado was still swinging to port, the situation appeared to be one of perfect safety; that when, however, the lighter was about 150 or 200 yards from the Colorado, the lighter suddenly blew a signal of one whistle and changed her course, shutting out the glimmer of the green light and swinging directly across the Colorado's bow; that alarm whistles were blown by both vessels but the lighter was so close to the Colorado at the time of her change of course that the master of the Colorado considered it impossible to avoid sinking the lighter by reversing his engines and kept her swinging to port to strike, if possible, a glancing blow; that the two vessels came together, however, in a serious collision, resulting in considerable damage to the bow of the Colorado, and injuring the lighter so seriously that she shortly afterwards sank.

It is then alleged:

"Third. Said collision was not due to any fault or lack of precaution on the part of the steamship Colorado, or those in charge of her navigation, but was wholly due to the fault and negligence of the steam lighter No. 24 and those in charge of her navigation in the following, among other, particulars, which will be pointed out at the trial:

I. In that her lights were not properly set, or were obscured. II. In that she did not maintain a proper or sufficient lookout. III. In that she did not recognize that the Colorado was bound to sea, and navigate accordingly. IV. In that she was proceeding on the westerly side of the channel between Governor's Island and Bedloe's Island. V. In that she did not answer the two whistles from the Colorado and act in accordance therewith. VI. In that she did not hold her course, but attempted to cross the bow of the steamship. VII. In that she increased her speed before the collision instead of stopping and backing."

This collision occurred about 6 o'clock. The Colorado was working under her harbor bells and was making probably 6 or 7 knots. It is claimed by the Colorado that the white light of the lighter was seen and subsequently the glimmer of a green. The lighter was making about 10 knots. It is claimed for her that the lights were fully visible and should have been seen by the Colorado. There is a great conflict of testimony concerning this matter, as indeed there was about all the important points in the case.

It is not claimed that the lighter did not have her lights burning but that they were obstructed and did not show. Four witnesses from the Colorado stated that the side lights did not show to them. The master on the bridge, said that he watched her carefully with a pair of powerful marine glasses and he was positive when he saw and blew to her that no colored light was showing. Subsequently, however, he admitted seeing the glimmer of a green light. He said:

"It was not the brilliancy of a light at all; it was the same as a light shining out on something; the body of the light itself hidden and the rays shining out across something; that was the effect it had, looking at it through a pair of glasses."

The quartermaster said that the first he knew of the presence of the lighter was after the captain blew two whistles, when he stepped to one side and saw the form of the lighter a little open on his starboard bow, about a point, 700 or 800 yards away, but not close enough to suggest trouble; that he could see the blur of her outline but could not recollect seeing any light; that he looked a second time when she must have been 250 to 300 yards away, she was then crossing the Colorado's bow and he could not see any colored lights. The chief officer said that he first saw the lighter after they were past Castle William and he then saw a small bright white light a point on the starboard bow, a half a mile away, which he reported to the captain, but saw no colored light. He did not continue watching as he had other work to do and paid no more attention to it; that he did not anticipate any danger of collision, and the next time he saw the lighter it was just about the happening of the collision. The lookout, standing forward on the bow, saw the bright light a point and a half to two points on the starboard bow but no colored lights, he thought it was 300 or 400 yards off at the time and there was no danger of collision; that he saw it several times before the collision but did not watch it carefully, "for I looked on both sides and right ahead too"; that he first saw any colored lights "when she struck, after the collision."

It appears that the lighter was about 100 feet long and generally engaged in picking up freight around the various steamboat and railroad piers in the harbor of New York for delivery to the railroad at Weehawken or West 65th Street. She contends that on this occasion her lights were not obscured.

The testimony from the lighter consists of that given by the master and of one of her deck hands, the other deck hand having been drowned by the collision.

Her master said that she was exhibiting the regulation head light, side lights and pole light, and that none of them was obscured; that the side lights were held in the lower of two sets of brackets on the sides of the pilot house, which the witness said he estimated to be at about 10 feet above the deck, but the counsel for the lighter said 7 feet 11 inches. The witness also testified to the placing of the other lights, i. e., the staff light and the head light. He said a part of the cargo was stowed on the deck forward of the pilot house and it is the contention of the Colorado that this cargo was the obscuring cause. He further said that on this occasion they were going to Weehawken with the flood tide and, as they were going home, they were doing the best they could, 9 or 10 miles an hour, possibly a little better than ordinary full speed; that the mate Corry was in the wheel house with him as lookout; that as they proceeded north they saw the masthead light and the port light of the Colorado, 3 or 4 points on his starboard bow and at that time he was showing to her the head light, starboard light and pole light; that just about this time he sent the mate out to look at the canvas covering of the cargo and the mate remained forward; that the side lights were lost in the collision.

Corry, the surviving deck hand, said it was his duty to attend to the head light; that he cleaned and filled it the day of the collision and

placed it above the niggerhead on the stem; that there was nothing to prevent it from being seen forward; that there was no cargo forward of the forward hatch but aft of that and forward of the house a number of bags of rice were stowed coming to within about 3 inches below the deck of the house; that he saw the lighted red and green lights placed on the pilot house before they left Bush's Docks by the missing deck hand; that he went below and hearing the captain blow one whistle and danger blast he came up on deck; that the cargo was not in such a position as to hide the red and green lights from a vessel ahead; that the top of the bags were 3 inches below the top of the coaming of the upper deck, the forward part of the cargo being somewhat lower than the after part.

The master of the Lehigh Valley Lighter Towanda, bound to Black Tom, from pier 11, Brooklyn, between the Battery and Governor's Island, when he rounded Castle William, saw the green light of No. 24, then rounding the lower end of Governor's Island.

It appears by other testimony for the lighter that her lights were seen at about the time of the collision but apart from such testimony, the thing to be ascertained is, what lights should have been seen by an approaching vessel. It is shown that the green lights of the lighter were actually seen by those on the Towanda, as stated above, and it also appears that when the lighter was 700 or 800 yards away from the Colorado, the master of the latter saw what he called the "glimmer" of the green light in a position that would have caused the vessels to pass within 20 or 25 yards of each other.

There is no dispute that the lighter had a deck load, stowed forward of the pilot house, which came near to obscuring the lights, but it is contended that it did not actually do so. I think it is probable that the lights were visible to careful observers over her deck load, and the important question in the case is whether the navigation of the vessels was in conformity with the rules and ordinary prudence.

The story told by the lighter is that she left Bush's Docks, Brooklyn, South of Governor's Island, at 5:30 or 5:35 p. m. bound for Weehawken, and cut directly across the flats toward Governor's Island and approaching there, she turned under a slight port helm in order to head almost directly for the center of the North River; that coming around the southerly end of the filled in portion of the island and about 500 feet therefrom, she sighted the port light and the range lights of the Colorado coming out above Castle William and angling toward Ellis Island; that the vessels were then $\frac{1}{2}$ to $\frac{3}{4}$ of a mile apart, the Colorado bearing about 3 or 4 points on the starboard bow of the No. 24; that the master realizing that the vessels were on crossing courses and that it was his duty to avoid crossing ahead of the steamer, he ordered a single blast of her whistle and ported her helm a few spokes; that no answer was made to his signal, which did not alarm him as he expected the Colorado would steady to obtain her southerly heading down the channel, but as the vessels drew nearer, to his consternation, the Colorado when 200 or 300 feet away and the vessels still port to port, suddenly increased her swing, opened her green light and shut out her red; that the master of the lighter being required to come to an

immediate decision, determined to increase his speed and rang bells to accomplish it and hard-a-ported his helm; that the Colorado neither changed her speed nor her swing toward Governor's Island but continued on, with the result that her stem struck the port side of the No. 24, abreast of her pilot house, at nearly right angles; that at the time of the collision the No. 24 was heading about for the red light on Castle William and the Colorado was angling in toward the filled in ground or basin of Governor's Island; that in order to gain time to save the crew, the master of the Colorado kept working ahead on his engines with the result that he executed a complete turning manœuvre so that when the No. 24 sank, the Colorado was heading up the North River with the lighter impaled on her bow; that the circling manœuvre of the vessel assisted by the flood tide and a "set off" from Governor's Island at that point, with the result that the final resting place of the No. 24 was considerably above and to the westward of the point of collision.

The account given by the Colorado is, that when she rounded the Battery she was forced to the westward of the channel by some other vessels and she then starboarded and started to swing to the southward to head for the Narrows; that after she swung sufficiently so that the Statue of Liberty was on her starboard bow, the white light of No. 24 was made out, then bearing about 2 points on the Colorado's port bow and about a mile away; that at the time of sighting the No. 24 the master of the Colorado could see that the No. 24 was not exactly stern on but appeared to be moving toward the New Jersey shore; that no side lights whatever were visible and the master concluded it was some vessel bound across toward the New Jersey shore; that on the proper assumption that the vessel was not approaching him, he blew her a signal of 2 whistles; that he had watched the No. 24 before blowing his signal until she was almost exactly ahead; that the Colorado was still on a swing to port and the No. 24 moving somewhat toward the Jersey shore as already stated; that the lighter did not answer the signal of two whistles from the Colorado, which did not surprise the master particularly as he did not consider, in view of the divergent courses of the two vessels, that it was necessary to blow No. 24 at all; that under the starboard wheel of the Colorado and the course of the No. 24, the relative positions of the two vessels changed until the No. 24 was on the Colorado's starboard bow and the master of the Colorado then for the first time caught the glimmer of a green light from the No. 24 and realized that the No. 24 instead of being bound away from him, was actually headed up toward the North River; that at the same time he did not feel that there was the slightest reason to anticipate trouble since the green light was far enough on his starboard bow to make his course perfectly safe, the two vessels being green to green and manifestly on courses which would carry them clear; that suddenly, when the No. 24 was only about 600 or 700 feet ahead of the Colorado, she changed her course sharply toward Governor's Island and blew a signal of one whistle; that this change of course was made after the glimmer of the green light was first seen and the green light was thereby shut out; that the vessels were then near enough so that the hull of the No. 24 could be seen directly across

the Colorado's bow; that the vessels were so close together that it was impossible for the Colorado to avoid collision by changing her course under a port wheel and there was not sufficient space in which to check the swing to port, which the Colorado still had, and change her course to starboard; that the master did not dare to stop and reverse because the Colorado having a right handed propeller such a manœuvre would have checked her swing to port, and he thereupon did, what was in his judgment the safest thing, that is, put his wheel hard-a-starboard so as to increase the swing as much as possible in order that the vessels might come together on a glancing blow; that danger signals were at this time blown by both vessels; that the vessels came together at practically right angles; that at the moment of collision the Colorado had swung so that she was heading for the wall at the lower end of the island; that the wheel of the Colorado was kept hard-a-starboard after the vessels came together in the endeavor to keep the lighter afloat until all the men should be saved, and, if possible, to push the No. 24 into shallow water near the island; that the cries of the men who were in the water could be heard from the Colorado and a boat was immediately lowered and a man picked up; that there was some delay in doing this and during the time the Colorado's engines were kept slow ahead and the No. 24 was worked in toward the island, probably 300 or 400 feet; that owing to the resistance of the No. 24 across the bow of the Colorado and the forward movement of the lighter's engine, the head of the Colorado was swung more and more to port until she was heading, at the end, practically toward the Battery and the bow of the lighter toward the Jersey shore; that the No. 24 suddenly went below the surface, and the Colorado finally proceeded to the southward of the Statue of Liberty and anchored.

We have here a dangerous collision brought about, it is contended, by the swing of each vessel from a safe passing position, that is, the Colorado suddenly swung from a position in which she was showing her red light to one in which she showed her green, and the No. 24 from a position in which she was showing her green light to one in which her red was, or should have been, seen.

The fact that whatever movement of the lighter there was after the collision was generally toward Governor's Island, until the Colorado was headed up the stream, would indicate that the point of collision was to the westward of the place contended for by the No. 24 and tends strongly to support the Colorado's contention. It is urged in this connection, that in making the necessary change of course on the part of the No. 24 in order to bring her ahead of the Colorado, after she had crossed her bow to the westward, if the Colorado's account of the matter is true, the No. 24 "committed the insane blunder of hard-a-porting, changing her heading from 6 to 8 points, and deliberately exposed her port side to the stem of an advancing steamer." While this is a very strong expression of the movement of the No. 24, I think it may be regarded as substantially correct.

The place where the No. 24 finally sank was described in the Weekly Notice to Mariners, Department of Commerce and Labor, Lighthouse Board, February 14, 1908, as follows:

"Steamlighter No. 24, wreck buoy, a H. S. first-class spar, was established February 6 in 82 feet of water, to mark the wreck of the New York Central & Hudson River Railroad Company's steamlighter No. 24 sunk off Governor's Island.

Governor's Island Light.....E SE $\frac{1}{2}$ E

Southwest part of Sea Wall south of Governor's Island.....S $\frac{3}{4}$ W

Statue of Liberty.....W $\frac{3}{4}$ S

The buoy is 50 feet northeast of the wreck which lies in deep water, and only her mast could obstruct deep water vessels."

This was practically 1,800 feet from the wall of Governor's Island.

The testimony of Mr. Andrews, a civil engineer, who has been acting for the War Department for about 20 years in hydrographic work in New York Harbor, is illuminative of the movements of sinking vessels in the locality of the wreck. He said that the direction of the ebb tide, with allowance of a degree for possible deviation, is S. 28° W. and the flood tide, subject to the same allowance, is N. 29° E., and the sub-surface currents are practically in the opposite directions and the latter would not run to any extent across the surface currents. He further said that a sinking vessel would be carried with the flood tide, which prevailed at the time, N. 29° E. until it was a part of the way down and then the sub-surface current would carry it in the opposite direction, so that it would probably land on the bottom about under where it sank. He further said that a vessel resting on the bottom approximately in the vicinity of the buoy would not move with the currents and that there is no such disturbance of the surface of the water, as was described by one of the No. 24's witnesses, as existing in the form of a circle. Mr. Andrews' testimony seemed to be entirely credible and tends to show that if the lighter was struck as far to the westward as the place where she lay sunk, which is probable, No. 24's testimony that she was within about 600 feet of the wall can not be true.

Having ascertained that the place where the vessel finally sank, and the most credible testimony seems to sustain the view that there was not much change, if any, to the westward during the sinking, was nearer the center of the channel than the No. 24's testimony indicates, she must necessarily have proceeded farther to the westward than she admits and far enough to bring her to the westward of the Colorado and to a place where a sudden and considerable change to the eastward was requisite to bring the vessels together.

This view of the situation reconciles the result with the Colorado's testimony that she saw the (glimmer of the) green light on her star-board bow shortly before the collision and renders unnecessary any definite conclusion as to the obscuration of the No. 24's lights by her cargo. If, as I have above stated, the lights of the No. 24 were exhibited, still the Colorado might not have seen them because the No. 24 was, when in view, proceeding on a heading somewhat across the Colorado's bow to the westward and the red light would naturally have been shut out.

There is another feature of the case which also seems to establish fault on the No. 24's part, that is, her signals or the absence of them.

The master testified that he blew a signal of one whistle when he was still to the southward of the lower end of Governor's Island and that

he blew no other whistle until he sounded an alarm just before the collision. He received no answer to the signal of one and he says that he saw the Colorado was constantly swinging toward his course in violation of the whistle which he had blown. In this situation he was bound to repeat his signal and if it was still disregarded, to stop and reverse. Instead of doing this, he admits that he kept going ahead at full speed, blowing no other signal until the collision was unavoidable. The whistle he says he blew was when he was 500 feet south of the southern end of the Governor's Island wall and when the Colorado was passing Castle William. This was when the vessels were more than a mile apart, although he said three-quarters. It was blown to a vessel whose course was unknown to him. The rules say that whistles are to be blown when vessels "are within half a mile of each other" and are evidently meant to apply to vessels needing signals from each other. No whistles were heard by the Colorado until the last minute when the collision was inevitable.

The foregoing sufficiently shows that this collision can be accounted for by the No. 24's faults alone.

The libel against the Colorado is dismissed, and she will have a decree against the No. 24, with an order of reference.

In re CLARK COAL & COKE CO.

(District Court, W. D. Pennsylvania. October 13, 1909.)

No. 3,535.

1. BANKRUPTCY (§ 228*)—REFEREES—REVIEW OF PROCEEDINGS BY JUDGE.

Only such orders or findings of a referee in bankruptcy can be reviewed by the District Court as are asked to be reviewed by petition filed as prescribed by General Order No. 27.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 228.*]

2. BANKRUPTCY (§ 347*)—LIENS—POWER OF COURT TO DISPLACE.

A court of bankruptcy has no power to take the proceeds of mortgaged property of the bankrupt, which belongs to the lien creditor, to pay the expenses of the general estate, or the expense of conducting the bankrupt's business through a receiver or the trustee, without the consent of the lien creditor, express or implied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 538; Dec. Dig. § 347.*]

3. BANKRUPTCY (§ 347*)—RIGHTS IN PROPERTY AFFECTED BY LIEN—ESTOPPEL OF LIENHOLDER.

A bank held the bonds of a bankrupt corporation, secured by mortgage on its property. The receiver in bankruptcy procured an order authorizing him to continue the bankrupt's business, and on his subsequent appointment as trustee obtained a further order to continue the business, on petition in which he showed a small profit from the previous operation and stated his belief that the business would at least hold its own. He made no further report for nearly a year, although the business was conducted at a large loss. Both orders were made without notice to the bank. *Held*, that it was not estopped by the fact that its attorney was also attorney for the receiver and trustee in procuring the orders, nor because its officers

may have had knowledge that the bankrupt's business was being continued, although not that it was losing money, to assert its claim to the proceeds of the mortgaged real estate, which was sold free of liens, as against the general expenses of the bankruptcy or the losses incurred in conducting the business.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 538; Dec. Dig. § 347.*]

4. BANKRUPTCY (§ 350*)—LIENS—PRIORITY.

Under the law of Pennsylvania, a mechanic's lien is entitled to priority in bankruptcy over a mortgage of the property of a private corporation, executed and recorded before the date of the lien, but given to secure bonds which were not issued until afterwards, and then delivered to a single creditor to secure a past indebtedness.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 350.*]

In the matter of the Clark Coal & Coke Company, bankrupt. Petition of the First National Bank of Pittsburg to review certain rulings of referee. Reversed in part.

G. C. Bradshaw, for petitioner.

Wm. C. Hall and S. G. Nolin, for receiver and trustee.

YOUNG, District Judge. This case comes before us upon a petition for review by the First National Bank of Pittsburg, a lien creditor. Upon the filing of this petition the referee certified the following questions as having arisen in the course of the proceedings before him:

"First. Whether, under the facts and circumstances set forth in the report and opinion of the referee on the account of the trustee and the exceptions thereto, the trustee should be allowed credits claimed aggregating the sum of \$15,327.42.

"Second. Whether the claim of the bonds belonging to the First National Bank, or a certain mechanic's lien of the Freeport Planing Mill Company, is entitled to priority in distribution.

"Third. Whether certain taxes are a lien on the real estate of the bankrupt company, and entitled to priority of payment out of the funds now for distribution, being the proceeds of the sale of certain real estate."

Inasmuch as the First National Bank alone asked for review, and that upon the first two questions certified, we cannot now consider the question raised by the third question certified. The bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) provides for a review by the judge of orders or findings of the referee, and General Order 27 provides how this review shall be obtained, viz., by the aggrieved party filing with the referee his petition for review. This is the only method provided for obtaining a review. In re Russell (D. C.) 5 Am. Bankr. Rep. 566, 105 Fed. 501; In re Hawley (D. C.) 8 Am. Bankr. Rep. 632, 116 Fed. 428. As it does not appear by the record that any petition for review was filed with the referee, or that he was requested to certify the question to the court as to the taxes, the question raised by the third certified question will not be considered.

This leaves for our consideration two questions:

First. Whether, under the facts and circumstances set forth in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

report and opinion of the referee on the account of the trustee and the exceptions thereto, the trustee should be allowed credits claimed, aggregating the sum of \$15,327.42.

Second. Whether the claim of the bonds belonging to the First National Bank, or a certain mechanic's lien of the Freeport Planing Mill Company, is entitled to priority in distribution.

The facts necessary to an understanding of the first question are as follows: The First National Bank of Pittsburg is the owner of certain bonds secured by a mortgage deed of trust duly recorded on April 12 and 13, 1905, almost two years before the filing of the petition upon which the mortgagor was adjudged a bankrupt. McCracken, the receiver appointed by the court to take charge of the bankrupt's business, on April 17, 1907, was permitted by the court, under the provisions of the act of 1898, to conduct the business of the bankrupt until the appointment of the trustee. No notice of this application was given to the First National Bank, and under this authority the business was continued. Upon June 27, 1907, McCracken, the receiver, having been appointed trustee, presented his petition to the court, setting forth that, not counting the depreciation of the plant and the interest charges, the concern had made \$194.73, and that he believed that the property would at least hold its own. No notice of this petition was given to the First National Bank, and upon an order being made the trustee proceeded to carry on the business until the plant was sold by order of court on July 14, 1908. Upon April 13, 1908, the trustee presented his petition to the referee, and was permitted to borrow \$1,200 upon certificates, for the purpose of paying pressing obligations, these certificates to be a prior lien to the other liens upon the real estate of the bankrupt. Notice of this petition was given to the First National Bank, and no objection was made by that bank to the priority of these certificates. Upon July 14, 1908, the real estate of the bankrupt was sold, discharged of all liens, for the sum of \$20,668.64, after notice to all the lien creditors, including the First National Bank, upon application for leave to sell and without objection on the part of the First National Bank. It also appears from the record that Wm. M. Hall, Esq., was the counsel for the receiver, and was also counsel for the First National Bank, the lien creditor, during the time covered by the receivership and the trusteeship, and as counsel for the receiver and trustee represented him in the proceedings authorizing the operation of the bankrupt's business.

The trustee having filed his account, which included the proceeds of the sale of the real estate, it appears that the fund in the hands of the trustee is the proceeds of the sale of the real estate upon which the First National Bank claims to have the first lien by reason of the mortgage above set out. The trustee in his account claims credit for the general expenses of administering the estate and all the expenses incurred by him in carrying on the business of the bankrupt. The referee allowed all the expenses, both those generally incurred in administering the estate and those incurred in carrying on the business, as a credit to the trustee, and thus wiped out all the lien of the First National Bank except about \$1,500.

This is the error complained of in the first question certified to us. The referee based his findings that the exceptions of the First National Bank to the allowance of the expenses of running the business should be dismissed, upon the fact, as found by him, that because the bank knew of the bankrupt's financial condition, that the business was being carried on, and that because counsel for the receiver and trustee was also counsel for the lien creditor, although he did not appear as counsel for the lien creditor in any of the petitions or orders for leave to run the business, he must be presumed to have acted for the interest of all whom he represented. This appears from his record and opinion:

"It appears by the record, that William M. Hall, Esq., was the attorney for the Industrial National Bank, the original holder of the bonds of the bankrupt company, and, after the merger of the Industrial National Bank in the First National Bank, represented the First National Bank in the proceedings taken in the year 1906 by the bankrupt company to validate the bonds irregularly issued by the bankrupt company and held by the First National Bank. It further appears that Mr. Hall, up until the time of the filing of the exceptions, appeared in the bankruptcy proceedings as counsel for the First National Bank; that Mr. Hall presented the petition for the appointment of the receiver, and also for the order authorizing the operation of the business of the bankrupt by the receiver, and subsequently for the order authorizing the operation of the bankrupt's business by the trustee. Thus Mr. Hall represented, not only the receiver and the trustee during the period of his receivership and trusteeship, but also the bank. It further appears that the petition for the issuance of the receiver's certificate to the amount of \$1,200 was presented by Mr. Hall, and was duly served upon all lien creditors; the record showing that the service on the First National Bank was upon Mr. Richards, the cashier of said bank, and that no objection was made by the bank.

"It is argued by counsel for the exceptant, who appears to have succeeded Mr. Hall as counsel for the First National Bank, at the time the exceptions were filed, as already stated, that the bank is entitled to have its lien paid without diminution, except as to the sum of \$1,200 represented by the loan made as if upon receivers' certificates, as being the only expenditure acquiesced in by the First National Bank. It is true that, with this exception, there is no evidence, either affirmatively or negatively, as to knowledge by the bank or its officers of the operation of the business, other than such as may be inferred from the fact that the counsel of the bank was, all through such operation, the counsel for the receiver and trustee. But it is clear from the evidence in the case that the bank officers were perfectly familiar with the bankrupt's financial condition and had full knowledge of the bankruptcy. There is no denial that they knew the bankrupt's business was being carried on; indeed, the account shows at least one note discounted by the trustee at the bank during such operation.

"The counsel of the receiver and trustee, who obtained the orders authorizing the operation of the business, was also counsel for the bank. He must be presumed to have acted for the interest of all whom he represents. It is not credible, in the absence of evidence, that he would act against his clients' wishes and consent. Both the bank and the trustee knew that Mr. Hall represented the other, and the record informed the referee, when the order for operation was made, that he represented both. The sale of the property was ordered not long after the order to operate, and notice thereof given to the bank. When the sale was adjourned repeatedly, the mortgage creditor was bound to know it, and to know that the business was being carried on. I am unwilling to hold that the bank could shut its eye to what its trustee was doing in its behalf, and take the chances of benefit therefrom, without obligation for losses. When, in April, 1908, it was necessary for the trustee to borrow money to pay the laboring men at the mines, no objection was made by the bank. If it were no party to the operation of the plant, it was bound to

object. That it did not object is convincing evidence that it regarded itself under obligation in the premises.

"The referee fully recognizes the soundness and importance of the rule that a trustee must keep within his resources or take the consequences, and that obligations on creditors in such cases should be most cautiously imposed; yet in this case the trustee appears to have been merely performing his duty as he was ordered by the bankruptcy court upon the application of counsel, who was also the counsel of the bank. It may be that the referee should have required the record to show more precise notice to the bank, as a lien creditor, before making the order for operating the business of the bankrupt in this case, as it is his standing rule to do so; but this is not sufficient reason to charge a faithful trustee as is sought in the exceptions."

While it may be said, as against the referee's conclusion of fact, that it appears from the record and evidence that, when the receiver first applied to the referee on April 16, 1907, for leave to operate the plant, he set out in his petition that he believed that no money would be lost by running the plant, and afterwards, in presenting his petition to the referee on June 27, 1907, set out in his petition that by conducting the business he had earned \$194.78 above the expenses of running the plant, and that he believed the property would at least hold its own, which statements the lien creditor had a right to rely on, and that it also appears from the record and the evidence that the trustee did not again show to the court the losses which he was making by running the plant, and that there is not any evidence from which it could be inferred that either the lien creditor, or Mr. Hall, its attorney, knew that the plant was not earning money under the management of the trustee, although it must be inferred that the trustee well knew that fact; yet, assuming that the conclusion of the referee, namely, that the lien creditor knew that the plant was being operated, and that Mr. Hall, as counsel for the trustee, knew that fact also, we cannot agree with the referee's conclusion of law that those facts, found by him, would shut out the lien creditor from claiming the fund upon the theory that it acquiesced in the operation of the plant, and was thus estopped, either by its own knowledge or that of its counsel. Unless the lien creditor came into court, or was brought into court by regular process, and consented to the operation of the plant, or unless the facts would warrant the conclusion that it was under such circumstances as would estop the lien creditor that the business was continued, the lien creditor could not be displaced and the property covered by his lien swept away from him.

The only authority for continuing the business of the bankrupt is found in section 2 of the bankrupt act:

"Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates."

There are no other words in the act or its amendment authorizing or regulating the conduct of the business of a bankrupt. There is a bare authority here given the court to allow the business of the bankrupt to be conducted. There is no provision for the payment of the expenses, or for the issuance of receivers' certificates to pay the expenses, although, no doubt, the court would have power to order the expenses paid out of the general estate, or, if the lien creditor was

properly in court and consented, could give the certificates or expenses priority over the lien. But that with this slight power, and in the face of section 67d, "that liens given or accepted in good faith should not be affected by the act," a court of bankruptcy, without notice, can take the money of a lien creditor to pay the expenses of the general estate, or provide a fund for distribution among the general creditors, does not appear to us to be sound. It is true that the bankrupt court is a court of equity, and that it may be argued that whatever a court of equity could do in like circumstances it may do, and that the authorization of receivers' certificates in bankruptcy is akin to the power of a court of equity in authorizing receivers' certificates for insolvent corporations. Nevertheless it was decided, in *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, and *Kneeland v. American Loan Company*, 136 U. S. 97, 10 Sup. Ct. 950, 34 L. Ed. 379, that it is because the property is of a public nature and because the public interest requires the operation of the concern, such as a railroad or other public service corporation, that the court will authorize the issuance of receivers' certificates to have priority over existing lien creditors.

It has been equally definitely settled that in the case of a private corporation no such authority or power resides in the courts. The following are cases sustaining this view: *Hanna v. State Trust Co.*, 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201; *Farmers' Loan & Trust Co. v. Grape Creek Coal Co. (C. C.)* 50 Fed. 481, 16 L. R. A. 603; *Newton v. Eagle & Phoenix Mfg. Co. (C. C.)* 76 Fed. 418; *Kneeland v. American Loan Co.*, 136 U. S. 97, 10 Sup. Ct. 950, 34 L. Ed. 379, where Mr. Justice Lamar said:

"Upon these facts we remark, first, that the appointment of a receiver vests in the court no absolute control over the property and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgaged liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contracted obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver for railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not on the expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens. *Railroad Co. v. Railway Co.*, 125 U. S. 658, 673, 8 Sup. Ct. 1011, 31 L. Ed. 832. So that these interveners acquired no right of priority by virtue of their antecedent contracts of sale."

But, assuming that there is authority for the issuing of receivers' certificates in this case, and that the power to issue such certificates would include the power to pay the expenses of running the plant just as if those certificates had been authorized, was the lien creditor estopped by either his own conduct or that of his counsel from claiming the priority of his mortgage over the expenses? Estoppel is defined by Bigelow on Estoppel (4th Ed.) 445, as follows:

"A right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the parties against whom they are alleged."

It was said in *Nowell v. International Trust Co.* (C. C. A.) 169 Fed. 508:

"Before an estoppel can arise, it must appear that the person invoking it has been influenced by and would rely upon the acts or conduct of him who is sought to be estopped, and that these acts and conduct were sufficient to warrant reliance and action thereon."

The receiver or trustee takes the property of the bankrupt subject to all the equities that existed as against the bankrupt. All that he may sell is the equity of redemption. *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. In the case at bar the receiver took the manufacturing plant and real estate of the bankrupt subject to the mortgage deed of trust, the bonds of which the First National Bank now claims to hold. He knew the condition of the business, of its finances, of its clay and coal veins, of its machinery and equipment, of its manufactured, partly manufactured, and unmanufactured product. He knew of the probable expenses of running the plant when he first applied for instruction to the referee to conduct the business, and in his petition swore to his belief that the conduct of the business would not cause loss. Would the fact that the lien creditor only knew that the business was being continued, there being no proof that he knew any of the facts as to gains or losses, or any of the other facts as above noted as known to the trustee, in any way influence the action of the trustee in continuing the business? Would the knowledge of the trustee that the lien creditor knew the business was being continued lead this trustee, with all the knowledge he had, to conclude that the lien creditor was willing to give up his rights and all the property covered by his lien to the trustee for the benefit of the general creditors? Where in the evidence is there any fact, where is there any evidence, from which it may be inferred that the trustee was influenced by or would rely on the lien creditor waiving his lien in favor of the administration or running expenses?

We are clearly of the opinion that the referee erred in allowing the general expenses, in any view of the case, against the lien creditor. We are also clearly of the opinion that there is nothing in the record or evidence that would justify the charging of the expenses of running the business against the proceeds of sale, except as to the \$1,200 receivers' certificates and such actual costs and expenses as are directly chargeable to the sale of the real estate, and the referee, therefore, erred in allowing any expenses except these as a priority over the lien creditor.

The second question certified under the petition of review was as to whether or not the mechanic's lien of the Freeport Planing Mill Company is a prior lien to the mortgage of the First National Bank. The finding of the referee is that the mechanic's lien is entitled to priority of lien; but as the referee has not given us any findings of fact, or any discussion of the question, whether of fact or law, or any distinct finding of fact or conclusion of law, except that the mechanic's lien is entitled to priority, we are in complete ignorance of the reason governing the referee in his conclusion. Proper consideration of this question requires an examination of the mortgage in question, of the evidence as to the filing of the mechanic's lien and as to the commencement of the work for which the lien is claimed, of the evidence as to whether or not the mortgage was for future advances, and, if so, when the payments were actually made to the mortgagor, and possibly of many other facts necessary to a correct conclusion. We have a right to expect from a referee, who has had the whole question submitted to him, and has seen the witnesses and heard the evidence, that he should give the court the benefit of his investigation, and assist the court in its investigation by making a proper report, discussion, and opinion leading him to his conclusion. However, as the whole case has been argued, we feel it to be our duty to decide this question now, rather than to delay the final decision by returning the case to the referee.

The exact question before us is whether the mortgage deed of trust of the bankrupt to the Guaranty Title & Trust Company to secure the issue of \$200,000 of bonds, dated April 1, 1905, and duly recorded on April 12 and 13, 1905, is a prior lien to the mechanic's lien filed by the Freeport Planing Mill Company against the bankrupt's real estate, and which concededly has the date of May 1, 1905. The Planing Mill Company claims that its lien is prior, because the mortgage was given to secure moneys to be paid in the future. It must be conceded that the law of Pennsylvania is that a mortgage for future advances is not good against intervening liens before the money is advanced upon the mortgage. *Bank of Montgomery County's Appeal*, 36 Pa. 170; *Appeal of the Bank of Commerce*, 44 Pa. 423; and many other cases. An exception has been made in the case of the borrowing of money upon bonds to secure which a mortgage is given. The case of *Reed's Appeal*, 122 Pa. 566, 16 Atl. 100, is authority for this position. There the learned court, afterwards affirmed by the Supreme Court, said:

"A reason of more substance is found in the nature of the bonds and their relation to the mortgage. Where a mortgage is given to cover future advances by one man to another, it is not a matter of much inconvenience for the mortgagee to ascertain, from time to time, as he is called on for advances, whether there be intervening liens. It is therefore reasonable and just that he should do so, and is in harmony with the purpose of the mortgage. But a different case is presented where a public improvement is undertaken, requiring the expenditure of large sums of money and the floating of a debt of great magnitude. The debt is necessarily divided into small parts and carried into different and distant markets. It would be out of the question to ascertain the state of the record or of the company's affairs each time a bond was about to be sold. If this were made the duty of purchasers, it would prevent the sale of such securities altogether, or at least confine their purchase to such large concerns as could buy in bulk after due and careful inquiry. Even then the

facts would be open to doubt at every subsequent sale. Thus their value would be entirely reduced. For these and similar reasons 'the whole issue of such bonds must be treated as of the date of the mortgage, without regard to the time when they were actually put out, unless the contrary is clearly expressed.' *Claffin v. Railroad Co.* (C. C.) 8 Fed. 118, 4 Hughes, 12, 23; *Nelson v. Iowa Eastern R. R. Co.*, 8 Am. Ry. Rep. (Shipman) 82, 88."

Under the facts of the case at bar, we do not think the exception obtains. This was not the case of borrowing money for a public improvement. It was not the case of the issuance of bonds which were disposed of to the public. The bonds, as appears from the finding of the referee, were delivered by the bankrupt corporation in November, 1905, months after the entry of the mechanic's lien upon the record, and for the purpose of securing a past indebtedness. Under these facts we can see no distinction between the lien of this mortgage and a mortgage given to secure future advances. We therefore conclude that the lien of the Freeport Planing Mill Company is prior to the mortgage.

The finding of the referee is therefore reversed as to the expenses of the receiver, and all his credits are disallowed, except those covered by the receivers' certificates to the amount of \$1,200, if such be otherwise a proper credit, and the actual expenses incurred in the sale of the real estate.

The finding of the referee that the mechanic's lien of the Freeport Planing Mill Company is prior to the mortgage securing the bonds held by the First National Bank is sustained, and said lien declared to be prior to said mortgage.

The case is returned to the referee, with instructions to find, in accordance with this opinion, that the mechanic's lien of the Freeport Planing Mill Company is prior to all other claims except the expenses of sale and the receivers' certificates, and that the First National Bank, as to the bonds secured by the mortgage, is entitled to the balance of the fund raised by the sale of the real estate.

Let an order be drawn accordingly.

THE J. G. GILCHRIST.

THE SIMLA.

(District Court, W. D. New York, July 21, 1909. On Settlement of Decree, October 4, 1909.)

1. COLLISION (§ 51*)—PRECAUTIONS FOR PREVENTING COLLISIONS—OVERTAKING VESSELS.

The duty rests upon an overtaking vessel to keep out of the way of the vessel ahead, and she is only entitled to pass at a time and place where it is suitable and safe, taking all factors into account, including the danger of suction.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 57-61; Dec. Dig. § 51.*

Overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COLLISION (§ 99*)—PRECAUTIONS FOR PREVENTING COLLISIONS—OFFICERS AND LOOKOUT.

It was negligent for the master of a steamer to navigate her down the St. Clair river without a lookout, and with no officer in charge of her navigation, except a mate, who was also acting as wheelsman.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 211; Dec. Dig. § 99.*]

3. COLLISION (§ 105*)—OVERTAKING VESSELS—BURDEN OF PROOF AS TO FAULT.

Where, as an overtaking vessel was passing a much smaller vessel in St. Clair river, the latter suddenly sheered from her course, resulting in her collision with the overtaking vessel, and also with a third vessel passing on an opposite course, the overtaking vessel has the burden of proving that she did not cause such sheer, taking into account the speed and distance at which she passed and the effect of her suction.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 105.*]

4. COLLISION (§ 91*)—STEAM VESSELS MEETING—EVIDENCE AS TO FAULT.

As the steamer Simla, 1,500 gross tonnage, was passing down the St. Clair river, where the channel was 1,600 feet wide, she was overtaken by the Gilchrist, 3,900 tons, which, after a proper exchange of signals, undertook to pass to the starboard of the Simla, and at a distance of not less than 100 feet, and a speed not excessive. When opposite, the vessels came together, and after a slight collision the Simla sheered sharply to port and came into collision with the steamer Smith, which was passing up at a distance of 600 or 800 feet. The Gilchrist was properly officered and manned, with an attentive lookout; but the Simla had no lookout, and the second mate at the wheel was the only person on her deck. *Held*, on the evidence, that the approach of the two vessels was not due to the suction of the Gilchrist, nor to her holding a converging course, but to the fact that the Simla was not properly manned and her wheelsman failed to hold her course, as he was bound to do under the rules, but sheered toward the Gilchrist until the Simla came within the influence of her suction, which caused the sheer to port and the second collision, and rendered the Simla solely in fault therefor.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 187–192; Dec. Dig. § 91.*]

5. COLLISION (§ 125*)—ACTION FOR DAMAGES—EVIDENCE.

While, as a general rule, the testimony of the officers and crew as to what took place on their own vessel is entitled to more weight than that of persons on other vessels, yet, where the other vessel was not more than 100 feet distant, with nothing to obstruct the view of those on board, their testimony as to the movements of the passing vessel cannot be wholly ignored.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 269, 270; Dec. Dig. § 125.*]

6. COLLISION (§ 130*)—DAMAGES—DEMURRAGE—INTEREST.

In collision causes, where demurrage is awarded as a part of the damages, interest should be allowed thereon from the time of collision, unless there are special reasons for its disallowance, in the discretion of the court.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 284; Dec. Dig. § 130.*]

In Admiralty. Suit for collision by the United States Transportation Company, as owner of the steamer L. C. Smith, against the steamer Simla and the steamer J. G. Gilchrist. Decree for libelant against the Simla.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Goulder, Holding & Masten, for libellant.

Hoyt, Dustin, Kelley, McKeehan & Andrews (Hermon A. Kelley and G. W. Cottrell, of counsel), for the J. G. Gilchrist.

Clinton, Clinton & Striker, for the Simla.

HAZEL, District Judge. On November 26, 1905, at about 9:15 o'clock in the forenoon, there was a collision in St. Clair river, off the dock at Woodtick Island, situated below Marine City, Mich., between the steamer Simla, downbound to the port of Kingston, Canada, and the steamer L. C. Smith, upbound to the port of Duluth, Minn., which collision resulted in damage to the latter vessel. Just before the collision, the Simla collided with another steamer, the J. G. Gilchrist, also downbound to Lake Erie, which was overtaking her on her starboard side; passing signals of one blast having been seasonably exchanged between them. The Simla was a vessel of 1,490 gross tonnage, 226 feet keel, 35 feet beam, and depth of 14 feet. The steamer L. C. Smith had a gross tonnage of 4,702, length of keel 414 feet, over all 434 feet, beam 50 feet. The Gilchrist was a vessel of 3,871 gross tonnage, length of keel 356 feet, beam 50 feet, and draft 18 feet 3 inches forward and aft. The Gilchrist was laden with iron ore, and the Simla with 50,000 bushels of wheat. It was a clear day, with a little wind blowing from the west. The navigable channel abreast of Woodtick Island is about 1,600 feet wide.

The libel charges the Simla with fault for diverging from her course after port to port passing signals had been exchanged with the Smith, and it charges the Gilchrist with fault in overtaking the Simla at such rate of speed and propinquity as to interfere with her safe and proper navigation, and thereupon becoming responsible for her sheer to port and into the Smith. The Gilchrist charges that the Simla, which was proceeding at a slow rate of speed, crowded upon her course after agreeing upon a starboard passing; that the Gilchrist was proceeding at a safe distance abreast of the Simla, when suddenly the Simla dropped over toward her, apparently under a port wheel; that the engines of the Gilchrist were immediately stopped, but the starboard bow of the Simla struck the Gilchrist's port quarter. It is claimed by the Simla that the Gilchrist negligently crowded on her course; that when her bow was about abreast of the boiler house of the Gilchrist, which was proceeding at a rate of about $10\frac{1}{2}$ miles per hour through the water and about 2 miles per hour faster than the Simla, the latter vessel sheered from her course and slightly touched the Gilchrist; and that then the suction of the Gilchrist came under the stern of the Simla, and, notwithstanding her reversal at full speed of the engines and porting her helm, she violently sheered to port, almost at right angles, crossing the course of the steamer Smith, and striking her forward of her boiler room. At the close of the case neither the Simla nor the Gilchrist attributed any fault to the Smith; both practically conceding that damage resulted to her through the negligent navigation of either the Simla or the Gilchrist.

The testimony is conflicting as to whether the initial sheer of the Simla was caused by faulty steering to starboard, or whether the Gil-

christ passed so close as to influence by her suction the departure of the Simla from her course. The pilot rules regulating navigation in St. Clair river in force at the time of the collision required (1) overtaking vessels to keep out of the way of the overtaken vessel; (2) the overtaken vessel to keep her course and speed, without crossing the bow or crowding the passing steamer. Rules 20-22 of Navigation of Great Lakes; Pilot Rule 6. Lawrence, second mate of the Simla, who was at the wheel at the time of the occurrence, testified that, immediately upon noticing the danger which menaced from the proximity of the Gilchrist, she then being about 40 feet distant on the right side, he ported a little, a point or so, to allow the Gilchrist more space for passing, but the Simla did not respond to such movement, owing to the suction of the Gilchrist, which drew her stern over to starboard; that he checked down her speed when the Gilchrist was about two-thirds ahead of the Simla. At this time the master of the Simla, who had been below, quickly came on deck, and, entering the pilot house, assumed command of the vessel, and backed her engines; but the Simla nevertheless sheered violently to port and into the Smith. The evidence shows that at the time of the initial sheer or drawing toward the Gilchrist, and prior thereto for upwards of a half hour, the Simla was without a lookout, and her master was not in charge of her navigation. In fact, there was no one on deck attentive to duty, except the second mate, who alone was at the wheel. It was an omission of duty on the part of the master to permit the Simla to proceed down St. Clair river without a competent lookout, and without intrusting her navigation to a mate or competent seaman, aside from the wheelsman, while engaged in other duties below deck.

It is a well-established rule of admiralty law that there must be a competent lookout on board a vessel, whose duty it is to carefully observe the movements and proximity of other vessels navigating in different directions or on other courses, and which are factors, or likely to become such, in her navigation or movements, and to make report thereof to the person in charge of her navigation. *Spencer on Marine Collisions*, §§ 172-173; *The Coleman*, Fed. Cas. No. 2,981; *The Arthur Gordon and The Independence*, Lush. 270. This salutary rule having been ignored by Capt. Malone of the Simla, the point is urged in behalf of the Gilchrist that in view of the circumstances a presumption of fault arises against the Simla, even though she was the overtaken vessel, and that therefore the burden is cast upon her to satisfactorily explain her initial deviation from her course. It is conceded that, as between the Smith and the Simla, the burden was upon the latter vessel to explain her sudden divergence from her course and to excuse her apparent misconduct. *The Atlantis*, 119 Fed. 568, 56 C. C. A. 134. But I think, as between the Gilchrist and the Simla, the overtaking and overtaken vessels, the rule is different. The overtaking vessel is obliged to keep out of the way of the ahead vessel, and the burden rests upon her to establish that the ahead vessel was not influenced by her suction. She could only pass at a time and place when it was suitable, proper, and safe to do so, having strict regard for the dangers from the force of suction. The master of the Gilchrist

is presumed to have been familiar with the subtleties and dangers from suction or the displacement of the water by the *Gilchrist*, a larger and faster vessel than the *Simla*, and in the navigation of his vessel on a parallel course and sailing in the same direction he was bound to take such forces into consideration. *The Fontana*, 119 Fed. 856, 56 C. C. A. 365; *The Ohio*, 91 Fed. 551, 33 C. C. A. 667. Concededly the *Gilchrist* had the right at this point in the river to pass the *Simla* upon complying with the pilot rules of the Great Lakes, which required her to first acquaint the ahead vessel with her desire to pass by blowing one blast of the whistle to pass on her right or starboard side, or two blasts of the whistle to pass on her left or port side, and then only upon receiving an answering assent.

Although the *Gilchrist* attributes fault to the *Simla* for not having a competent lookout and navigator on duty at the time of the initial sheer, yet the contention is that the main fault arose from the incompetent and negligent conduct of the wheelsman, who failed to hold the vessel in her course by improperly porting her helm. Considering the evidence in its entirety, I am constrained to agree in this contention. According to the witness Lawrence, when the bow of the *Gilchrist* came abreast of the *Simla's* stern, she was about 100 feet distant on the starboard side. In this estimate he seems to be supported by the observations of the witnesses on board the steamer *Smith*. The master of the *Gilchrist*, however, her two mates, two wheelsmen, and her steward testify that the distance apart between the steamers when the *Gilchrist* lapped the stern of the *Simla* was 200 to 250 feet, and that such distance was maintained until they perceived the *Simla* dropping over towards the course of the *Gilchrist*. Assuming the distance to have been but 100 feet, it is not claimed that there was anything unusual or unsafe in the situation, or that sheering from suction by the ahead steamer should have been anticipated. The relative positions of the vessels when they began lapping each other was not dangerous or out of the ordinary.

It is contended in argument by counsel for the *Simla* that the overtaken and overtaking vessels were navigating on slightly converging courses from the time passing signals were blown at Recors Point, and that the distance between them was so materially reduced in passing that the *Simla* came under the influence of the suction of the *Gilchrist*. Certainly, if such was the fact, the *Gilchrist* should be condemned for not keeping a parallel course and getting in the way of the ahead steamer; but this contention, I think, is inadequately supported by the facts, although I have carefully considered the reasons assigned for its advocacy. In my mind, a preponderance of the testimony establishes that the wheelsman of the *Simla* erred in maneuvering her helm to port, causing the vessel to swing to starboard and toward the *Gilchrist*. It was the duty of the *Simla* to hold her course, except to avoid danger, and to swerve or depart therefrom was a violation of rule 20 and pilot rule 6, and accordingly the *Simla* is called upon to prove that her deviation did not precipitate the disaster or contribute thereto.

The theory of sailing on converging courses is predicated upon the testimony that to the witnesses on the *Gilchrist* the *Simla* appeared to

be dropping over toward her on an angle of a half point or a point, while to the wheelsman of the Simla the Gilchrist seemed to be coming over to port and toward the Simla. To the witnesses on the Smith, the Simla appeared to drop over toward the Gilchrist, as distinguished from over to starboard. The witnesses on the Smith, however, were too far away to accurately state the movements of the vessel, and I do not think their testimony on this point is entitled to great weight. The inference of proceeding on converging courses would probably legitimately follow, if it were not satisfactorily shown that Lawrence ported the Simla's helm, not deliberately, but evidently through mistake and want of proper precaution. He manipulated the wheel in such a way as to cause her to edge over toward the Gilchrist. I am not unmindful of the rule that ordinarily the testimony of the officers and crew to acts committed or omitted on their vessel is entitled to more weight than the testimony of witnesses on other vessels, whose views are chiefly derived from what they believed they observed (*The Alex. Folsom*, 52 Fed. 403, 3 C. C. A. 165); but in the present case the witnesses for the Gilchrist were distant from the Simla not more than 100 feet, the pilot house and wheelsman of the Simla were in their direct line of vision, and there were no disturbing or interfering atmospheric conditions. Under these circumstances, the testimony of witnesses on a passing vessel should not be entirely ignored or set aside.

Upon the subject of whether the Simla's helm was ported or starboarded there was much controversy. The testimony of Lawrence left the impression in my mind that he did not maintain positive or accurate control of the helm. His responses to questions as to what he did at the wheel, at the critical time when deliberate action, based on sound judgment, was demanded, is not convincing. His testimony as to whether he rolled the wheel over to port or to starboard to give the Gilchrist more space in passing was somewhat confused, and my impression is that just before the sheering he labored under such excitement as would probably account for his faulty steering. This view finds support in the fact that he alone was in charge of the wheel and of the navigation of the vessel. There was no lookout or responsible mind to guide him at a time when direction and keen observation were required, and in the circumstances probably his error in failing to hold the vessel's course is not without palliation. The Simla, however, must be held at fault for not being properly manned and officered, as a result of which the wheelsman inefficiently and improperly steered the vessel, failing to hold her course, and bringing her under the influence of the suction of the passing steamer. The proofs show that the Gilchrist was properly manned and officered, with lookout attentive to his duties; that she undertook to pass the Simla at sufficient distance alongside to keep her suction from interfering with the Simla, if properly navigated. She was well over near the American shore (about 400 feet), as far over as was proper and safe for her navigation. It is not seriously claimed that her speed was excessive. Her wheelsman carefully steered on trees ahead, which brought him still closer to the American side of the river. The Simla, also, was proceeding in the channel, not far distant from the American shore, with an abun-

dance of deep water between her and the course of the Smith, which was variously estimated at from 600 to 800 feet. On the instant that it was noticed that the Simla was edging over, the master of the Gilchrist promptly checked, and then quickly stopped, his engines. There was nothing else he could do with safety. Indeed, to have ported at such close quarters, or to have reversed her, would have caused her stern to swerve to port, and in all probability into the Simla, while, on the other hand, the effect of stopping her engines tended to reduce or allay the force of her suction. In my judgment, the Gilchrist was properly navigated, and there is no evidence to attribute to her any blame for the collision between the Simla and the Smith.

This conclusion makes it unnecessary to discuss any alleged errors in extremis by the Simla, subsequent to her initial sheering, and explanatory of the collision with the Smith.

The libelant may have a decree against the Simla, holding her solely at fault, with costs, and dismissing the libel against the Gilchrist.

On Settlement of Decree.

On settlement of final decree the question arose whether interest on demurrage should properly be allowed from the date of loss, as specified in the stipulation filed herein, or from the entry of decree. Heretofore this court apparently held in *The Sitka*, 156 Fed. 427, on the authority of *The Eloina*, 4 Fed. 573, that interest on demurrage was only recoverable from the date of decree, and not from date of loss or injury. But this broad holding is not sustained by the weight of prior decisions. Collision cases are now called to my attention by which it is clearly shown that, not only is demurrage a proper element of damage, but that interest should be allowed from the time of collision, unless in the discretion of the court there are special reasons for its disallowance. The reason for the rule is that the party damaged is entitled to a complete return for the loss sustained by reason of the tort, and the interest is regarded as a part of the indemnification or damage award. The liability for interest usually relates to the date of injury, subject to the exercise of a sound judicial discretion. The *Mahanoy*, 127 Fed. 773. In *Milburn v. Thirty-Five Thousand Boxes of Oranges and Lemons*, 57 Fed. 236, 6 C. C. A. 317, the Circuit Court of Appeals for this circuit, in a cause of admiralty for detention and discharge, considered the refusal of the district court to allow interest, and Judge Lacombe, speaking for the court, in effect said that there was no reason why demurrage should be subject to any other or any different rule than that which obtained in other cases. This would seem to settle any uncertainty in this district as to the allowance of interest on demurrage from the date of injury which may have been created by the decision in *The Eloina*, supra.

So decreed.

UNITED STATES v. LAMSON.

(Circuit Court, D. Rhode Island. September 28, 1909.)

No. 2,631.

1. INTERNAL REVENUE (§ 25*)—OLEOMARGARINE—STATUTES—REGULATION.

The oleomargarine act (Act Cong. May 9, 1902, c. 784, § 6, 32 Stat. 197 [U. S. Comp. St. Supp. 1907, p. 641]) provides that wholesale dealers in oleomargarine shall keep such books and render such returns as the Internal Revenue Commissioner may require, and that such books shall always be open to the inspection of any internal revenue officer or agent. *Held*, that such section did not so limit the power of the Internal Revenue Commissioner as to authorize only the making of regulations requiring returns as to the contents of the books required to be kept by wholesale dealers; but that he was authorized to adopt a regulation requiring such dealers to make monthly returns showing the packages and pounds of oleomargarine received, the quantity disposed of, and the names and addresses of the consignees.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 72; Dec. Dig. § 25.*]

2. INTERNAL REVENUE (§ 25*)—OLEOMARGARINE ACT—REGULATION—RETURNS.

The oleomargarine act (Act Cong. May 9, 1902, c. 784, § 6, 32 Stat. 197 [U. S. Comp. St. Supp. 1907, p. 641]), requiring wholesale dealers in oleomargarine to keep books and render returns as required by the Commissioner of Internal Revenue, and the regulation requiring monthly reports by such dealers, did not make the sufficiency of the returns depend on their conformity to the books, but on their conformity to the facts; such dealers being required to make both their books and returns a correct record of the facts.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 72; Dec. Dig. § 25.*]

3. INTERNAL REVENUE (§ 25*)—OLEOMARGARINE—REGULATIONS—DISCLOSURE OF PURCHASERS—REASONABLENESS.

The oleomargarine regulations of December, 1904, requiring wholesale dealers to make monthly returns showing the names and addresses of purchasers, was not unreasonable.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 72; Dec. Dig. § 25.*]

4. INTERNAL REVENUE (§ 25*)—OLEOMARGARINE—REGULATIONS.

The oleomargarine act (Act Cong. May 9, 1902, c. 784, § 6, 32 Stat. 197 [U. S. Comp. St. Supp. 1907, p. 641]), requiring wholesale dealers in oleomargarine, process, renovated, or adulterated butter to keep books and render returns as required by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, authorized the commissioner to require returns as to both dealers in oleomargarine and in process, renovated, or adulterated butter; and hence a regulation requiring monthly returns from dealers in oleomargarine only was not objectionable because it did not apply to dealers in process, renovated, or adulterated butter.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 72; Dec. Dig. § 25.*]

5. INTERNAL REVENUE (§ 39*)—OLEOMARGARINE—REGULATIONS—FICTITIOUS RETURNS.

The oleomargarine regulations of December, 1904, require monthly wholesale dealers' returns, showing in detail the number of packages and pounds of oleomargarine received from manufacturers and wholesale dealers, also the quantity disposed of, with the names and addresses of each person to whom sold or consigned. *Held* that, where the names of the purchasers as given in a wholesale dealer's return were wholly or partly

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 173 F.—43

fictitious or erroneous, there was a violation of the regulation, though the quantity disposed of was correctly disclosed.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 105; Dec. Dig. § 39.*]

6. INTERNAL REVENUE (§ 47*)—OLEOMARGARINE—REGULATIONS—VIOLATION—INDICTMENT.

Counts of an indictment against a wholesale dealer in oleomargarine, charging a failure to make a return of purchases and sales for a particular month under oleomargarine regulations of December, 1904, requiring such monthly returns, were not objectionable for uncertainty.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 147; Dec. Dig. § 47.*]

7. INDICTMENT AND INFORMATION (§ 137*)—OLEOMARGARINE REGULATIONS—MOTION TO QUASH.

Where an indictment for violating the oleomargarine regulations charged in several counts a failure to make any return for a particular month, whether such counts could be supported by evidence of the making of a false or incomplete return for that month could not be considered on a motion to quash the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 483; Dec. Dig. § 137.*]

George F. Lamson was indicted for failure to make returns under the oleomargarine act. On motion to quash the indictment. Denied. See, also, 162 Fed. 165.

Chas. A. Wilson, U. S. Atty., and G. H. Huddy, Jr., Asst. U. S. Dist. Atty.

Walter H. Barney, for defendant.

BROWN, District Judge. The indictment charges the defendant, a wholesale dealer in oleomargarine, with failure to make returns required by section 6 of the act of May 9, 1902 (Act May 9, 1902, c. 784, 32 Stat. 197 [U. S. Comp. St. Supp. 1907, p. 641]), known as the "Oleomargarine Act," and by regulations made under said act. Section 6 provides:

"That wholesale dealers in oleomargarine, process, renovated or adulterated butter shall keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require; and such books shall be open at all times to the inspection of any internal-revenue officer or agent. And any person who willfully violates any of the provisions of this section shall for each such offense be fined not less than fifty dollars and not exceeding five hundred dollars, and imprisoned not less than thirty days nor more than six months."

By regulation of December, 1904, wholesale dealers were required to make monthly returns—

"showing in detail the number of packages and number of pounds of oleomargarine received direct from manufacturers and other wholesale dealers, also the quantity disposed of, with the name and address of each person to whom sold or consigned. These returns will be rendered on the first day of the month succeeding that for which the return was made, or within ten days thereafter, in duplicate, to the collector, who will forward one copy to the Commissioner of Internal Revenue."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The indictment is based wholly upon the failure to make returns required by the regulation. The first point in support of the motion to quash is that, by the provisions of section 6 of the oleomargarine act, the returns which may be required are explicitly confined to the books, and that, as the regulations go beyond this, they are not authorized by the statute. This point was raised in *United States v. Lamson* (C. C.) 162 Fed. 165-168, and was decided adversely to the defendant's present contention. The sufficiency of the returns depends upon their conformity with the facts, and not upon their conformity with the books. Both books and returns are to be a correct record of the facts. A construction which would lead to the conclusion that the returns were in conformity with the statute if correctly taken from the books, though the books were false, is artificial and unreasonable, and would serve no other purpose than to afford a violator of the regulation a ground of defense that is without substantial merit.

The regulation requires returns of the quantity of goods disposed of with the name and address of each person to whom sold or consigned. It is urged that such a return was not contemplated by the statute. It is contended that the requirement of the names and addresses of purchasers is an unnecessary and unreasonable interference with the personal and property rights of both the seller and the purchaser. It is said that:

"To require him to act without salary as a government agent for the detection of crime and to warrant the accuracy of the information furnished by him under pain of heavy fine and imprisonment is not a burden which should be placed upon a citizen by a Department regulation, unless it is unmistakably authorized by the provisions of the statute."

Apparently the object of this regulation is to trace the oleomargarine to the hands of others. As it has been decided by the Supreme Court that the oleomargarine act is justifiable as a revenue law, it is not clear that a regulation designed to assist in the tracing of property subject to a tax is unauthorized.

It is further argued that as section 6 of the oleomargarine act is applicable, not only to wholesale dealers in oleomargarine, but also to dealers in process, renovated, or adulterated butter, the regulation, which is confined to wholesale dealers in oleomargarine, and does not apply to dealers in process, renovated, or adulterated butter, is not in conformity with the statute. If, however, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to require returns as to both, I see no reason why a failure to do so as to dealers in process, renovated, or adulterated butter should render invalid the requirement as to dealers in oleomargarine.

It is further argued that, so far as appears in the first eleven counts of the indictment, the defendant has complied with the regulations therein set forth. The first three counts allege that certain sales of oleomargarine reported in the return as made to certain persons had not, in fact, been made to such persons. Assuming that the whole amount reported as sold was actually sold, but that it had not been sold to the persons whose names are reported, it follows that it was sold to persons not reported in respect of their names and addresses. Ac-

ording to the statement of the attorney for the United States, this is the theory upon which the indictment is drawn. If it is correct to hold that the regulation properly requires that the names and addresses of the persons to whom oleomargarine is sold be given, the defendant's argument upon this point is unsound. The defendant argues that the regulation is complied with if only the quantity disposed of is given, though the names of the persons to whom sold or disposed of are wholly or partly fictitious or erroneous. Only if the requirement of names and addresses is invalid is there force in the defendant's argument on this point.

The twelfth, thirteenth, and fourteenth counts are in very general language, and are objected to for uncertainty. Each of these counts charges a failure to make a return for a particular month, and in this respect is not objectionable for uncertainty. In each count is charged the failure to make a return showing the quantity of oleomargarine disposed of during the month, with the name and address of each person to whom the same was sold or consigned. Each of the last three counts seems to be sufficient to charge a total failure to make any return for a particular month. Whether either of these counts can be supported merely by evidence that a return actually made was in some particular false or incomplete is a question which cannot properly be considered on the motion to quash.

The motion to quash is denied as to each and every count.

UNITED STATES v. CERTAIN LANDS IN TOWN OF PORTSMOUTH, R. I.

In re QUINN.

(Circuit Court, D. Rhode Island. October 22, 1909.)

No. 2,780.

DOWER (§ 112*)—ASSIGNMENT BY PROBATE COURT—CONCLUSIVENESS OF DECREE.

Where, after the condemnation by the United States in a federal court of easements appurtenant to the lands of a decedent, but before the award of damages, the widow obtained an assignment of her dower in the probate court, the federal court will not award her a dower interest in the fund paid into court as damages on the unsupported assertion that the value of the easements was not taken into account in the probate court, in the face of the decree which does not show such fact, but she will be required to make application for any desired modification of such decree to the probate court.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 317; Dec. Dig. § 112.*]

Proceeding by the United States for condemnation of certain lands in the Town of Portsmouth, R. I. In the matter of the claim of Helen M. Hall Quinn. Claim denied.

Wm. P. Sheffield, for petitioner.

Frank A. Pease, for claimant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BROWN, District Judge. By the terms of the decree of award in this cause it is provided:

"Said award to said Hall claimants being in full of any and all rights and interests of Helen M. Hall Quinn, widow of the said Benjamin Hall, and is made subject to the dower interests of said Helen M. Hall Quinn, if any therein, to be hereafter determined by this court, in full for all damages sustained by said claimants by reason of the taking of said easements under said condemnation proceedings."

In pursuance of this decree, a hearing was had upon the question whether the said award to the Hall claimants is subject to a dower interest.

The claimant is the widow of Benjamin Hall, who died August 5, 1901, seised of lands in Portsmouth, R. I. Appurtenant to said lands were certain easements which were condemned and extinguished by the United States by decree of this court, dated September 18, 1905. After the entry of the decree of condemnation, but before the entry of the decree of award of damages, the petitioner filed with the court of probate of Portsmouth, R. I., her petition for assignment of dower, pursuant to which commissioners were appointed, and on July 13, 1906, her dower was set off to her by metes and bounds; land known as the "Mott Farm" being assigned to her.

By her claim filed in this cause she sets up this assignment of dower, but avers:

"That in considering the amount of her dower, and in setting off and assigning the same, no account was taken or consideration had of the proceedings herein and the loss of rights and the damages suffered by this claimant by reason thereof, and no allowance was made to her on that ground by the commissioners appointed by said probate court to set off her dower as aforesaid, nor did she, by reason of her ignorance that these proceedings were pending, call them to the attention of said commissioners."

Though the counsel for the claimant seems to have regarded these facts as conceded, I find no support for this contention. The record of proceedings before the probate court does not, in my opinion, support the claimant in these allegations of fact. Though the easements appurtenant to the lands of Benjamin Hall at the time of his decease are not mentioned specifically, the petition to the probate court averred that:

"The petitioner is entitled to her dower in all of the lands, tenements, and hereditaments of which said Benjamin Hall died seised in said town of Portsmouth."

The specific descriptions of the various tracts in the petition contain no reference to appurtenant easements. Nevertheless, it is the ordinary rule that in conveyancing such easements will pass by a description of the land, though not specifically mentioned or referred to. The language of the petition and the decree of the court of probate assigning the dower omit any express reference to easements; but from this omission alone it cannot be inferred that the commissioners in the admeasurement of dower did not give due consideration to the value of the lands, together with the easements appurtenant thereto at the date of the death of Benjamin Hall.

The claim that dower was assigned merely on the basis of the value

of the lands as they remained after condemnation of the easements cannot at the present stage of the case be accepted as fact. The contention is in substance that the admeasurement of dower was incomplete, inasmuch as she was not given an estate which was in value equal to one-third of the entire estate of which she was dowable. Assuming the truth of the claimant's allegations, they amount to a statement that the commissioners in assigning her dower adopted an erroneous basis of measurement. As a matter of right she was dowable out of her husband's lands with such enhancement of value as was due to the appurtenant easements, and her right could not be lessened through condemnation proceedings without just compensation to her. It would be manifestly unjust that appurtenant easements which added to the value of the lands, and thus increased the value upon which her dower should be computed, should be taken, and that the entire compensation for the taking should be awarded to the heirs. The result of this would be in effect a conversion of a part of the entire estate out of which she was dowable into money, and the payment of this money to the heirs at law, freed from any claim of the widow. It is obvious that dower rights, if properly asserted, cannot be extinguished in this manner. The claim of dower, even when inchoate and not consummate, as in the present case, is in the nature of a lien upon real estate, and is treated as an incumbrance to be protected. *Atwood v. Arnold*, 23 R. I. 609, 610, 51 Atl. 216.

If it be the fact that the value of the entire estate out of which the claimant was dowable was reduced by the condemnation proceedings, and that this reduced value was the basis upon which the dower was determined, it seems quite clear that the widow has failed to secure what was her legal right. The difficulty in the present case is not in the claimant's arguments as to the law governing the claimant's substantive rights, but in the facts now before the court. The claim of a present dower right in funds which may be considered as the equivalent of a portion of her husband's estate is met by a record of a previous assignment of dower, which upon its face seems a bar to further proceedings.

The contention that the commissioners did not consider the value of a portion of the estate out of which she is dowable amounts to a contention that there was error or mistake in the decree of the probate court. Ordinarily the proper place for the correction of an erroneous decree is in the court where the decree was entered. It is suggested, however, that under the terms of the present decree of award the dower interests are, by consent, to be determined by this court, and that the present decree is broad enough to give the court jurisdiction in the same way that a court of equity might have jurisdiction upon the discovery of new lands not known at the time of setting off the dower.

The argument that, upon proof that these easements were not taken into consideration by the commissioners, the case becomes simply one of the omission or oversight of a part of the husband's estate, and can be corrected in this court by giving the equivalent of a dower interest in the amount of the award, regardless of the prior assignment of dow-

er, is not free from practical difficulties. The assignment of dower was by metes and bounds; a particular farm was assigned to the widow. It is quite in accordance with ordinary practice that this assignment was approximately rather than mathematically correct. The character of the division indicates an approximation, and possibly an assent by the heirs to what must be regarded rather as a practical than as a theoretically correct assignment of dower.

It would seem more suitable that the question of the relation of the Mott farm already assigned to the claimant to the entire value of the Benjamin Hall estate should be reconsidered than that it should be assumed by this court as mathematically accurate. In other words, having due consideration for the methods of assigning dower, it would seem not unlikely that the Mott farm already assigned may be a proper assignment of dower, even if some additions should be made to what we may term the "principal of the estate for the purpose of computing the widow's third." If, for the sake of practical convenience, there has been some inaccuracy in the assignment of dower, this might fairly be readjusted upon a new consideration of the relation of the value of the Mott farm to the entire estate of Benjamin Hall without deduction of the value of the easements. It would seem hardly proper that this court, for the purpose of making a proper apportionment of the fund, should either reconsider all the questions which were before the commissioners in the original assignment of dower, or that it should assume the exact mathematical accuracy of that assignment.

The decree of the court of probate is at present, and until reformed, a complete answer to a further claim of dower. Whether there are sufficient grounds for reforming this decree or for supplementary proceedings, I am unable to determine on the present record. It seems quite clear, however, that upon no theory should the heirs at law be deprived of immediate payment of such portion of the award as exceeds an amount sufficient to satisfy the value of the widow's dower interest, assuming her contention to be correct.

I am further of the opinion that the claimant should be given a reasonable time to take such proceedings in the probate court or elsewhere as she may be advised are necessary for the reformation of its decree, and that there be retained during such period in the registry of the court a sum sufficient to satisfy her claim if it shall be finally adjudicated in her favor.

A draft order may be presented accordingly.

IN RE MOORE.

(District Court, E. D. Tennessee. May 15, 1909.)

No. 17.

BANKRUPTCY (§ 396*)—EXEMPTIONS—LIFE INSURANCE POLICIES—TENNESSEE STATUTE.

Code Tenn. 1858, §§ 2294, 2478 (Shannon's Code, §§ 4030, 4231), which provide that any life insurance effected by a husband on his own life shall inure to the benefit of his widow and children free from claims of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his creditors, do not exempt in favor of the husband during his life policies of life insurance payable either to himself or to his estate; and since such policies remain subject to assignment by him during his life, they pass to his trustee on his bankruptcy, under Bankr. Act July 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451) subject to his right to redeem the same by paying their surrender value.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 396.*]

In Bankruptcy. In the matter of A. C. Moore, bankrupt. On petition for review of order of referee. Order reversed.

See, also, 146 Fed. 187.

Susong & Biddle and H. N. Cate, for trustee.

J. B. Holloway and W. D. & W. J. McSween, for bankrupt.

SANFORD, District Judge. This petition is filed to review an order of the referee adjudging that two insurance policies taken out by the bankrupt upon his own life, one payable to himself and having a stipulated cash surrender value of \$985, and the other a paid-up policy payable to the bankrupt's estate upon his death, having an estimated cash surrender value of about \$100, were exempt to the bankrupt under the statutes of Tennessee and the bankruptcy act of 1898 and did not pass to the trustee in bankruptcy as assets for the benefit of creditors in this cause. These exemptions were claimed by the bankrupt under sections 2294 and 2478 of the Code of Tennessee of 1858, which are but the substance of section 3 of the act of February 2, 1846 (Acts 1845-46, p. 327, c. 216), brought forward into the Code. *Williams v. Carson*, 9 Baxt. (Tenn.) 516.

Section 2294 (Shannon's Code, § 4030), which is found in the chapter of the Code entitled "Of the Administration of Estates," provides that:

"A life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, to be distributed as personal property, free from the claims of his creditors."

Section 2478 (Shannon's Code, § 4231), which is found in the chapter of the Code entitled "Of Husband and Wife," provides that:

"Any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children; and the money thence arising shall be divided between them according to the law of distributions, without being in any manner subject to the debts of the husband, whether by attachment, execution or otherwise."

1. I am of the opinion that the referee was in error in holding that under these statutes the life insurance policies were exempt to the bankrupt. While it does not appear, either from the referee's certificate or from any testimony to which I have been referred, that the bankrupt was, when the policies issued, or is now, a married man, so that the essential condition upon which any claim for exemption can be based under the Tennessee statutes is, so far as disclosed by the record, lacking, these statutes having no application except to a policy upon the life of a married man (see *Rose v. Wortham*, 95 Tenn. 505, 32 S. W. 458, 30 L. R. A. 609; *Wright v. Wright*, 100 Tenn. 313, 45 S. W. 672); yet as no question has been raised on this point, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the fact of his marriage has apparently been assumed by counsel for all parties and by the referee, I shall, upon this assumption, consider the question of law as applicable to the case of a married man.

Thus considered, the question depends entirely upon the construction of the Tennessee statutes. It is settled on the one hand that insurance policies exempt by the state law are exempt under section 6 of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424]), and do not pass to the trustee in bankruptcy as assets under section 70a of that act (*Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018): while, on the other hand, it seems equally clear that, if not exempt under the state law, they pass to the trustee as assets of the estate, under section 70a, subject only to the right of the bankrupt to redeem them upon paying their surrender value (1 *Remington on Bankruptcy*, § 1005). See, also, *Holden v. Stratton*, 198 U. S. 202, 213, 214, 25 Sup. Ct. 656, 49 L. Ed. 1018. After careful consideration of the Tennessee statutes and the decisions of the Supreme Court of Tennessee in reference thereto, I am of the opinion that these statutes do not exempt, in favor of the husband, during his life, policies of insurance upon his life, payable either to himself or to his estate, but merely exempt the proceeds of such policies, after his death, for the benefit of his widow and children or next of kin, free from the claims of his creditors.

It is apparent from the face of these statutes that they create no exemption in favor of the husband himself, a construction which is emphasized by the fact that the Tennessee statute creating exemptions in favor of the heads of families does not include policies of insurance upon their own lives. Code Tenn. 1858, § 2391 (Shannon's Code, § 3794). Nor is there anything in either of these statutes indicating that it was intended to create any exemption, even in favor of the wife and children, during the life of the husband. On the contrary, section 2478 (Shannon's Code, § 4231) by its terms applies only in case of death of the husband, and provides for the division of the proceeds according to the law of distributions. And while section 2294 (Shannon's Code, § 4030) does not in terms refer to the husband's death, the fact that it was intended to apply only after his death is shown, not merely by its being found in the chapter relating to the administration of estates, but also by the provision that the insurance "shall inure to the benefit of the widow and next of kin, to be distributed as personal property"; such provision being manifestly applicable only after the husband's death.

It is furthermore well settled by the decisions of the Supreme Court of Tennessee that the provisions of these statutes only apply where the policy remains undisposed of by the husband during his lifetime, and that during his lifetime he may deal with such policy as with any other property he may acquire, and may assign and dispose of the same during his lifetime, by will or otherwise. *Rison v. Wilkerson*, 3 Sneed (Tenn.) 565; *Williams v. Carson*, 9 Baxt. (Tenn.) 516, affirming 2 Tenn. Ch. 269; *Rose v. Wortham*, 95 Tenn. 505, 510, 32 S. W. 458, 30 L. R. A. 609; *Cooper v. Wright*, 110 Tenn. 214, 216, 75 S. W. 1049. In *Rison v. Wilkerson*, supra, Caruthers, J., delivering the opinion of the court, said:

"We think that nothing more is intended by the act, and that no other operation can be given to it, than to prevent a fund of this kind from passing into the hands of the administrator with the other effects of the insured, in favor of the widow and children, or, in other words, to prefer them to creditors to that extent. But it can only apply where the claim remains undisposed of by the deceased. His power over it during his life is not at all affected by the act, but continues as ample and unrestricted as before."

In other words, the effect of these decisions is that during the husband's lifetime there is, under the statutes, no irrevocable setting apart of the insurance policies for the benefit of the wife and children, and no vestiture of interest in them; but the policy remains in all respects the property of the husband, to be dealt with by him as any other property; and disposed of by him as other assets, so far, at least, as the rights of his wife and children are concerned. On the other hand, if the husband makes such insurance upon his life payable to his wife or children, it seems that he loses the power of disposition, and cannot assign or transfer it, so as to defeat the rights of the beneficiaries. See *Southern Insurance Co. v. Booker*, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344; *Scobey v. Waters*, 10 Lea (Tenn.) 551; *Ewing v. Coffman*, 12 Lea (Tenn.) 80.

As a result of these decisions, it is a fair inference that where the husband, in taking out the policy upon his own life, makes it payable to himself or his estate, instead of to his wife and children, he does not intend to make an irrevocable dedication of the proceeds to his wife and children, but, on the contrary, intends to retain the same during his life as his own property, with the right of disposing of the same for his own benefit for any purpose that he may deem proper. This being so, I think it clear that as no right in these policies has vested in the widow and children, and if the policies were held to be exempt in favor of the bankrupt, he could immediately dispose of them for his own benefit as any other asset, he has now no valid claim to them as property exempt to him under the Tennessee statutes, in the absence of any provision in such statutes indicating any intention whatever to create any such exemption in his favor, or to create any other exemption than that in favor of his wife and children or next of kin after his death, provided the policies have not been previously transferred by him.

It was clearly not intended by these statutes to allow a debtor to invest money equitably belonging to his creditors in policies of this character, in such form that the beneficial interest would not be vested beyond his control for the benefit of his wife and children, but would be retained in a form convertible at any time to his own uses and capable of being disposed of for his own benefit, and, at the same time, to insist that such policies were exempt, in his own favor, from the claims of his creditors, at a time when his wife and children had acquired no vested interest therein.

It may be added that, even if the Tennessee statutes were intended to create any exemption at all during the lifetime of the husband, this would clearly not be an exemption which the husband himself could set up in his own behalf, thereby giving him the privilege, after the exemption had been allowed, of defeating the interest of the wife and

children by disposing of the policies for his own benefit, but would, at most, be an exemption in favor of the wife and children. Whatever may have been the intention of these statutes, they were clearly not designed as a shield to protect the husband himself from his creditors, and to enable him, under the guise of a contingent protection for his family, to make investments for his own benefit free from the claims of his creditors.

In the present case, however, the sole claim for exemption is that made by the husband; the wife and children, if any, not being before the court or setting up any claim whatever to this insurance, so far as this record discloses.

It is true that in the case of *Harvey v. Harrison*, 89 Tenn. 470, 473, 14 S. W. 1083, 1084, involving a contest between the creditors of Harrison and his widow as to the proceeds of insurance taken out by him upon his life and payable to his wife as the beneficiary, the court said, incidentally, that:

"If the insurance had been made payable to Harrison's estate, and had so continued, the creditors could not have touched it before or after his death. * * *"

This, however, was merely an incidental reference, entirely obiter, having no reference to the question directly under consideration, and made without any statement of the reasons upon which it was based. Under these circumstances, I cannot regard this dictum as controlling the present case. Nor is the case controlled, as I view it, by the opinion in the case of *Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, in which it was held that life insurance taken out by a husband upon his own life in favor of his wife was exempt in bankruptcy proceedings under a statute of the state of Washington. The statute (Laws 1897, p. 70) there under consideration was entirely different from the Tennessee statutes, providing broadly "that the proceeds or avails of all life insurance shall be exempt from all liability for any debt," there being apparently no limitation in the act either as to the character of the debts from which it was to be exempt or the class of persons in whose favor such proceeds should be exempted; the intention to exempt such insurance in favor of the husband during his lifetime being furthermore shown, as pointed out by the Supreme Court, by an amendment expressly extending the statute to the avails of accident policies. The court, in its opinion sustaining the exemption, emphasized the difference between this statute and the form common in many states, saying:

"The wide departure from the legislation of many of the other states, shown by the unrestricted terms of the Washington statute, instead of manifesting the intention of the Legislature of that state to narrow the exemption to conform to the statutes of other states, on the contrary, conclusively shows the intention of the Washington Legislature to adopt a broader and more comprehensive exemption. And light upon the intention to give a broad and popular meaning to the term 'life insurance' is shown by the amendment exempting the avails of accident policies, which ordinarily, in the event death does not result, is payable to the insured."

Furthermore, as pointed out, the exemption allowed was in conformity to an earlier decision of the Supreme Court of the state of Washington.

2. I have not considered the question referred to in the referee's certificate as to the claim made by the City National Bank of Morris-town that these policies have been assigned by the bankrupt to his brother. This question is not in any manner in issue under the present pleadings and is not determined at this time.

An order will be entered overruling the referee's report and adjudging that the policies in question are not exempt in favor of the bankrupt, but that so far as the claims of the bankrupt are concerned they passed to the trustee in bankruptcy as assets of the bankrupt estate.

UNITED STATES v. CHICAGO, R. I. & P. RY. CO.

(District Court, W. D. Missouri. February 21, 1908.)

1. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—CONSTRUCTION.

Act March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), prohibiting the use by common carriers by railroad in interstate commerce of any car not equipped with automatic couplers, and imposing a penalty for its violation, while a penal statute, is remedial, and designed to protect employes from injury, and is to be given a fairly liberal construction to effectuate such purpose.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*]

2. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—ACTION FOR VIOLATION—MEASURE OF PROOF.

In an action by the United States against a railroad company to recover the penalty imposed for a violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), it is not required, to warrant a recovery, that the proofs should establish the violation beyond a reasonable doubt.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 772; Dec. Dig. § 254.*]

3. RAILROADS (§ 229*)—SAFETY APPLIANCE ACT—VIOLATION.

A railroad company, which moved, in the carriage of interstate commerce, a car the automatic coupler on which was so out of repair that it would not work, is not relieved from liability for violation of Safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), by the fact that it placed a bad-order card on such car, indicating the defect.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. § 229.*]

Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

At Law. Action by the United States against the Chicago, Rock Island & Pacific Railway Company. Judgment for the United States.

The defendant was charged with having violated the safety appliance act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), and an action in debt was brought to recover the statutory penalty of \$100. A jury was waived, and the trial was to the court. The evidence showed that the defendant hauled an Erie coal car with the uncoupling chain "kinked" and wedged in the coupler head on one end of the car. In that condition it was impossible to operate the coupler without a man going between the ends of the cars. One of defendant's engines coupled onto a "cut" of cars in which was this defective car, and hauled it to the yard of the Chicago, Bur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lington & Quincy Railway Company, where a number of other cars were coupled onto the "cut." The entire lot was then hauled by the defendant over to the Chicago & Alton yards, where five more cars were attached. One of the defendant's inspectors undertook to operate the coupler in the Union Depot and found the car defective. He then affixed a "bad-order" card to the car, indicating the nature of the defect. The car was then taken by the defendant to Armourdale, Kan. The defendant contended that, by placing the "bad-order" card upon the car, it had complied with the statute, and was not liable for the penalty.

Arba S. Van Valkenburg, U. S. Atty., and Leslie J. Lyons, Asst. U. S. Atty.

Frank Sebree, for defendant.

SMITH McPHERSON, District Judge (after stating the facts as above). I find in the Johnson Case, as reported in 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, that, while the rule of construction as to penal statutes requires such statutes to be strictly construed, yet in the safety appliance statute the design to give relief was more dominant than to inflict punishment; the act, therefore, falling within the rule applicable to statutes to prevent fraud upon the revenue and for the collection of customs. The rule there laid down is that the statute is to be construed sensibly and as a whole, with a view to accomplish the obvious intent of Congress. In that decision the Supreme Court reversed the Circuit Court of Appeals for this circuit,¹ because, as it said, the view of the latter court has been too narrow. The great purpose of the statute was to remedy conditions. It is remedial and preventive, and, if observed, will reduce to a minimum the crippling and killing of railroad employes in this country. As I said yesterday, every one of us can recollect, 15 or 20 years ago, that about four times out of five, when you went to shake hands with a railroad employé, either a switchman, brakeman, or freight conductor that had been raised from a brakeman, you took hold of a crippled hand; fingers gone, sometimes an entire hand or leg gone, because of the extraordinary hazardous business of railroading.

The Supreme Court of the United States upheld the Iowa statute with reference to liability because of the negligence of a co-employé upon the ground that the Legislature had the authority to single out the railroad and make them liable for the negligence of a co-employé, while the same would not be liable if applied to a manufacturing plant, solely because of the extremely hazardous business of railroading, placing railroads in a distinct class. You can scarcely pick up a paper but what you read of some accident to an employé, but it used to be ten times worse. Up in Iowa we do not have one accident now to where we used to have ten. The dockets used to be crowded with work by reason of the number of these accidents, and the percentage has greatly decreased. I do not know how it is in Kansas City; but, if it has not decreased, it is on account of the marvelous growth of Kansas City. But I am sure the percentage has decreased. That is the purpose of this statute, and every one who has humane views commends this statute. While I suppose, of course, there are no statistics to prove it, I have no doubt that the enforcement of this statute has been a money-saving proposition to the railroad companies. I have

¹ 117 Fed. 462, 64 C. C. A. 508.

no doubt that the occasional infliction of a small penalty of \$100 prevents many a \$5,000 and \$10,000 judgment.

But it can not be said that the statute was enacted for that purpose. It was enacted for the protection of railroad employes. It is within the knowledge of every one of us that everybody is negligent almost every day of his life. We cross these street car tracks without a thought in our minds that we are within miles of a track. Sometimes we are reading a paper, or visiting with some friend, and if we are run down we could not recover, because of our own gross contributory negligence. In a great percentage of these railroad cases, the employes are denied a recovery because of their own negligence. You seldom have a case but what somebody is negligent. If there was no negligence, there would be but few cripples or untimely deaths. What is the use of putting up a red card on the end of a car, as was done after the United States inspectors spotted the car, except to call the attention of some one to the fact that it needed repairs? That does not stop brakemen from going in there. Men are negligent because they are unthinking for the time being, and some of them have a dare-devil spirit. Any day you can stand in the railroad yards and see a switchman who stands in the middle of the track. The switch engine comes to him. He takes his life in his hands every time he does it, but he steps on the switchboard and looks around for the applause of the crowd, about as much as to say, "See my agility." You cannot stop that. You cannot stop a man from going in between cars by putting a red sign on one of them, and they will not report it, because they do not care to have the hostility of the company that employs them, and they do not say anything about it unless they get hurt. You and I would do the same.

Now, while this is a penal statute, it has the form of a civil action. There was a time when the courts held, in slander and libel cases, where the words used imputed a crime, that the proof must convince the court or jury beyond a reasonable doubt; but I understand that the rule has been abrogated. Such weight of proof is not required anywhere, except in proving an indictment; and this is not that kind of a case. Now, this inspection of the 23d was very indefinite and vague. One man has no recollection about it at all. He placed thereon a mark "O. K." The other man has no recollection whatever, except the memorandum in his book. That kind of an inspection will not do. The next thing we know this car is on the way, and my notion about it is that the car would have been taken to St. Louis in that condition if it had not been that these government inspectors happened along at that time. Now, if these government inspectors, who in all cases are ex-railroad employes, could see this, why could not this train crew see it? And they would not have seen it when they did, if they had not seen these government inspectors riding this car, and they then supposed something was wrong. The two government inspectors were on this particular car, so, if the train was cut, they would still be with the car, I suppose.

Now, here is a case of \$100. If the penalty were extreme, a jury would hesitate more about inflicting the penalty. I would like it bet-

ter if the same penalty was fixed in these 28-hour cases. I have tried a good many of them, and I have never yet tried one that called for more than the minimum penalty, and I have never inflicted more than that. In most cases there is some substantial reason for delay, and too often a good deal of malice is behind the prosecution, not on the part of the government officials, but on the part of the shipper. He believes he has been charged a little too much for his hay or grain, or has some other complaint. In nearly every case under that statute that I have tried, I have found that kind of a spirit behind the prosecution. Here is a class of cases where it is impossible to have any malice back of the prosecution. The penalty is light, and in every case, where the proofs are reasonably sufficient, I think it is wise and proper and benevolent to enforce the penalty. And I think it is an act of benevolence to the company itself to see to it that these things are broken up, and thereby lessen the amount they have to pay in personal injury cases. There are many thousand employes in this hazardous business, and I do not think in this case there is any sufficient excuse shown. There is no telling how long that car had been in that condition, and I have no doubt that, if these government inspectors had not been there, that car would have been hauled across the state of Missouri and then to Pennsylvania, and with what result nobody knows.

The judgment will be for the payment of the penalty of \$100, and 90 days for a bill of exceptions will be granted.

THE SINALOA.

THE FRANCIS L. ROBBINS.

(District Court, W. D. New York. August 28, 1909.)

COLLISION (§ 102*)—STEAM VESSELS MEETING—NEGLIGENT NAVIGATION.

A collision by daylight in Duluth-Superior harbor between the steamer Robbins passing out and the steamer Sinaloa going in, and which had just passed through the broken Interstate Bridge, *held* due to the negligent navigation of both vessels; the initial fault being that of the Robbins, which, after agreement on a passing signal to the right, kept too far to the left side of the channel, making it difficult for the Sinaloa, after passing the bridge, to navigate properly, and the latter being in fault for not sooner observing the improper position of the Robbins and navigating accordingly.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 102.*

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

In Admiralty. Suit for collision by the Robbins Transportation Company against the steamer Sinaloa, and cross-libel against the steamer Francis L. Robbins. Decree for division of damages.

Goulder, Holding & Masten, F. S. Masten, and F. L. Leckie, for libellant.

H. R. Spencer, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAZEL, District Judge. There was a collision on October 15, 1906, in the Duluth-Superior harbor, between the steamers Francis L. Robbins, a steam propeller 400 feet long and 50 feet beam, owned by the Robbins Transportation Company, libelant, and the Sinaloa, 440 feet long and 50 feet beam, owned by the respondent, the Superior Steamship Company; the Robbins receiving a cut or opening on her port bow from the stem of the Sinaloa of about 8 feet in length running down below the water line. The libelant corporation claims to have sustained damage amounting to \$17,000 in repairing the Robbins. A cross-libel has been filed, wherein damages to the Sinaloa are claimed in the sum of \$500.83. The Robbins, laden with iron ore, had just cleared the Northern Pacific Railroad Bridge downbound. She had previously blown one blast of her whistle to the Sinaloa, which was coming up the harbor from the opposite direction and then nearly a mile away, to indicate her intention to direct her course to starboard, so as to pass on the port side, and the Sinaloa had blown an answering assent. At this time the vessels could not see each other, owing to the bend in the river, and their view was also obstructed by the wreck of the Interstate Bridge and by piles of lumber on the dock. In the Duluth-Superior harbor there are two bridges, the Northern Pacific Railroad, and about 2,000 feet distant therefrom down the river the Interstate Bridge, which primarily had a swing, but which had been injured, and its two draws at the time of the collision were littered with the débris of the drawbridge and could not be used by boats in passing. In this situation one section of the bridge on the Superior, or south, side of the harbor, which rested on stone abutments, was taken away, leaving an opening or passway 270 feet wide between the abutments for up and down bound boats to pass through. Vessels and other water craft coming to the iron ore docks from points below the Interstate Bridge were required to skillfully navigate through this opening between the abutments and make a turn to starboard of about seven points to reach the drawbridge of the Northern Pacific Railroad, beyond which the ore docks were situated. After port to port passing signals had been exchanged, the Sinaloa continued on her course at slow speed of about three or four miles per hour towards the Interstate Bridge and the southerly opening thereof.

The Robbins, according to the Sinaloa, instead of seasonably complying with the single blast of the whistle which she had initiated, navigated on a course too far to the left of the channel or basin, continuing on a straight course, and then coming too close to the bridge, which sailing movement interfered with the Sinaloa turning to the right or starboard to enable her to pass port to port as agreed. The specific faults attributed to the Robbins are that she kept too far over to port, heading too closely to the bridge abutment, and then passing down to the bridge draw on a course nearly at right angles with it. A different claim, however, is contended by the libelant, and, if such claim is sufficiently supported by the testimony, the Sinaloa was solely at fault. In behalf of the Robbins it is claimed that, after she had blown the passing signal that she would direct her course to starboard, she proceeded in the usual and ordinary way towards the draw or opening on

the Superior side of the harbor, first porting her helm to cross the basin or harbor at a speed of about two miles per hour, and then starboarding slowly as soon as she came in line with the middle bridge abutment. Her master testified that when the Robbins approached the center projection he noticed that the Sinaloa was not waiting on the other side of the draw, as he anticipated she would do, but that she was coming through; that he immediately stopped his engines, preferring to drift, so as not to meet or pass the Sinaloa in the draw, and, having reached that conclusion, he gave the Sinaloa ample space to pass to port; but he testified that she did not swing to starboard, as she was called upon to do. The principal fault attributed to the Sinaloa is her omission to skillfully and properly maneuver to the right or starboard side, although it is also claimed that she should have remained below the draw, and that she proceeded through it at an excessive rate of speed. The testimony on the material points is discrepant, and the accounts of the manner in which the vessels were navigated are in such conflict as to make it difficult of reconciliation. It was a careless collision, and in my judgment a proper amount of precaution on the part of either vessel would have avoided it.

It is unquestioned that steamers navigating as in the present case are approaching each other end on, or nearly end on, within the meaning of rule 17 of the White law, passed February 8, 1895 (Act Feb. 8, 1895, c. 64, 28 Stat. 648 [U. S. Comp. St. 1901, p. 2891]), and that both the Robbins and the Sinaloa, in the circumstances, were bound to regulate their movements to starboard, so that passing one another would be on their port sides. It certainly comes within the category of negligent and unskillful seamanship if either of the vessels failed to seasonably alter her course to starboard. There is abundant credible evidence in the record to satisfy me that the Robbins navigated closer to the left of the channel than was usual or customary by vessels intending to pass through the temporary draw. Concededly the Robbins was required to comply with the custom of navigation, and her failure to do so by getting too close to the abutment, so as to interfere with the oblique movement to starboard of the Sinaloa, was a fault for which she must be held liable. By her erroneous navigation in proximity to the protection piling, she was prevented from straightening in line with the draw, but came in line on an angle of 45 degrees across the bridge opening, when she should have been well over to starboard. In this situation the collision was imminent, and could only have been avoided by immediate backing on the part of the Robbins; but this was not done.

After carefully considering the testimony, I have an impression that the Sinaloa, when she reached the draw, could by the exercise of vigilance have seen that the Robbins was too far over to port, and that she had not sufficiently or seasonably starboarded. The Sinaloa had assented to the Robbins passing on her left side, and according to her master she was proceeding at such a rate of speed that she should have anticipated passing the upbound steamer in the draw, and should have seasonably directed her course to starboard before her bows cleared the stone pier. Then there was nothing to prevent her doing so, although

later, on account of her proximity to the abutment, it was probably too late to avoid the collision. The wheelsman of the Sinaloa testified in substance that if he had turned in the same angle as the Robbins there would have been ample room to pass in safety; that he was steering two or three points to the right of the docks just south of the draw. This concededly left the vessel on, or nearly on, a straight course through the draw; for, if skillfully navigated, she should have been on a slanting course, making her turn and heading well to starboard. The wheelsman further testified that, while coming through the draw, he swung the wheel a little to starboard, but was directed to "steady her a while," which obviously tended to again head her straight through the draw. At this instant of time the Sinaloa claims to have been so close to the abutment that an order to steady the wheel was necessary to escape coming in contact with it.

But, assuming the truth of this claim, it will not excuse her for navigating without having regard for the presence of the Robbins and her right to carry out the agreement to pass on her port side. If she had initiated her swing before her bow came abreast the stone pier, or lower end thereof, she probably would not have been in danger of striking the abutment. This view is thought to be abundantly supported by the evidence and the probabilities arising from the circumstances. Moreover, I think that the Sinaloa, by the exercise of proper diligence and carefulness, could have seen the Robbins before her pilot house reached a point outside the stone abutment. The wrecked bridge undoubtedly interfered with distinctly perceiving her movements; but, as the lookout of the Sinaloa was stationed about fifty feet above the water line, it is inconceivable that he could not at least have seen the spars and smokestack of the Robbins. I think the Sinaloa should have noticed the error of the Robbins in failing to sufficiently steer to starboard, and governed her own movements accordingly. Such a fault, in view of the circumstances, cannot be deemed to have been an error of judgment. The situation, perhaps, was not such as to require her to wait below the drawbridge; but her master had ample time to deliberate upon the manner in which she should pass the Robbins, and whether passing in the draw was fraught with danger. This is not a case where in a moment of sudden danger, precipitated by the misconduct of the Robbins, it became a question of stopping, or backing, or proceeding ahead. The masters of both vessels were familiar with the unfavorable conditions due to the wreckage of the Interstate Bridge, and therefore greater precaution on the part of both vessels in passing that point was demanded. The Robbins was primarily in error in not seasonably directing her course to starboard, while the Sinaloa must also be held in fault for not directing her course in such a way as to adequately turn to starboard, thereby contributing to the collision.

The damages, after ascertainment by a master, will be divided.

In re ALLERT.

(District Court, W. D. New York. March 21, 1908. On Rehearing, August 26, 1908.)

No. 562.

1. BANKRUPTCY (§ 347*)—MORTGAGES—SALE OF MORTGAGED PROPERTY BY TRUSTEE—RIGHT OF MORTGAGEE TO FULL PAYMENT.

The holder of a first mortgage on real estate of a bankrupt, the validity of which is not disputed, is entitled to payment in full from the proceeds of the property sold by the trustee, with interest to the time of payment, and cannot be required to pay any portion of the general expenses of the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 538; Dec. Dig. § 347.*]

2. BANKRUPTCY (§ 482*)—FEES—ALLOWANCE OF ATTORNEY'S FEES.

The action of a referee in allowing fees to counsel for a second mortgagee and for unsecured creditors from the proceeds of mortgaged property reversed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 482.*]

3. BANKRUPTCY (§ 228*)—REFEREES—REVIEW OF PROCEEDINGS BY JUDGE.

The allowance by a referee in bankruptcy of fees to himself is reviewable by the court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 228.*]

In Bankruptcy. In the matter of Rudolph Allert, bankrupt. On review of orders of referee. Reversed in part.

George G. Reynolds, for petitioner.

Roswell R. Moss, pro se.

Charles Marvin, pro se.

Herendeen & Mandeville, pro se.

HAZEL, District Judge. This is a petition for review by the holder of the first mortgage lien upon the real estate of the bankrupt. The mortgage was given to secure \$7,000, with 5 per cent. interest per annum, and covered about three-fourths of the bankrupt's estate, which was sold by order of the bankruptcy court for \$20,150. In distributing the trust fund, the referee did not allow interest on the mortgage to the date of his final report, on the ground that, as the fund was not enough to pay all the secured and unsecured creditors in full, it was proper, under the circumstances of the case, to pay out of the amount realized on the sale of the real and personal property, first, the expenses and allowances of administration; second, priority creditors; and, third, secured creditors. In computing the amount of the petitioner's lien, he allowed interest to October 17, 1901, the date of the approval of the sale. Subsequently, on December 30, 1905, the final decree distributing the bankrupt estate was entered, and the petitioner now claims to be entitled to interest to the date of such decree, in the amount of \$654.11.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

I think the referee erred in not paying in full the principal and accrued interest to the date of the final decree. *Taylor v. Wing*, 84 N. Y. 471; *Brandenburg on Bankruptcy*, § 1195. The validity of the mortgage was not in issue, and, accordingly, the lienor should not be obliged to pay any portion of the expenses of the bankruptcy proceedings. Her lien was not affected by the bankrupt act (Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]). She had the right to institute foreclosure proceedings in the state court, but, instead of so doing, properly elected to invoke the simpler and supposedly less expensive remedy of enforcing her lien in the bankruptcy court. The trustee in bankruptcy, as said by Judge Holt in *Re Anders Push Button Telephone Co.*, 136 Fed. 995, took the estate subject to the lien. In that case the court held that under the bankrupt act a creditor having a valid lien was not obliged to pay commissions on the amount realized thereon to the trustee and to the referee, although the property was sold by the trustee. No question is raised here as to the right of the referee to make an allowance of commissions to the trustee and to himself out of the proceeds of sale, or to deduct expenses for advertising the sale of the property free from liens, or, indeed, to make an allowance to the attorneys for the bankrupt and for the trustee, because of the claimed additional services performed by them in selling the mortgaged property free and clear of incumbrances.

The second ground of error assigned by the petitioner is that the trustee, pursuant to order of the court, has unlawfully and unnecessarily paid out various sums of money as fees and charges to attorneys for creditors. The record does not disclose that anything was done in this proceeding by the attorneys for creditors which specially resulted to the benefit of the mortgagee. After careful reading of the proceedings before the referee, and consideration of the arguments contained in the briefs of counsel, I am constrained to the conclusion that the objection of the petitioner is well founded. The proceeding was devoid of any complexity, or the usual intricacies of practice, or even the opposing contentions of counsel, which not infrequently confront bankruptcy courts. There were no issues specially referred to the referee under district rule 29, and, strictly considered, it is doubtful whether he is entitled to an additional allowance as special master. But, as he appears to have performed services by consent of interested parties outside of his prescribed duties as referee, which are usually performed by a special master, and also in advising with the trustee and counsel regarding the best methods of continuing and conducting the business until such time as a purchaser could be found, I think it would not be inequitable to allow him an additional sum, as hereinafter computed, for such services performed. In *re Hart & Co.*, 18 Am. Bankr. Rep. 137.

No objection is made to the amounts of compensation to attorneys for the trustee and the bankrupt, nor to the allowances to the trustee and appraisers, though such amounts, unexplained, seem excessive; but it is contended by the petitioner that it was improper to make an allowance out of the bankrupt estate to the attorney for the holder of

the second mortgage and to the attorneys for certain unsecured creditors. This objection is not without merit. The bankrupt act very properly does not allow compensation to attorneys for creditors out of the assets of the estate. *Collier on Bankruptcy* (6th Ed.) p. 499; *In re Goldville Mfg. Co.* (D. C.) 118 Fed. 892. I have searched the record in vain to ascertain if in any way the services rendered in this proceeding by counsel for creditors inured to the value of the bankrupt estate. Such services undoubtedly were beneficial to their clients; but why the bankrupt estate should remunerate them is difficult to understand. It should remain uppermost in the minds of litigants and attorneys practicing in the bankruptcy courts that it is the policy of the bankrupt act to administer estates with the strictest economy, to the end that fees, costs, and charges should be reduced to the lowest minimum. That this object has been achieved in the case under consideration is not without doubt. Upon this subject it may not be inappropriate to quote from the opinion of the Circuit Court of Appeals in *Re Curtis*, 100 Fed. 784, 41 C. C. A. 59, where it is said:

"The present act, so far as it specifies the amount of fees of officers whose services may be required in execution of the law, fixes them at a low figure, possibly much lower than is compensation for the service; but it is not for us, for that reason, to disregard the law, or seek to thwart the design of Congress, however inadequate we may think the compensation allowed."

The amounts of \$200 allowed to the attorney for the second mortgagee, and of \$250 allowed to attorneys for certain creditors, are disallowed; and, having been distributed by the trustee, these amounts, together with \$204.11, to be repaid by the referee out of the sum of \$400 retained for services, as appears by the report of the trustee, which sums in the aggregate amount to \$654.11, the amount which the petitioner is entitled to receive as interest, must be refunded within 30 days, to enable him to pay the lien of the first mortgage, together with interest at 5 per cent. per annum to the date of the final decree.

So ordered.

On Rehearing.

The errors in the amount of interest due to the first mortgagee and in the amount allowed Mr. Marvin, attorney for the second mortgagee, may be corrected in the order to be entered. But the amount of \$200, instead of \$204.11, out of the total sum retained by the referee for his services, and the full amount paid to Mr. Marvin for services as attorney for the second mortgagee, are disallowed, and must be refunded to the trustee for distribution. The trustee, whose present residence is unknown, may be removed, if it is thought necessary, under General Order 13 (89 Fed. vii, 32 C. C. A. xvii). See, also, section 2, subd. 17, Bankr. Act.

It is insisted on this application that the trustee and his attorneys also received excessive allowances, which under the circumstances should be disallowed, to the end that the deficiency in the claim of the first mortgagee may be paid proportionately. As the various amounts for trustee's fees and expenses, including attorney's charges, were distributed in 1901 and 1902, six years ago, and the final decree of the referee not filed until December 30, 1905, an examination of the serv-

ices rendered with the object of diminishing the allowances and recovering back any excess probably would not be successful. Moreover, upon the papers before me, it is not believed possible to determine that such allowances to counsel made by the referee were improper or excessive.

It is also claimed that the parties appearing before the referee consented to the allowance to Mr. Marvin in consideration of the non-foreclosure of the mortgage owned by his client and her consent that the property be sold free and clear of such lien, and, further, that such allowance was without objection by the petitioning creditor. The reply to this contention is that the referee had power to sell the property free and clear of liens without the consent of such mortgagee; the requirement being in such case that the liens be transferred to the proceeds of the sale. *Brandenburg on Bankruptcy*, § 1195, and cases cited. That no formal objection to the allowance was made by the petitioning creditor, a prior lienor, is without special force, in view of her demand before the referee for full payment of her secured debt and interest.

The referee on this motion submits that the former decision rendered by me, disallowing a portion of his fees and charges, has the effect of holding him personally liable for a judicial error. Such, however, is not the fact. The compensation of referees in bankruptcy is fixed by the bankrupt act, and the trustee's authority to pay such allowances, even prior to the amendment of 1903 (Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1024]), in the absence of a reference as special master, was questionable, and without doubt the allowances of fees by a referee to himself is reviewable. *In re Mammoth Pine Lumber Co.* (D. C.) 116 Fed. 738.

The order may be entered disallowing the allowance to Charles Marvin, attorney for secured creditor, and the allowance made by the referee to himself, except that the order may provide that the referee is authorized to retain the sum of \$200 for and on account of special services performed by him as indicated in my first decision herein.

(It appears that Attorneys Herendeen & Mandeville have refunded the amount allowed them as attorneys for creditors.)

In re MEADOWS, WILLIAMS & CO.

In re DOUGLAS.

(District Court, W. D. New York. July 29, 1909.)

No. 3,040.

1. BANKRUPTCY (§ 140*)—PROPERTY VESTING IN TRUSTEE—STOCKBROKERS—STOCKS BOUGHT FOR CUSTOMER.

Bankrupts, who were stockbrokers in Buffalo, received orders from petitioner to buy certain stocks, which they executed through their New York correspondents, who purchased the stocks, paid for the same, and charged the amount to bankrupts' general account. They subsequently had the stocks transferred and certificates therefor issued in petitioner's name, but retained the same as security for the bankrupt's account. On being advised of the purchase, petitioner paid bankrupts for the stocks;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

but they did not remit the money to the New York brokers, and the stocks had not been delivered when the bankruptcy occurred. Bankrupts' indebtedness to the New York brokers was paid from the proceeds of a seat in the Exchange, on which they had a lien under the rules of the Exchange, and the stocks were delivered to bankrupts' trustee. *Held*, that, on her payment for the stocks, the title vested in petitioner, subject, possibly, to a lien in favor of the New York brokers for the purchase price, and, such price having been paid from other property, on which they also had a lien, she was entitled to the certificates, as between her and the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 140*)—STOCKBROKERS—TITLE AND RIGHTS OF TRUSTEE.

In such case, the bankrupts having no title to nor lien upon the stock, the trustee took none, but occupies the same relation toward petitioner that the bankrupts did.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

In the matter of Meadows, Williams & Co., bankrupts, on review of order of referee denying petition of Alice H. Douglas for delivery to her of certain stocks. Order modified.

Kenefick, Cooke & Mitchell (James McCormick Mitchell, of counsel), for petitioner.

Edward L. Jellinek, for trustee.

HAZEL, District Judge. This is a proceeding on the petition of Alice H. Douglas to reclaim two certificates, of 100 shares each, of preferred stock of the Great Northern Railway Company, which are in the possession of the trustee in bankruptcy herein. The petition was referred to the referee, and a decision rendered, which is the subject of review. The salient facts are as follows:

On June 2 and 17, 1908, the petitioner, by her husband, acting as her agent, purchased 200 shares, in blocks of 100 each, of the capital stock of the Great Northern Railway Company, at 134 and 130½, respectively, through the firm of Meadows, Williams & Co., brokers, at Buffalo, N. Y. On the same days that the stock was ordered, Meadows, Williams & Co. in writing notified the petitioner that the purchases had been made on her account. On July 22d, petitioner notified Meadows, Williams & Co. that she would take up the stocks later. On July 31st, she paid them in cash therefor the sum of \$26,698.26, which was the amount stated by said firm to be due on account of such purchases. At the time of such payment, and frequently thereafter between the 2d and 24th days of August, the petitioner demanded delivery of the stock from Meadows, Williams & Co.; but they informed her that it was being transferred on the books of the Great Northern Railway Company, and the certificates would be delivered to her as soon as the transfer was completed. At each time the blocks of stock were ordered to be purchased Meadows, Williams & Co. transmitted said order by wire to their correspondents, Post & Flagg, of New York City, stockbrokers with whom they had an account, requesting them to purchase the preferred stock, which they did at the figures quoted. When the purchases were completed, Post & Flagg so wired Meadows, Williams & Co., who notified the petitioner thereof. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said stock was held by Post & Flagg as collateral security for the payment of the debts and obligations of Meadows, Williams & Co. and as a margin in their account. On August 1st the bankrupts credited the petitioner with a quarterly dividend on said stock. On August 17th, Post & Flagg, in response to a telegram from Meadows, Williams & Co. requesting them to have the 200 shares of stock transferred to the petitioner and forward it to them, declined so to do, on the ground that the balance of account of Meadows, Williams & Co. did not cover the value of the stock; but subsequently, on August 19th, at the request of Meadows, Williams & Co., the said firm did cause the specified stock to be transferred to Mrs. Douglas on the books of the railway company, and forwarded the certificates to the Bank of Buffalo, with draft on Meadows, Williams & Co. for \$27,812.50 attached. The draft was not paid on presentation, and it was returned with the stock to the drawers. On August 20th the husband of the petitioner, in response to a request for the stock, received a letter from Meadows, Williams & Co. explaining that the stock owned by Mrs. Douglas was then in Buffalo, but because of financial complications they were compelled to defer delivery to her. At all times the petitioner was ignorant of the fact that the stock had not been transferred to her, or that Post & Flagg were holding it in their hands as security for its purchase price, or as collateral security for any indebtedness of the bankrupts. On August 24th Meadows, Williams & Co., as individuals and copartners, were adjudged bankrupts, and a trustee was elected by the creditors, who qualified and entered upon the discharge of his duties. In November, 1908, the indebtedness of the bankrupts to Post & Flagg, including the purchase price of the stock in question, was fully paid and satisfied out of the proceeds of the sale of a membership seat in the New York Stock Exchange owned or controlled by Meadows, Williams & Co. It is shown that Post & Flagg, who were also members of the New York Stock Exchange, had a lien upon the said seat or membership privilege, and that the sale was had upon their application to the governors of the Stock Exchange, with the assent of the trustee, to satisfy their lien or claim against the bankrupts. The seat netted \$64,000, out of which sum Post & Flagg, in satisfaction of their lien and indebtedness, received \$46,091.98; the remainder, after payment of certain obligations to other members of the Stock Exchange, amounting to \$7,473.57, being turned over to the trustee, to whom, also, Post & Flagg delivered the 200 shares of stock in question.

The primal question is whether the petitioner was the owner of the 200 shares of stock at the time of the bankruptcy. The transaction was the usual one of buying stock in an interior city, first on margin, and then directly for delivery, through a stockbroker, who consummated the purchase by wire through another stockbroker carrying on business in New York City. They regarded the transaction as one between themselves, in which the purchase price would seasonably be covered either in cash or collateral security. It is well settled that the right of ownership of stock does not depend upon the precise method of payment or the customary course of business between stockbrokers. In the present case the petitioner paid the broker, with whom she

initiated the transaction, in full for the stock, and relied upon them to faithfully consummate the agreement. The stock was issued to her, and she was entitled to its immediate delivery, subject, perhaps, only to the equitable right of Post & Flagg to be reimbursed for their advances in purchasing it. It was not essential that the bankrupts, acting as the agents for the petitioner, should personally buy the stock. If, however, they had bought it personally, and caused it to be issued in the name of Mrs. Douglas, she was, upon payment, entitled to its possession. That the stock was bought through Post & Flagg does not alter the relations of the parties, except, perhaps, they might, if without sufficient collateral, claim a lien upon the stock purchased.

Counsel for the trustee concedes that, when shares of stock are bought on margin, the title vests in the customer; the broker having the legal right to retain its possession in pledge for the purchase price. This rule is not thought essentially different in a case where the stock is bought direct, or for delivery, and absolved from the complications of speculation. There would almost seem to be better reason for the applicability to a straight purchase, where the stock is to be delivered, of the rule which counsel for the trustee concedes applies to a margin transaction. From the facts herein, Post & Flagg must be deemed to have bought the stock, relying upon the obligation and ability of Meadows, Williams & Co. to pay the sales price. They had the option of refusing to buy the stock until the price therefor was fully paid; but, instead of so doing they completed the transaction, and subsequently recognized the petitioner's claim of ownership of the stock. *Le Marchant v. Moore*, 150 N. Y. 209, 44 N. E. 770.

In *Denison v. Emery* (C. C.) 153 Fed. 427, Corner gave an order to Denison, Prior & Co. for 50 shares of Quaker Oats stock, which order was wired to their Chicago correspondents, Finley, Barrel & Co., by whom the purchase was made. The purchasing brokers did not deliver the stock, but held it as collateral security for the general account of Denison, Prior & Co. Corner afterwards paid Denison, Prior & Co. in full for the stock and demanded a transfer thereof to him; but it was not transferred, although they frequently promised to do so. Possession of the Quaker Oats stock, together with other stocks belonging to different persons, bought on account of Denison, Prior & Co., continued in the purchasing brokers up to the time of the failure of Denison, Prior & Co. Thereafter all the stocks so held as collateral were sold by Finley, Barrel & Co., and the proceeds applied to the indebtedness to them of Denison, Prior & Co. The court, overruling the master, decided that, as the Corner stock was in the possession of the purchasing brokers, was traceable, and could be separated from other stock, and as it had been paid for as between him and other creditors, except the pledgee, he was entitled to the stock—that it was his property. The Circuit Court of Appeals, affirming the District Court, sub nom. *Harmon v. Sprague*, 163 Fed. 486, 90 C. C. A. 32, said:

"The stock was bought on the order of the Cleveland brokers, by the Chicago firm, for Corner, and was paid for by him; the bill being sent him by the Cleveland firm. When this was done, the stock belonged to Corner, and the certificate should have been sent him; but the Cleveland firm failed to

do so, and as a result the stock was sold, upon their failure, as collateral, to satisfy the account of the Chicago brokers against them. We think this was done wrongfully. Corner owed neither the Cleveland firm nor the Chicago brokers anything, and consequently the proceeds of Corner's stock, which went into the funds at the sale, should go to him."

This holding, in which I concur, may be paraphrased upon the facts of this case. See, also, *In re Bolling* (D. C.) 147 Fed. 786, affirmed *Kean v. Dickinson*, 152 Fed. 1022, 82 C. C. A. 667; *In re Graff* (D. C.) 117 Fed. 343.

The referee was of the opinion, *inter alia*, that if Post & Flagg had continuously carried the stock from the time it was first purchased to the date of the bankruptcy, and had sold it with other securities pledged with them, the claim of the petitioner to the surplus, if any, would have been superior to that of the trustee; but in his opinion, as the purchase price of the stock was actually paid out of the proceeds of the sale of the seat in the Stock Exchange, an asset of the bankrupts, the petitioner would have been in no different position than any other customer of Meadows, Williams & Co., if their stock held as collateral had been sold by Post & Flagg. I am unable to agree with this conclusion. It makes no difference that the 200 shares of stock were not continuously in the possession of Post & Flagg from June 2d to August 24th. It is enough that Post & Flagg bought the number of shares ordered for the petitioner through her brokers, and caused them to be transferred to her on the books of the Great Northern Railway Company on the 19th day of August, prior to the filing of the petition in bankruptcy. Whatever jobbing there was in these shares were dealings between the brokers, and the petitioner was ignorant of them. Post & Flagg had the lawful right to satisfy their claim out of the proceeds of sale of the seat in the Stock Exchange. *Hyde v. Woods*, 94 U. S. 523, 24 L. Ed. 264; *Weston v. Ives*, 97 N. Y. 222. While, true enough, the seat was an asset of the bankrupts, yet it was incumbered by a lien; i. e. their indebtedness to their associate members in the Stock Exchange, which included the purchase price of the stock in question. Prior to the filing of the petition in bankruptcy Meadows, Williams & Co. could not have made a valid disposition of the 200 shares of stock, nor could the same have been levied upon or seized under judicial process against them. The legal title was not in them, and upon receiving payment for the stock their interest as pledgee was extinguished. *Richardson v. Shaw*, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835; *Le Marchant v. Moore*, *supra*; *Skiff v. Stoddard*, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102. The relation of the trustee to the stock is in no sense dissimilar to that of the bankrupts. By his election he obtained no right or title to the stock, and the authorities uniformly hold that a trustee occupies the same relation to the creditors that the bankrupt sustained prior to the inception of the proceedings. *In re Kellogg* (D. C.) 112 Fed. 52; affirmed *sub nom. Hewitt v. Berlin Machine Works*, 194 U. S. 298, 24 Sup. Ct. 690, 48 L. Ed. 986.

If, then, we consider the trustee in the shoes of the bankrupts, how can he, for the bankrupts, insist on retaining the stock when the petitioner paid for it, and, moreover, when the bankrupts themselves, be-

fore their adjudication, declared that she owned it, that it was bought for her, and when the stock, though in the possession of the purchasing stockbroker, was traceable and set apart from other stocks in which the bankrupts were interested. The legal title did not vest in the trustee, and as to whether an equitable interest may be impressed upon the stock, in view of the situation, is a question not here for decision. If the purchasing brokers had an equitable lien, there certainly is merit in the contention that they relinquished it. They elected to look for payment of their advances to their claim against the seat in the Stock Exchange, which certainly, by analogy, if not in fact, operated as a valid lien for the indebtedness pro tanto of the bankrupts.

The referee held that the petitioner had a prior right to the general creditors to 60 shares only of the stock now in the possession of the trustee; but the exceptions filed to his conclusions must be sustained, and his decision modified to conform hereto.

So ordered.

In re EDWARD ELLSWORTH CO.

(District Court, W. D. New York. October 11, 1909.)

No. 3,383.

1. BANKRUPTCY (§ 60*)—"ACT OF BANKRUPTCY"—APPOINTMENT OF RECEIVER.

Where a suit in equity was brought by creditors to wind up a corporation and for the appointment of a receiver, the bill alleging that it was unable to meet its obligations as they matured and that it would be to the advantage of creditors and stockholders that its affairs be wound up, but that it was solvent, the filing of an answer by the corporation, admitting such allegations and joining in the request for a receiver, did not constitute an "act of bankruptcy," under Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended in 1903 (Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1025]), which makes it an act of bankruptcy if a debtor, "being insolvent, applied for a receiver or trustee for his property" nor was the appointment of a receiver in such suit made "because of insolvency," so as to constitute an act of bankruptcy under such section.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*

For other definitions, see Words and Phrases, vol. 1, p. 118; vol. 8, p. 7562.]

2. BANKRUPTCY (§ 91*)—ACTS OF BANKRUPTCY—GROUNDS OF APPOINTMENT OF RECEIVERS—EVIDENCE.

A court of bankruptcy cannot consider evidence allunde to contradict the recitals of an order of a court of equity appointing receivers for a corporation, and to show, contrary to such recitals, that such appointment was made because of the corporation's insolvency, and constituted an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 138; Dec. Dig. § 91.*]

3. BANKRUPTCY (§ 104*)—CORPORATIONS—ENJOINING SALE OF PROPERTY IN EQUITY SUIT.

A court of bankruptcy, on the filing of a petition in bankruptcy against a corporation by a small minority of its creditors, who are hostile to the plans of the majority, will not enjoin a sale of the corporation's property

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by order of a court of equity, which acquired prior jurisdiction by the appointment of receivers, where a large majority of the creditors desire such sale, and it does not appear that it will be to the detriment of the minority, or jeopardize their rights.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 156, 157; Dec. Dig. § 104.*]

In the matter of the Edward Ellsworth Company, an alleged bankrupt. On motion to enjoin sale of property. Motion denied.

William T. Tomlinson, Frank L. Gibbons, and H. Edson Webster, for intervening creditors.

George P. Keating, for creditor's committee.

Louis L. Babcock, for receivers.

HAZEL, District Judge. This motion is to enjoin the sale of the assets of the Edward Ellsworth Company, a corporation, by receivers appointed in an equity action brought against it by contract creditors, until there can be an adjudication in bankruptcy on an involuntary petition filed by creditors subsequent to such appointment. The inquiry presented is whether the corporation proceeded against, by admitting the material allegations of the bill in the equity action and joining in the application for the appointment of receivers, can be held in a legal sense to have applied therefor pursuant to section 3a, subd. 4, of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025).

If the company, while insolvent, had voluntarily brought an action to wind up its affairs for the benefit of its creditors, and had applied for the appointment of receivers to take charge of its property, the superior right of the bankruptcy court could not safely be questioned; but the interposition of an answer in an action brought by a contract creditor, admitting therein the truth of the allegations of the bill and joining in the prayer for relief, is not believed to be the equivalent of the term "being insolvent, applied for a receiver or trustee for its property." In the equity action the complainants applied for receivers on the ground that the Edward Ellsworth Company was unable to pay its debts as they matured, and that it would be to the advantage of creditors and stockholders to have its affairs wound up. Nowhere in the bill is it asserted that the corporation is insolvent, as that term is defined by section 1, subd. 15, of the bankruptcy act. In fact, the bill contains an affirmative allegation that the defendant is solvent. Such averments, together with the admission by the corporation of their truth and its consent to the appointment of receivers of its property, undoubtedly vested the Circuit Court, in view of the diversity of citizenship of the parties, with power and authority to act in the premises. *Re Metropolitan Railway Receivership*, 208 U. S. 90, 28 Sup. 219, 52 L. Ed. 403.

The bankruptcy act has not superseded the right and power of a court of equity to take charge of the property of an insolvent corporation for the protection of stockholders and creditors, marshal the same, recognize and enforce valid liens and priorities, and equitably dis-

tribute the surplus proceeds among its creditors. It is only where a receiver has been appointed in another court because of insolvency, as that term is defined in the bankruptcy law, or where the corporation on its own initiative has applied for the appointment of a receiver or custodian of its property, that an act of bankruptcy under section 3a, subd. 4, has been committed. This provision of the bankruptcy law must be strictly construed. *Collier on Bankruptcy* (7th Ed.) 83, and cases cited. Inasmuch as the record in the Circuit Court action does not assert or claim that the Edward Ellsworth Company was insolvent, within the meaning of the bankruptcy act, this court is precluded from considering evidence aliunde to contradict the decree or judgment appointing receivers and setting forth the basis of such appointment. This appears to be settled by abundant authority. *Blue Mountain Iron & Steel Co. v. Portner*, 131 Fed. 57, 65 C. C. A. 295; *In re Douglas Coal & Coke Co.* (D. C.) 131 Fed. 769; *In re Spaulding*, 139 Fed. 245, 71 C. C. A. 370; *Moss, etc., v. Arend*, 146 Fed. 351, 76 C. C. A. 629; *Collier on Bankruptcy* (7th Ed.) 82; *Thomkins Co. v. Catawba Mills* (C. C.) 82 Fed. 780.

The petitioning creditors have not intervened in the equity action, or asked leave to institute suit to subject the property and assets of the corporation to the payment of their debts; nor do they dispute the debt which is the subject of the bill in equity. True, it is claimed that there was collusion between the parties to the equity suit to defeat the operation of the bankruptcy act; but it is not contended that there was fraud or wrongful act by either of the parties to confer jurisdiction upon the Circuit Court. Such being the fact, the particular object sought to be accomplished in the equity action, the winding up of the business of the corporation, or perhaps its reorganization, or readjustment of its affairs or any wrongs to dissatisfied creditors that are supposed to ensue therefrom, are not thought material on this application. *Re Metropolitan Railway Receivership*, *supra*.

The petition in bankruptcy also alleges that the Edward Ellsworth Company gave an unlawful preference to the Manufacturers' & Traders' Bank of Buffalo; but affidavits read on this motion tend to show a surrender of any asserted preferential security. As to whether a sufficient surrender thereof has been made is a question that may be left for trial in the bankruptcy court. If, after reorganization, the bank receives in full its debt from the new company, the question whether such payment would amount to an unlawful preference, under section 3 of the bankruptcy act, may also be left for future decision.

To effectuate the proposed reorganization and readjustment, evidently, both the secured and unsecured creditors, together with the stockholders, will be obliged to raise or contribute a large amount of money, and probably suffer some loss or depreciation of their claims. The business of the company is large and extensive, the debts are many, and the property valuable. The court has authorized the receivers to issue certificates in a large amount to enable continuing the business until it is wound up or a reorganization effected, and such business presumably has been profitably conducted by the receivers for the past five months. A public sale of the property has several times

been postponed, pursuant to direction of the court, made necessary by the dissentient creditors, and to accord them the opportunity to substantiate their assertions that injustice will be done by permitting a sale by the receivers in equity. The opposing affidavits show that 95 per cent. of the total amount of valid claims presented to the receivers favor immediate reorganization and sale of the property in its entirety. It further appears that various meetings and conferences have been held to discuss the subject of reorganization and readjustment, in which the attorney for creditors who are now dissentients participated, but who, later, when the plan adopted by the majority dissatisfied them, filed a petition in bankruptcy to have the company adjudicated bankrupt. They object to accepting lien bonds of so-called 10-year extension class, and assert generally that their claims are imperiled by the proposed reorganization. Of course, the objecting creditors cannot be compelled to take 10-year bonds in payment of their debts in full. Unless they join the majority creditors, they will be entitled to receive in cash their proportionate share out of the proceeds of the sale of the property.

It is difficult to see, in view of the large indebtedness, secured and unsecured, properties and assets, what advantage there would be if the sale were conducted in the bankruptcy court. The dissentient minority are not barred from bidding in the property, or using their best efforts to obtain a higher price than the bid of the reorganizers. They stand on the same plane with other creditors or bidders. To enjoin the sale, already extensively advertised and promoted, until the question of whether acts of bankruptcy have been committed is settled after trial of the issues raised by the answer of the bankrupt in the bankruptcy proceeding, will certainly mean increased expenses for trustee's commissions, fees of receivers and the referee in bankruptcy, and legal expenses generally. The court should be slow to permit the objections of a few creditors to defeat the plan of reorganization favored by a large majority of the creditors in number and amount, especially as nothing has developed or been proposed by which it may be presumed that the few have any plan by which the property may ultimately be sold to better advantage, or that there is a likelihood of obtaining a larger price therefor.

In deciding this application, it is also to be considered that in several instances the intervening creditors have purchased bonds of the company on the market at a diminished price since the bankruptcy proceeding was instituted, and now seek to recover the full amount due on coupons, and other claims appear to have been bought since such time. That the objection to the reorganization comes from influences originating with a former officer of the Edward Ellsworth Company, as contended by the majority creditors, is likewise entitled to consideration on this application. In such a situation, whatever doubt may arise in the mind of the court as to the propriety of permitting the sale by the receivers should be resolved against the intervening creditors, who manifestly are hostile to the plan of the large majority of the creditors. It is suggested, however, by the court, that if the sale by the receivers operates unfairly, unjustly, or inequitably against any

of the creditors, it would be the duty of the court to withhold confirmation or approval.

It is further objected that the proposed acceptance of valid claims by the receivers at a certain percentage of their face value in payment of any bid would operate harmfully or disadvantageously to the creditors; but such methods are not unusual or improper, where large properties are sold under decree of a court of equity. *Ketcham v. Duncan*, 95 U. S. 659, 24 L. Ed. 868; *Cook on Corporations*, § 887. The order of sale, however, should be amended, by striking out the words "as in the judgment of the receivers," in connection with the words "would remain for distribution." The percentage of the face value of claims at which they may be accepted at the bidding in lieu of cash should be reserved until the report of sale is made to the court for its approval and sanction.

The injunction will be vacated, and the property sold by the receivers under the order heretofore entered, as now modified, but not until the expiration of two weeks from the entry of an order upon this decision.

THE MERIDA.

(District Court, W. D. New York. September 21, 1909.)

COLLISION (§ 95*)—STEAMER AND TOW—MUTUAL FAULT OF STEAMER AND TUG.

A collision off the south entrance to Buffalo harbor and some 200 feet northward of the submerged extension to the west-northwest from the north end of the south breakwater, between the freight steamer *Merida*, coming in, and a dump scow in tow of the tug *McNaughton*, passing out, held due to the fault of both steamer and tug; the former being in fault for failing to go to port, after an agreement to pass starboard and starboard, sufficiently to permit the tug to safely navigate to keep her tow off the submerged crib, and the latter for not sooner signaling when the master found he did not have sufficient room, and for keeping too far to the south until compelled to alter her course to the north across the bows of the steamer.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

In Admiralty. Suit for collision by the Buffalo Dredging Company, as owner of the dump scow No. 12, against the steamer *Merida*. Decree dividing damages.

Brown, Ely & Richards, for libellant.

Clinton & Clinton, for respondent.

HAZEL, District Judge. This action was brought by the libellant, Buffalo Dredging Company, to recover damages in the sum of \$12,593, sustained through a collision between its dump scow No. 12 and the large freight steamer *Merida*, which occurred off the south entrance to Buffalo harbor at about 2 o'clock in the afternoon of July 8, 1907. The scow, which was being towed by the tug *McNaughton* to the dumping ground out in the lake, was struck by the steamer on her port side and was sunk.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

There are three breakwaters in the vicinity of the collision, located in such way as to form a gap or entrance from the lake to the dock of the Buffalo & Susquehanna Steel Company plant: The main breakwater, which extends north and south, and has at its southerly end a light, called "Bottle Light." Beyond the light is an open space, of about 600 feet in width; and then comes the Stony Point breakwater, which extends from the land in a northwesterly direction, having at its outer end a lighthouse. Commencing at the extreme end of the Stony Point breakwater is a submerged extension, running about 1,000 feet out into the lake in a west-northwesterly direction. About 50 feet off the terminus of the submerged breakwater there was a gas buoy, around which vessels proceeding in a westerly or southerly direction were obliged at the time of collision to navigate, as the submerged crib was incomplete, and was of various depths under the water, and boats could not pass over it. On the north side of the submerged pier, however, throughout its entire length, the water is deep enough for large vessels to safely navigate. About 400 feet outside the entrance to the gap between the main breakwater and the submerged crib, the available navigable water was about 1,000 feet wide and about 21 feet deep. At the time of collision the wind was blowing fresh from a southwesterly direction, and the waves were high in the gap, rolling at intervals over the main breakwater.

Libelant claims, and testimony has been given in support thereof, that the collision occurred about 200 feet east of the gas buoy, which was located about 50 feet north-northwest of the outer end of the submerged crib. Respondent sharply disputes that the boats came together the number of feet stated from the submerged crib, and contends that the place of collision was about 284 feet therefrom.

It is important to know the position of the vessels in the channel. The scow, which had no rudder, was taken in tow by the tug McNaughton inside the breakwater, and a tow line 200 feet long was made fast to her starboard corner. It is usual and customary in this port, in towing behind the breakwater, to use a short tow line on scows having no rudder, fastening it on the starboard end thereof, so as to insure the scow following in the wake of the tug; for, if towed differently, the water stirred up by the propeller would cause her to swerve from side to side. The respondent intimates that the scow was fastened to the tug in such a manner as to cause her to swerve toward the submerged pier; but it is proven by a number of expert witnesses, familiar with the usual and proper way of towing in the situation presented, that the tow line was not only of sufficient length, but properly fastened to the scow. It appears that the McNaughton was following another tugboat and mud scow, which was navigating 200 feet ahead, and at the time of the collision was turning around the gas buoy. Previously both tugs had blown signals, two blasts of their whistles, to the Merida, which was then about one-half to three-fourths of a mile out in the open lake, headed to the entrance to the harbor, and intending to go to the wharf adjacent to the steel plant. Each of the signals were answered; the Merida assenting to the proposal to pass on the starboard side of the tows. After receiving the assenting signal, the McNaughton steamed ahead at the rate of three

miles an hour and straightened in her course; the Merida meanwhile bearing down on her. The master of the tug blew three blasts of the whistle to indicate the necessity for the Merida to check her speed or stop, to allow the McNaughton to go around the gas buoy. To this signal the Merida responded with a similar signal, and then proceeded slowly towards the entrance to the harbor.

The tow at this time was closer to the submerged crib than it was usual or customary for tugs with scows to navigate, and as the scow sheered closer to keep from striking it the tug required more space to the northward than the steamer was giving her. When about 500 feet from the crib light, the tug, which was then under check, changed her course a little to north. She first steered a little to port, and then to starboard, to keep the scow from edging over onto the crib. She became apprehensive of danger, blew an alarm signal when the scow was approximately 150 feet away from the crib, and drew over to the right side, intending to hold the scow off. The Merida did not go to port, as she agreed to do, but kept on straight ahead, and, as there was immediate danger of collision, the tug opened her engine and went across her bow, which was then 200 feet away. Before the McNaughton could haul the scow clear, it was struck by the steamer, head on, a little forward on its port side. Just before the impact the tug, which was then off to starboard and at right angles to the steamer, signaled the scowmen to dump the scow; but, in spite of doing everything possible at this time to avoid the collision, it was inevitable. The scowmen leaped into the lake and were rescued, while the scow instantly sank in deep water.

The master of the Merida was a stranger to the harbor, and did not know of his proximity to the submerged crib. He had heard of it, but it is plainly established by the evidence that he did not appreciate its nearness to his course. He did not comprehend the reason why the McNaughton came so close to the course which he had elected to take, and failed utterly to appreciate the danger to the scow. To keep the scow from going on the submerged crib, owing to the current or swell setting in its direction, it was necessary for the tug to maneuver to starboard; but the proofs show that she was not left free to do so by the Merida. That Capt. Ott did not regard the submerged crib as a factor in his navigation is plain from the conversation between him and the master of the McNaughton directly after the scow was sunk. Testifying on this point, Capt. Green says:

"A. The Merida came up kind of close. I said to him: 'Captain, you can't get by here, because I can't get out of your way.' He says: 'Why?' I says: 'The tow line is on my wheel.' 'Well,' he says, 'can't I go around the other way, over around the buoy?' Q. What buoy? A. The red gas buoy. Said I: 'Why, no; they are building a breakwater there. There's only five, six, or seven feet of water along in there.' Said I: 'If I could get over there, I would have went out that way.' Says I: 'You can't get around that way. You have got to go around my boat.' Says he: 'Are there water for me to go around your boat?' Says I: 'Yes.' Says he: 'All right, if there is.' He says: 'When I am going by you, I'll give you a line—pull you out from there.'"

In view of the circumstances that the McNaughton proceeding, with tow in a heavy sea, was the privileged vessel, her maneuvering to starboard would undoubtedly have been thoroughly understood by the

Merida, had she possessed the requisite knowledge of the obstructing crib to enable her skillful and careful navigation through the entrance to the harbor. Her master did not sufficiently alter her course to port after receiving the two-blast signal. He in effect testified, as did also the wheelsman, that the Merida starboarded her helm, which would have taken her to the northward; but I think the situation of the vessel at the time of the collision clearly contradicts him. The witnesses for the Merida are positive in their assertions that the steamer was headed between the middle of the entrance and the Bottle Light; but most of them are uncertain as to whether she steered to port after passing signals were exchanged, or that she appreciably went northward.

The contention of counsel for the Merida is that the McNaughton was proceeding too close to the submerged crib and that the scow came under the influence of the eddy which made it necessary for the tug to suddenly pull to starboard; that directly after executing this movement her master, perceiving the danger, blew an alarm, and, becoming excited, he went strongly to starboard and across the bow of the Merida. This view, however, is not supported by the evidence, and I therefore reject the contention. The proofs are that the Merida did not allow enough room in the channel to permit the McNaughton to properly handle her tow. It was her duty to give the tug such room as she could with safety to herself, as it was navigating in a peculiar situation under apparent difficulties. *The Mayumba* (D. C.) 21 Fed. 476; *The Jamestown* (D. C.) 114 Fed. 593; *The Alabama* (D. C.) 114 Fed. 214; *Mitchell Trans. Co. v. Green*, 120 Fed. 49, 56 C. C. A. 455. It was necessary for the tug to have a lateral distance of 150 feet in towing straight ahead from the side of the scow, and I believe the Merida was less than 225 feet from the crib, too far to the southward. This I deem to be fairly established by the testimony of the witness De Grasse, who was on the lighthouse on the Stony Point breakwater, and in an excellent position to judge of the distance between the submerged crib and the steamer.

Accordingly the Merida was in fault for not giving way to port under the agreement to pass starboard to starboard, and in navigating so close to the submerged crib as to afford insufficient space for the McNaughton to properly navigate with the scow. That the ahead tug and scow were safely passed by the Merida does not show that sufficient room was allowed the McNaughton and tow for reasonably safe navigation; for the ahead tug was turning the gas buoy when the steamer passed, a manifestly different position than that of the McNaughton and tow.

But the McNaughton was also faultily navigated. Her master perceived, shortly after blowing the passing signal, and when close to the Bottle Light, that the steamer was holding her course too far over to the southward, and, knowing of the nearness of the submerged crib, he nevertheless continued to the southward of the usual course towards the gas buoy without signaling the steamer. He claims that the three-blast signal was intended for an alarm or admonition to the Merida to stop and reverse; but of this I am not convinced. I believe the signal

was to request her to come ahead slowly, a signal with which she complied. There was a roll of the waves toward the submerged crib, and the McNaughton should have anticipated the sheering of the scow. Not having done so, she must be held in fault for altering her course without seasonably signaling the Merida to stop and reverse, and for navigating her tow across the path of the Merida.

Both vessels, the steamer and the tug, were in equal fault for the sinking of the scow, and therefore the damages will be divided, without costs to either party.

So ordered.

WORMWELL v. P. DOUGHERTY CO.

(District Court, S. D. New York. November 3, 1909.)

TOWAGE (§ 11*)—LOSS OF TOW—NEGLIGENCE—EVIDENCE.

Stranding of schooner in tow near the Middle Ground Gas Buoy in the lower Chesapeake Bay *held* to have been caused by improper navigation on the part of the tug and not by the steering of the schooner after the parting of the hawser.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

(Syllabus by the Judge.)

In Admiralty. Action by Willis B. Wormwell against the P. Dougherty Company for the stranding of the schooner Alice M. Lawrence. Decree for libellant.

Wing, Putnam & Burlingham, for libellant.

James J. Macklin, for respondent.

ADAMS, District Judge. The six-masted schooner Alice M. Lawrence, loaded with coal, was taken in tow by the P. Dougherty Company's tug Dauntless at Baltimore, Maryland, on the 31st of July, 1908, bound for Portland, Maine. On the following day, the schooner was stranded on the Middle Ground, a short distance east by north from the Middle Ground Gas Buoy in the lower Chesapeake Bay. The libellant contends that the stranding was not due to any negligence on his part, but was wholly due to the fault of the respondent in that the Dauntless did not at the time have any proper lookout or competent navigating officer on deck, that she did not take proper soundings, or observe the bearings of the buoys and in that she failed to keep the schooner on her proper course, notwithstanding the favorable conditions of wind and weather.

The respondent after denying that there was any negligence on its part, alleged:

"Ninth: And for further answer to said libel, respondent alleges: That at or about the times mentioned in said libel the said respondent agreed to tow the schooner Alice M. Lawrence from Baltimore to Cape Henry, the said schooner to furnish a proper hawser for the performance of said towage service, and that the crew of said schooner was to look after the proper steering of the same, and pursuant to such contract the said schooner did provide a hawser of about 125 fathoms in length.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Tenth: Upon information and belief, respondent also alleges, that the Steamtug Dauntless took the said schooner in tow and that said hawser was made fast to the forward part of said schooner by those on board thereof and the other end of said hawser on the stern of the said steamtug, and that at or about 10 o'clock of the day mentioned in said libel, the said steamtug started with the said schooner from Baltimore to Cape Henry, the weather being pleasant and favorable, and that at or about midnight of the first day of August, 1908, bad weather set in, making a rough sea the wind blowing very strong, and whilst said steamtug was proceeding very carefully with said schooner the hawser so provided by said schooner parted at or about 5 o'clock a. m.; whereupon the said steamtug attempted to pick up the said schooner, and while so manœvering, found that the said schooner's wheel had been put the wrong way by those on board thereof; whereupon those on board the said schooner were hailed to hard a port their wheel, but before the same was done the said schooner brought up on the Middle Ground mentioned in said libel, a short distance from the Middle Ground Gas Buoy, resulting in damage being done the said vessel, the wind at the time being from the North Northeast.

Respondent also alleges that had proper care and attention been exercised by those on board and navigating said schooner with the sails she had set, and had her wheel been properly attended, the said schooner would not have touched bottom, nor would the stranding mentioned in said libel have occurred.

Respondent also alleges upon like information and belief that the said Steamtug Dauntless did everything possible to haul the said vessel off bottom in order to save her from pounding on the same, and proceeded to Norfolk and secured the services of the Steamtug Margaret and returning to said schooner found her afloat; whereupon both said steamtugs Dauntless and Margaret towed the said schooner into Hampton Roads where a survey was held and a steam pump placed on said schooner.

Eleventh: Respondent upon information and belief also avers that the parting of the said hawser and the damage resulting to the said schooner was either from the imperfect condition of said hawser provided by said schooner, the bad weather that set in on said voyage or the carelessness of those in charge and controlling said schooner in putting her wheel the wrong way, thus causing her to touch bottom as aforesaid."

It appears that the four-masted schooner William H. Yerkes, Jr., was being towed to sea at the same time by the tug Tormentor, and that the vessels were kept in company until the accident happened.

The libellant's testimony shows that about 5 o'clock a. m., the Lawrence fetched up to the north eastward of the Middle Ground Gas Buoy. She came off leaking and anchored. Afterwards she was taken to Hampton Roads and subsequently proceeded to Portland, with a wrecking pump. Her damages were found to be serious and were estimated at \$10,000.

It appears that the Yerkes was a smaller vessel, drawing 23 feet 8 inches, and probably was of less draught than the Lawrence. The cargo capacity of the Yerkes was 2,400 tons, while the Lawrence carried 5,000 or 5,200 tons.

When the vessels were approaching the Middle Ground, the Yerkes was about a quarter of a mile ahead of the Lawrence and about a point on her port bow. Her tug was more powerful than the Dauntless, but the Yerkes was not carrying sail, while the Lawrence had considerable set, which accounts for the latter keeping up with the former.

It was the custom of navigators in the vicinity of the Middle Ground to arrange their speed so as not to reach the place before daylight, ac-

cordingly the Dauntless slowed her engines so as to wait, having been under one bell since 3 a. m.

When near the Middle Ground the tide cuts strongly to the eastward upon the shoals. On this morning, when the vessels approached, it was near the last of the ebb and of a strength of about 2 miles an hour. The north wind which was blowing down the bay, had tended naturally to drive the water out of the lower part of the bay thus increasing the danger from the shoals.

Both tugs were in the hands of their mates, the respective masters having left their pilot houses to go to their sleeping quarters, to come out when specially called. The courses of the vessels, which seemed to be parallel to each other, were S. $\frac{1}{2}$ W. The variation here is $4^{\circ} 40''$ to the westward, hence the course of S. $\frac{1}{2}$ W. would be about S. true.

There was ample navigable water to the westward of the Gas Buoy, and to be safe against the side set of the current the buoy should have been left well on the port hand, on a course of something like S. S. W. The courses of S. $\frac{1}{2}$ W. were therefore dangerous, as they proved in this case by the Lawrence shortly striking bottom heavily aft. After this thump she struck again and then brought up. The Yerkes did not strike the bottom but parted her hawser probably because of the strain caused by the waves incident to a heavy sea. The Dauntless at the time of striking was either directly ahead or slightly on the port bow of the schooner. After the striking the Dauntless sheered off to starboard but could not pull the Lawrence off the ground. Subsequently, however, assistance was obtained and she was released and later went on her way.

The preponderance of the testimony shows that the cause of this stranding was the negligent navigation of the tug, as the Lawrence was following her closely at the time of stranding. The Dauntless contends that the accident was due to the bad navigation of the schooner after the parting of the hawser, which broke just before the Lawrence struck. It was a good hawser and nothing against the schooner can be attributed to it. The hawser was brought into court, and the parted place looked as if a clean cut had been made near where it was fastened to the tug, but assuming it was a break, it does not relieve the tug of liability, which is established not only by the proved occurrences but by admissions of the master shortly after the accident. It was also shown by the testimony of the master of the schooner Perry, which had sailed down the bay and anchored about a mile to the westward of the Gas Buoy. He said that the Lawrence was certainly a mile and a half out of her course to the eastward.

The contention of the respondent that after the breaking of the hawser, the schooner sailed aground on the shoals from a safe place in the channel must be rejected.

There will be a decree for the libellant, with an order of reference.

TWEEDIE TRADING CO. v. THOMSEN & CO.

(District Court, S. D. New York. November 4, 1909.)

SHIPPING (§§ 175, 184*)—DEMURRAGE—LACHES—EVIDENCE.

Demurrage and expenses at Savannah, Georgia. Claim for the recovery of a fine paid to the Brazilian government. *Held* that the libellant was entitled to recover for two days' demurrage and the expenses of moving the steamer Hathor across the river, for a violation of a bill of lading contract; also *held* that the testimony was too unsatisfactory to establish a claim for the recovery of the fine paid by a vessel to the Brazilian government.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 572-574; Dec. Dig. §§ 175, 184.*]

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

(Syllabus by the Judge.)

In Admiralty. Action by the Tweedie Trading Company against Thomsen & Co. to recover demurrage and certain expenses. Decree for libellant.

Ralph J. M. Bullowa, for libellant.
Wingate & Cullen, for respondents.

ADAMS, District Judge. This action was brought by the Tweedie Trading Company, chartered owner of the steamship Hathor, against Thomsen & Co., to recover certain demurrage and expenses, alleged to amount to \$619.27, due by reason of the detention of the said steamer at Savannah, Georgia, in August, 1904, and for a further sum of \$371.27, which the libellant was obliged to pay as a fine to the Brazilian Government in November, 1904, by reason of the steamer Nithsdale, of which it was also the chartered owner, not being furnished with proper invoices and entry papers.

The respondents, after sundry denials and admissions, allege as follows:

"Eleventh: For a first, separate and complete defense to the alleged cause, or to each of the alleged causes of action set forth in said libel.

That the defaults of respondents with respect to the contract or engagement of freight per S. S. Hathor as set forth in said libel, if any there were, were fully and completely waived by libellant orally at two or three conversations had between respondents and officers of libellant, held between the 7th day of September, 1904, and the 1st day of February, 1905; and by the delivery to respondents of a clean or unendorsed bill of lading dated August 31st, 1904, in pursuance of aforesaid contract or engagement of freight per S. S. Hathor; also that the defaults of respondents with respect to the delivery of invoices and entry papers for the S. S. Nithsdale as set forth in said libel, if any there were, were fully and completely waived by libellant orally at two or three conversations had between the respondents and officers of libellant, held between the 28th day of November, 1904, and the 1st day of April, 1905; and also that said defaults of respondents in respect to the delivery of invoices and entry papers for the S. S. Nithsdale as set forth in said libel, if any there were, were fully and completely waived by libellant in a letter sent by it to respondents dated December 30, 1904."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

And the respondents further claim that the action is "stale and barred in admiralty by reason of the laches of libellant in the commencement" of the action.

The question of laches should be taken up first because if that defence is to prevail, further discussion is not necessary.

The first contract which was involved was dated June 13, 1904, but there was no breach till the beginning of the following September and the action was not actually ripe until somewhat later. In the Nithsdale part of the controversy, the bills of lading which formed the bases of the action were dated in November, 1904. The libel was filed January 22, 1908, and the original answer February 11, 1908. The action was therefore commenced about 3½ years after the transactions. In the absence of some special reason, loss of testimony, or something of that kind, I do not think that the mere lapse of time of this duration is sufficient to bar the action. Moreover, the secretary of the libellant testified that he had tried to collect the money many times.

There is no evidence sufficient to establish the respondents' claimed waiver.

With respect to the Hathor's part of the case, the contract was contained in two letters, as follows:

"New York, June 13th, 1904.

The Tweedie Trading Co., Present.

Dear Sirs: We confirm engagement of 150,000 feet of P. P. Lumber to be shipped by Steamer from Savannah to Santos at \$12.—, p. 1000 ft. 1x12" during the month of August, your option. It is understood that the lumber will go under &/or on deck, your option, but it would be preferable to us to have most of it, if not all, go under deck. B/Ldg. to contain the usual clause 'not accountable for splits, stains or broken pieces.' If you desire we can let you have the approximate specification of the 150,000 ft. which we intend to ship.

Please confirm & believe us, Dear Sirs.

Yours very truly,

Thomsen & Co."

"New York, June 14, 1904.

Messrs. Thomsen & Co., 96 Wall St., New York.

Dear Sirs: Pitch Pine Savannah-Santos:— We duly received your favor of yesterday's date.

We confirm booking at \$12. on or under deck at our option, August shipment, on 150,000 superficial feet of Pitch Pine, shipment subject to our usual Bill of Lading.

As explained to you, we will do everything possible to so arrange carrying the cargo, or the largest part of the cargo under deck, but even so, we think the chances are against it, and that practically all of the Lumber will be shipped on deck.

Yours very truly,

The Tweedie Trading Co.,
By M. Stanley Tweedie, President."

The bill of lading was dated August 31, 1904, but the date did not really represent the time of the transaction. The Hathor was delayed but the respondents did not avail themselves of the charter provision for a cancellation. She reached Savannah September 4th, when she proceeded to the wharf of the South Atlantic Steamship Company and loaded her cargo of rosin. A demand was then made for the lumber, which was not there, and the Hathor, after taking on the rosin, which occupied her until the 7th, was obliged to proceed to the Georgia Lumber Company's wharf, across the river, for the remainder of her

cargo. She was detained until the 9th, when she sailed. It is for these two days that demurrage is claimed, it being contended that if the lumber had been ready at the rosin place of shipment, she could have put it on at the same time she loaded the rosin.

The bill of lading, mentioned in the libellant's letter of June 14, 1904, *supra*, provided, *inter alia*:

"8. Also, Steamer to commence loading immediately upon arrival at the port of loading, and to load continuously, working all hatches at once, any custom of the port to the contrary notwithstanding. Any detention on the part of the shippers in supplying cargo as fast as Steamer can receive to be accounted for by the payment of demurrage by them at the rate of eight pence British Sterling per Steamer's net register ton, and Steamer to have a lien on cargo for same, unless contrary agreement outside of this Bill of Lading."

There seems to be no doubt that the lumber and rosin could have been loaded at the same time. The lumber was demanded at the time the rosin was being loaded but not furnished, hence the necessity of going across the river to the place where it was furnished. This moving caused the detention complained of and in view of the contract contained in the bill of lading that the vessel should "load continuously, working all the hatches at once," the libellant is entitled to recover for the demurrage and for the expenses caused by taking the vessel to the new place.

With respect to the second claim for the fine exacted in Brazil, the evidence is so unsatisfactory that nothing definite can be determined from it. The fine was probably imposed because some of the cargo had been stolen and the state thereby defrauded of its duties, but, in any event, there is nothing to legally substantiate the libellant's claim in this particular.

There will be a decree for the libellant for \$619.27, with interest.

BARBITT v. READ et al.

(Circuit Court, S. D. New York. November 3, 1909.)

1. BANKRUPTCY (§§ 282, 284*)—ACTIONS BY TRUSTEES—SUIT AGAINST STOCKHOLDERS OF BANKRUPT CORPORATION.

Where plenary suits are necessary to collect unpaid subscriptions from stockholders of a bankrupt corporation, it is not necessary that the bankruptcy court should determine the amount due from the stockholders, which may be left to the courts in which such suits are brought, and authority given by the bankruptcy court to the trustee to collect such amounts as may be due is a sufficient demand on the stockholders.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 426; Dec. Dig. §§ 282, 284.*]

2. BANKRUPTCY (§ 282*)—ACTIONS BY TRUSTEES—SUIT AGAINST STOCKHOLDERS OF BANKRUPT CORPORATION.

The fact that bondholders of a bankrupt corporation may be estopped by a waiver expressed in the bonds or mortgage to assert any personal claim against the stockholders is no defense by the stockholders to a suit by the trustee to enforce their liability on unpaid subscriptions, where

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

there are other creditors not so estopped; nor does the pleading of such estoppel as to the bondholders make the mortgage trustee a necessary party to the suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 426; Dec. Dig. § 282.*]

3. BANKRUPTCY (§ 154*)—ACTIONS BY TRUSTEE—SUIT AGAINST STOCKHOLDERS OF BANKRUPT CORPORATION—SET-OFF.

That stockholders of a bankrupt corporation are also bondholders, and as such entitled to share in the distribution of the estate, does not entitle them to set off their claims as such in a suit against them by the trustee in bankruptcy to recover unpaid subscriptions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 451; Dec. Dig. § 154.*]

Hornblower, Miller & Potter, for plaintiff.

Carter, Ledyard & Milburn, for defendants Hamilton Trust Co., Metropolitan Life Ins. Co., and John R. Hegeman.

Strong & Cadwalader, for defendants Read, Seaman, and Clark.

Rushmore, Bisbee & Stern, for defendant Gardiner.

WARD, Circuit Judge. The defendants object that the bill is defective, because the Central Trust Company, a corporation of the state of New York, has not been made a party, and the cause is set down on that objection only under equity rule 52.

The complainant, a citizen of Missouri, is the trustee in bankruptcy of the Randolph-Macon Coal Company, a corporation of the same state, where it has been duly adjudicated a bankrupt. The bill charges that a mortgage on the company's property to secure an issue of \$3,000,000 of bonds, of which \$2,150,000 are outstanding, has been foreclosed, resulting in a deficiency judgment against the company of \$2,149,729.45; that this judgment has been proved against the company's estate as a claim in bankruptcy; and that other claims have been proved to the amount of \$247,067.33. The bill further charges that the referee in bankruptcy has found that the company's debts are \$2,329,551.01 in excess of its assets; that, the trustee being advised and believing that at least \$4,000,000 remain due and owing on the company's capital stock, he is therefore authorized and directed to institute proper proceedings at law or in equity against the stockholders for the purpose of enforcing their liability for any unpaid balance.

This right of the corporation to enforce the liability of stockholders for the purpose of paying its debts passed to the trustee under section 70a (6) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 566 [U. S. Comp. St. 1901, p. 3451]), and while he is ready to enforce it no one else can. The Central Trust Company is neither a necessary nor proper party to that end. It will be noticed that the referee in bankruptcy has not found the amount due by the stockholders, or even expressly that there is any amount due. The defendants contend that such a finding is a necessary preliminary to a plenary suit against stockholders, and cite *In re Remington*, 153 Fed. 345, 82 C. C. A. 421, to that effect. All the proceedings in that case were in the bankruptcy court, and the stockholders were apparently residents and parties. This court held the proceedings there taken to be regular,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and referred to *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968. But, where plenary proceedings are necessary against stockholders, I see no reason why the bankruptcy court may not leave the question of the amount due by them to the courts in which the plenary proceedings are instituted. The authority given by the referee in bankruptcy to the trustee to collect such amount as may be owing from stockholders seems to me an authorized demand for payment within the language of Mr. Justice Woods in *Scovill v. Thayer*, at page 155 of 105 U. S. (26 L. Ed. 968):

"But under such circumstances, before there is any obligation upon a stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or at the very least some authorized demand upon him for payment."

The stockholders would certainly have no reason to complain of such a course. Be this as it may, the stockholders have the right to set up in a plenary suit such personal defenses as are now to be considered. See *Matter of Munger Vehicle Tire Co.* (C. C. A.) 21 Am. Bankr. Rep. 395, 168 Fed. 910.

The question is whether the trust company is a necessary party to this cause because of the following defenses: First, that the bondholders have waived their right to make any claim against the stockholders personally; second, that the defendants, besides being stockholders, are owners of bonds secured by the mortgage and entitled to set off the amount of their bonds against any claim against them as stockholders; third, that the mortgaged property was purchased at the foreclosure sale on behalf of all but 24 of the bonds for the sum of \$100,000, whereas its actual value is sufficient to discharge the deficiency judgment in addition to the purchase price.

The first defense depends on a provision in the mortgage, which is incorporated by reference in the bonds, to the effect that:

"No recourse under any obligation of this mortgage, or of any bond or coupon hereby secured, shall be had against any incorporator, officer, stockholder, or director of the company, either directly or through the company, by the enforcement of any claim or right, statutory or otherwise, or by any legal or equitable proceeding; it being expressly agreed and understood that this mortgage and the bonds secured hereby are solely a corporate obligation, and shall derive no support or aid by or through the personal liability of, and that no personal liability whatever shall be attached to or be incurred by, the incorporators, stockholders, officers, or directors of the company, or any of them, under or by reason, or founded, whether wholly or partly, directly or indirectly, upon any of the obligations of this mortgage, or any of the bonds and coupons hereby secured, but any and every such personal liability of every such incorporator, stockholder, officer, or director is hereby expressly waived as a condition of and in consideration for the execution of this mortgage and of such bonds and coupons."

The trustee is asserting the right of the bankrupt corporation on behalf of its creditors. If this defense is good against the bondholders, he can assert the right only on behalf of the other general creditors to the amount of \$247,067.33. It is no objection to his acting that the rights of these creditors and of the bondholders are inconsistent, or even hostile. He is an officer of the court, without any personal interest whatever, representing the bankrupt and all its creditors, and is

no more unfit to act in the premises because those interests conflict than is the court to dispose of the questions for that reason. It is not like the case of a stockholder's bill, where the plaintiff's personal interest is antagonistic to the interests of other stockholders, and therefore they should be made parties. I do not see that the Central Trust Company is a necessary, or even proper, party in connection with this defense.

Coming to the second defense, the set-off alleged is not available against the trustee in bankruptcy, because it involves no mutual debt or credit between the stockholder and the estate of the bankrupt, within section 68 of the bankruptcy act. *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731. When the Central Trust Company, as trustee under the mortgage, distributes among the bondholders it represents the dividend paid it by the trustee in bankruptcy, so far as the same has been collected from the stockholders, this equity can be adjusted. In that proceeding the paying stockholders will get back whatever they are entitled to as bondholders. The trustee in bankruptcy is not concerned in settling the equities of the bondholders and the stockholders interest. If, however, for the protection of creditors other than the bondholders, it should prove necessary to settle these equities in the bankruptcy court, that court has power to do so, because it is necessary for the proper distribution of the bankrupt's estate. I do not think the Central Trust Company is a necessary party to this cause in connection with this defense.

The third defense also involves equities between the bondholders and stockholders, with which neither this court nor the bankruptcy court is concerned; and for the same reason I do not think the Central Trust Company a necessary party.

The objection is overruled.

THE GEORGE W. PEAVEY.

(District Court, W. D. New York. October 4, 1909.)

1. COLLISION (§ 125*)—ACTION FOR DAMAGES—EVIDENCE.

In a collision suit, the testimony of the officers and crew as to what occurred on their own vessel is entitled to more weight than that of witnesses on board other vessels, who merely assert their opinions based on what they observed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 268-271; Dec. Dig. § 125.*]

2. COLLISION (§ 95*)—STEAMER AND TOW MEETING—SHEER OF TOW.

A collision at night in the canal through the St. Clair Flats, between a barge in tow passing down and a steamer going up, *held*, on conflicting evidence, to have been due solely to the sheering of the barge to the east side of the channel and against the steamer, which was without fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

In Admiralty. Suit by W. S. Brainard against the steamer George W. Peavey for collision. Libel dismissed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Goulder, Holding & Masten, for libelant.

Hermion A. Kelley (Hoyt, Dustin, Kelley, McKeegan & Andrews and G. W. Cottrell, of counsel), for respondent.

HAZEL, District Judge. This is a suit for damages for injuries to the schooner barge Chippewa, caused by a collision between said barge and the large steamer George W. Peavey, on the night of July 28, 1906, in St. Clair Flats Canal, at the mouth of St. Clair river. The steamer Cherokee, with the barge in tow, was downbound from Escanaba to Cleveland. When she arrived in St. Clair Ship Canal, she checked her speed and blew a passing signal to the steamer Brittanic, which was proceeding up the canal, and as she passed the Brittanic she exchanged passing signals with another steamer, the George W. Peavey, which was about 700 feet behind the Brittanic, also upbound. The Cherokee and tow were on the right or west side of the canal, not far distant from the west pier. The Chippewa had passed the stern of the Brittanic, when she suddenly diverged from her true course on the west side of the canal, and on perceiving that the Peavey, which had passed the Cherokee and was distant about 200 feet, was in close proximity, her master ran forward, intending to hail an admonition to the Peavey to port her wheel, but before he did so the Peavey hailed the barge to port her wheel. Her master replied that the barge had ported, whereupon the Peavey, complying with the hailed request, hard aported her wheel and reversed her engines, there being nothing more she could do to avoid the collision, but nevertheless the bows of the vessels came forcibly together. From the force of the impact and under a hard aport wheel the Peavey immediately swung over against the east pier, and in doing so her port quarter struck the barge a second blow on her port bow, which caused the latter to swing against the opposite pier.

The principal fault charged in the libel is that the speed of the Peavey was excessive, and that she failed to keep to her own side of the canal a sufficient distance to allow the Chippewa to pass in safety. The chief fault charged by the respondent, in attributing the collision to the Chippewa, is that she sheered to port and into the Peavey's bow while the latter was in her proper position on her own side of the channel. The weather was slightly clouded, but clear, with no wind, and nothing to interfere with seeing the lights on the vessels. The tow line used by the Cherokee was 700 feet long. The canal which leads from the lower part of St. Clair river into Lake St. Clair, a distance of 7,227 feet, is 292 feet wide. The vessels were properly manned and equipped, the lights were burning bright, the officers and crew were performing their duties, and there were lookouts properly stationed. The Peavey was without cargo, and the Chippewa laden with 2,066 tons of iron ore. The testimony as to the speed of the Peavey and her position in the canal is in sharp conflict, and it can scarcely be reconciled.

What has been aptly said in other collision cases is recalled by the situation presented—that seamen in litigations of this character invariably give testimony in favor of the proper navigation and careful-

ness of their own ship and challenge the skill and precaution of the other. The libellant claims that the speed of the Peavey exceeded 8 miles an hour, the limit fixed by the rules adopted for navigating the St. Clair Flats Canal, and that she was proceeding through the canal at the rate of about 11 or 12 miles an hour. It is pointed out that she was proceeding at such excessive speed, so as to readily overtake and pass the Brittanic when she got outside the canal, where passing was permitted, and before reaching Southeast Bend, where the channel becomes tortuous; but upon this contention I am not satisfied by the testimony and the estimates of speed which have been given. As the steamers were each proceeding at the rate of perhaps 6 or 7 miles per hour, the combined rate of speed in passing being about 14 miles per hour, their speed and the darkness undoubtedly materially interfered with the formation of reliable estimates of the speed of either vessel by persons on board the other. The testimony of the Peavey's officers and crew to establish a speed of less than 8 miles an hour is more reliable. In view of the circumstances, the rule applies that the testimony of the officers and crew as to what occurred on board their own vessel is entitled to more weight than that of witnesses on board other vessels, who merely assert their opinions based upon what they observed. *The Alex. Folsom*, 52 Fed. 403, 3 C. C. A. 165; *The Hope* (D. C.) 4 Fed. 89; *The Alberta* (D. C.) 23 Fed. 807. The master, engineer, assistant engineer, and wheelsman on board the Peavey testified that an order was given by the master to the engineer to reduce her speed, an order which was promptly obeyed. I think the evidence establishes that she was proceeding in the canal at the time of the collision at the rate of about 6½ miles per hour through the water. The libellant has not sustained the burden of proving excessive speed, or that the collision resulted in consequence thereof.

The testimony is in conflict as to the distance apart at which the Peavey and the Cherokee passed each other. On behalf of the Peavey it is claimed to have been from 75 to 100 feet, while the witnesses for the Cherokee state that it was 40 or 50 feet. Whatever the distance between the passing vessels, it did not excite apprehension, although such distance bears upon the charge of fault that the Peavey was out of her course and west of the center of the canal. Libellant concedes that, when the stern of the Brittanic passed the bow of the Chippewa, the Chippewa sheered to the left and toward the approaching Peavey. Now to what extent did she sheer? If it is true that the Peavey was only about 40 feet from the Cherokee when they passed, and kept on a straight course, and the Cherokee and barge were only 30 feet from the west pier, it would seem perfectly evident that the Peavey selfishly took more of the channel than she had a right to under the circumstances, and the subsequent sheer of the barge was probably restricted to water in which she had a right to maneuver; but I think the probabilities of the situation point to a different state of facts. In my opinion, considering the undisputed testimony, as well as the probabilities of the case, the Peavey, when passing the Cherokee, was a little east of the center of the canal. The master testified, and he is corroborated by the crew, that she was about 50 feet from the east pier; but I think the probabilities are that she was about 75 or 80 feet therefrom, and

that the distance between the Cherokee and the Peavey, when passing, was about 80 feet.

As the record stands, the reasonable presumption is that, when the Peavey consented to direct her course to starboard, she, having received a signal from the Cherokee requesting such passing, edged over nearer to the east pier. In this situation, it being conceded that she continued on a straight course, she would not have come in contact with the barge, had not the barge deviated from her course beyond the space claimed by the libellant. It is not questioned but that her sheer was unavoidable. That it was controlled, however, within 60 feet of the west pier, or within 30 feet of her course in the wake of the Cherokee, is not proven. In all probability the sheer of the Chippewa or divergence from her path extended a little beyond the middle of the canal and into the bow of the Peavey. Whether by prudence and care, in view of the situation, her sheer could have been prevented or controlled, is a question that need not be specially passed upon. It is enough that the barge did not keep on her side of the canal, but deviated to port, and interfered with the safe navigation of the steamer Peavey, which was without fault.

Accordingly the libel must be dismissed, with costs. So ordered.

In re WIESEL et al.

(District Court, E. D. Pennsylvania. November 6, 1909.)

No. 3,438.

1. **BANKRUPTCY (§ 143*)—PROPERTY PASSING TO RECEIVER OR TRUSTEE—PENDING APPLICATION FOR RENEWAL OF LIQUOR LICENSE.**

Where the owners of a retail liquor license in Philadelphia had made application for a renewal, to which they were entitled under the rule of the court, on the filing of a petition in bankruptcy against them, their old license, together with whatever right they had to a renewal, passed to their receiver as an asset of their estate, and he has the right to sell the renewal license, when granted for its benefit.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 143.*]

2. **BANKRUPTCY (§ 136*)—BANKRUPTS—DUTY TO ASSIST IN TRANSFER OF ASSETS.**

Alleged bankrupts, pending action on the petition, may be compelled by the court to join with a receiver appointed for their property in a petition to a state court for the transfer of a liquor license granted to them, which has been sold by the receiver.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

In the matter of Charles O. Wiesel and William T. Knaup, individually and trading as Wiesel & Knaup, alleged bankrupts. On petition of receiver for rule on bankrupts. Rule granted.

Henry N. Wessel, for receiver.

Louis Goodfriend, for alleged bankrupts.

HOLLAND, District Judge. Upon petition presented by the receiver of the alleged bankrupts, Wiesel and Knaup, a rule was granted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to show cause why each of them should not join with the petitioner in an application to the court of quarter sessions of Philadelphia county, praying said court to transfer a retail license to John C. Monteith for the license year beginning June 1, 1909. The petition for this license had been filed in the court of quarter sessions of Philadelphia county by the alleged bankrupts some time in March of 1909 for a renewal of the retail liquor license held by them for their place of business at No. 5633 Market street, Philadelphia. The license in question, being a renewal of the one they formerly had, is for the license year beginning June 1, 1909. Under the printed rules of the Philadelphia courts:

"All persons holding licenses granted to them during the last previous year, or transferred to them during that year, against whom no specific remonstrance has been filed, will be presumed to be entitled to a renewal of their licenses."

After the filing of the petition for a renewal, bankruptcy proceedings were instituted against Wiesel & Knaup on April 2, 1909, and on the 5th of the same month a receiver was appointed and qualified. No adjudication has yet been entered. The renewal was granted April 30, 1909, and before June 1st of the same year the receiver paid the license fee of \$1,103.75, in order that there might not be a revocation of the license by operation of law. This license was duly advertised and sold at public sale on October 19, 1909, as an asset of the bankrupt's estate for the sum of \$3,000, which sale was approved by this court, and the receiver presented his petition in the court of quarter sessions for a transfer to the purchaser. Wiesel & Knaup, the alleged bankrupts, refused to aid the receiver in securing a transfer, claiming that the license, having been granted subsequent to the institution of bankruptcy proceedings against them, did not become part of the estate passing into the hands of the receiver, and that the right of the bankrupts to a renewal of said license is not such an asset as passed to the receiver or trustee in bankruptcy.

It is conceded that a retail liquor license held by a licensee at the time bankruptcy proceedings are instituted against him is an asset which passes to the receiver or trustee in bankruptcy; but it is claimed here that, as this license was granted subsequent to the institution of such proceedings against these alleged bankrupts, it does not so pass, notwithstanding the fact that the petition was presented prior to the bankruptcy proceedings, and that no adjudication has yet been entered, and notwithstanding the further fact that the alleged bankrupts were unable to pay the license fee for renewal and made no claim to the license until after it had been secured by the payment of the fees by the receiver.

The decisions of the federal courts are to the effect that the right to apply for a renewal of a liquor license is an asset which passes to the trustee in bankruptcy. *In re Fisher*, 1 Am. Bankr. Rep. 557, affirmed in (D. C.) 3 Am. Bankr. Rep. 406, 98 Fed. 89; *In re Brodbine* (D. C.) 2 Am. Bankr. Rep. 53, 93 Fed. 643; *In re Becker* (D. C.) 3 Am. Bankr. Rep. 412, 98 Fed. 407. In the latter case, Judge McPherson, in this district, said:

"It can hardly be correct to hold that a bankrupt's creditors may not avail themselves of the fact that money can be had for the chance of stepping into

the licensee's place, but that the bankrupt himself may make the same bargain and put the money safely in his pocket."

It is almost a daily occurrence that solvent licensees sell their licenses, with this privilege or right to apply for a renewal, subject to the contingency that the purchaser may be able to qualify to receive the transfer or renewal before the court granting the license. As there are purchasers willing to pay for this privilege to apply for a renewal, it seems to us absurd to say that it is not an asset passing to the bankrupt estate, because the possessor of a license, at the time of the institution of bankruptcy proceedings against him, is at the same time the possessor of the privilege to apply for a renewal, and entitled to the preference to such renewal created by the practice under the rules of court above referred to, and, in this case, the licensees had filed their application for renewal, as required by law, before the institution of the petition in bankruptcy. On April 2, 1909, when the petition in bankruptcy was filed, the old license and the application for a renewal then on file, together with whatever rights and privileges they had to a renewal by reason of their possession of the old license in question, passed as an asset to the bankrupts' estate, and the license in question was subsequently granted upon this application.

This license the receiver advertised and sold, and it is the duty of the bankrupts to assist the receiver in securing a transfer to the purchaser, so far as they are able to render such assistance. Up to the time of their discharge they can be compelled, by summary order of court, to give the receiver any information they may possess, or render him any assistance they can in the transfer of possession of property belonging to the bankrupt estate. In *re Fisher*, supra; In *re Brod-bine*, supra; In *re Becker*, supra; *Sparhawk v. Yerkes*, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915; *Collier on Bankruptcy* (7th Ed.) p. 821. In the case of *Whitlock's Appeal*, 39 Pa. Super. Ct. Rep. 34, the court refused to transfer the license, because the petitioner for the transfer "did not present sufficient reasons in his petition to warrant the court in making the transfer." An examination of that case shows the facts were entirely different from those we are called upon to consider in this case. It is true that all renewals and transfers of licenses are addressed to the sound legal discretion of the court of quarter sessions. This contingency, while it hinders the sale to some extent, and no doubt affects the market value of the asset, yet it is not a valid reason why the receiver should not dispose of it for the benefit of the bankrupt's creditors. *Collier on Bankruptcy* (7th Ed.) 821.

The rule, therefore, on the bankrupts to show cause why they should not be required to aid and assist the receiver in securing a transfer of this license to the purchaser, by joining with the petitioner in the application for such transfer, is made absolute, and counsel for the application of transfer will draw a decree directing the bankrupts to render the necessary assistance in accordance with this opinion, and submit the same to this court.

In re STARIN.

(District Court, E. D. New York. November 9, 1909.)

SHIPPING (§ 209*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—PLEADING.

In a proceeding by the owner of a vessel for limitation of liability, where the petition alleges generally freedom from fault on the part of the vessel, its owner, officers, and navigators, if fault is claimed by a claimant, he must allege and offer evidence to prove the same; and it is not sufficient to merely deny such allegation of the petition, but the answer should specify in what the fault consisted.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 652; Dec. Dig. § 209.*

Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

In Admiralty. Proceeding by John M. Starin, and by substitution Howard Carroll, Harriet M. Spraker, and Walter J. Peck, as executors of John H. Starin, deceased, as owner of the steamer John H. Starin, for limitation of liability. On exceptions to answer. Exceptions sustained.

Cushman & Dewell, for libellant.

James J. Macklin, for claimant.

CHATFIELD, District Judge. On the night of February 19, 1909, the steamer John H. Starin was injured by running upon a breakwater during a storm. In a proceeding to limit the liability of the owners of that vessel, with reference to cargo claimants, a libel was duly filed in this district, alleging, among other things:

"That the disaster to the steamer and the loss and damage to her cargo were in no wise caused by the fault or negligence of the said steamer or her officers or men in charge of her navigation, but were caused solely by the gale of wind," etc., and "that the disaster to said steamer and the loss and damage to her cargo were done, occasioned, and incurred without the privity or knowledge of your libellant and petitioner, as well as without any fault or negligence on the part of those in charge of the navigation of the said steamer."

An answer has been interposed on behalf of the claimants, in which a general denial on information and belief is set forth to the above allegations of the libel, and as a further answer the claimants aver that:

"Owing to the unfitness of the said steamer to successfully encounter and navigate in the weather that prevailed, she started leaking, her pumps being unable, although operated, to keep her free," and that "the owner of the said steamer, his agents and servants, as well as those in charge of her navigation, were guilty of negligence in permitting the said steamer to start from her dock or berth on said trip from New Haven to New York in the weather conditions that prevailed, she being unable, because of her weakness, age, unseaworthiness, and fittings to successfully withstand the sea and wind that was on, and had been on for some time previous to her departure from New Haven, which fact should have been known to the said owner of said steamer, as well as his agents, servants," etc.

To this answer certain exceptions have been filed, to the effect that the answer is indefinite and insufficient, in the sense that it does not state in what particular or particulars the steamer was unfit to suc-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 173 F.—46

cessfully encounter and navigate, in what she was weak, and in what she was unseaworthy, or deficient in fittings, so as to successfully withstand the sea.

It may be assumed that admiralty does not require the same accuracy and definiteness of pleading as is usually required in courts of law or under a system of Code Practice. It may also be assumed that the filing and bringing on for hearing of exceptions to an answer is the recognized and proper way to obtain more definite statements of the elements of any defense or answer, and even to secure particulars of an account. It has been held in *Re Davidson S. S. Co.* (D. C.) 133 Fed. 411, that in proceedings to limit liability an answer to a petition, under rule 56 of the Supreme Court of the United States (29 Sup. Ct. xlvii), should be full and explicit, to the extent required by rule 27 (29 Sup. Ct. xlii) in answering a libel. And it was further held in that case that an allegation in the petition of freedom from fault was sufficient to form the issue raised by allegations of fault in the answer interposed by a claimant. But the allegations of fault were to be stated so as to meet the provisions of rule 23 (29 Sup. Ct. xli), governing a libelant's charges of liability. As to such allegations the petitioner becomes a respondent, and, according to the decision in the *Davidson Case*, may interpose reply to the claimant's allegations, if he sees fit. Further, the claimant must prove his allegations of fault by affirmative evidence other than the mere presumption arising from the accident itself.

It is urged by the claimants herein that their general denial, or, in other words, their denials of the allegations of the petition, are sufficient to raise the issue involved. But it is thought that a libelant should not be called upon to contest without notice any issue that might be raised upon the trial under a mere denial of his averment that the vessel, its officers and navigators, and the owner thereof, were free from fault. The case above cited seems to indicate that it would be no more than just that a claimant, alleging fault or negligence, should specify what that fault or negligence was, and the claimant herein has apparently recognized the necessity for so doing by interposing the separate defense in his answer, charging unseaworthiness and lack of ability in the vessel in question to perform the duty required of her. His answer is based upon the proposition that this lack of condition was such that the owners were responsible therefor, in that they, either through themselves or their agents, should have prevented the vessel from sailing when in a condition of which they are alleged to have been aware, or negligent if they did not have knowledge thereof.

In order to recover, the petitioner must ultimately sustain the burden of proof, to the extent of showing that he had a right to limit his liability, and the claimant, to present an issue, must allege, and offer some affirmative evidence to prove, negligence on the part of the petitioner. If such evidence shall be offered, and answering testimony shall have been given by the petitioner, whether it be on the examination of his own witnesses or after hearing the witnesses for the claimant, then the question before the court will be whether the petitioner has sustained the burden of showing that he was free from negligence. The

shifting of the burden of offering testimony is the question with which we are directly concerned, rather than that of the burden of proof, which never shifts from the party demanding relief. But, bearing this in mind, and assuming that the purpose of the allegations in the answer is merely to state in what respects negligence is imputed to the petitioner, it would be unfair to compel him to prepare for trial without a precise definition of the issue, and this can only be had by requiring a full and exact statement of the allegations of fault.

The proprieties of pleading must not be confused with the rights of the parties after the case is at issue; nor should the fact that a party is compelled merely to make certain allegations, and to support them by some evidence, be mistaken for a complete compliance with rule 27 and rule 56 above referred to. The cases of *The Fri* (D. C.) 140 Fed. 123, *In re Starin* (D. C.) 151 Fed. 274, and *McGill v. Michigan S. S. Co.*, 144 Fed. 788, 75 C. C. A. 518, all bear out the view that the person alleging negligence should specify that negligence to the extent of framing a proper issue; and it would not appear that a mere general denial, or a specific charge of negligence in general terms, can inform the parties or the court, to the extent that good pleading requires, where the negligence charged is based upon some particular defect, or some definite omission constituting a failure to exercise proper care.

The exceptions will be sustained, and the claimant ordered to make his allegations of fault more definite.

THE SEGUIN. THE FRANK ROCKEFELLER. THE SIR ISAAC
LOTHIAN BELL.

(District Court, W. D. New York. October 7, 1909.)

COLLISION (§ 95*)—STEAMER AND MEETING TOW—FAULT AS CAUSE OF COLLISION.

The steamer Rockefeller was proceeding up the St. Clair river at night, with the steel barge Bell in tow on a line 600 feet long, which was the customary length, when a collision occurred between the Bell and the meeting steamer Seguin. The night was clear and calm. The vessels carried proper lights, including towing lights on the Rockefeller, which were seen by the Seguin, when a mile distant. Pursuant to an agreement, the steamers passed port to port at a distance of about 80 feet. *Held*, on the evidence, that immediately after passing the Seguin swung sharply to port, and brought on the collision, while the Bell did all that was possible to avoid it, and that the Seguin was solely in fault, and liable for the damage caused.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

In Admiralty. Suit for collision by the Pittsburgh Steamship Company, as owner of the steel barge Sir Isaac Lothian Bell, against the steamer Seguin, and cross-libel against the Bell and the steamer Frank Rockefeller by the Parry Sound Lumber Company, as owner of the Seguin. Decree for libellant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Hermon A. Kelley (Hoyt, Dustin, Kelley, McKeehan & Andrews and G. W. Cottrell, of counsel), for libellant.

Clinton & Clinton, for respondent.

HAZEL, District Judge. The steel barge Sir Isaac Lothian Bell, which was without cargo, and the Canadian steel steamer Seguin, loaded with lumber, collided in St. Clair river at about 8 o'clock on the night of November 14, 1906. The night was dark, but clear, and there was no objectionable wind. The barge, which was injured by the collision, was in tow of the whaleback steamer Frank Rockefeller, also without cargo, on a trip upbound from Lake Erie ports to Escanaba. The headlights displayed on the whaleback indicated that she had a barge in tow, and concededly the Seguin, which was downbound, perceived such lights when she entered the rapids at the head of the river a little over a mile distant. The tow line was 600 feet long, the customary length for towing barges of the dimensions of the Bell in the river in calm weather. The steamer Seguin, when entering the rapids of the river, initiated a port to port passing signal, to which the Rockefeller agreed, and immediately directed her course to starboard. The barge also ported her wheel, going to the right. The steamers passed port to port, with a distance of about 80 feet between them.

At the place of passing the navigable water is, according to the testimony, about 1,000 feet in width, and there is a current variously estimated by the witnesses at from $3\frac{1}{2}$ to 5 miles an hour. There was ample water for the Seguin to navigate on her right or starboard hand; but directly after passing the Rockefeller she is claimed to have swung to port, or to the left, and toward the approaching barge. An alarm was immediately sounded by the Rockefeller, and directions were given by her master to release the tow line. The Seguin, however, went ahead on what is claimed to have been under a starboard helm at the rate of about $9\frac{1}{2}$ miles an hour over the land, evidently unmindful of the proximity of the tow. Her master testified that he fully understood that the steamer had a barge in tow, and that he kept a lookout ahead, but that on account of the presence of smoke of a downbound steamer, which had collected on the American side of the river, he was unable to see the barge or her lights until she loomed out of the smoke probably 300 feet away; that she appeared to him to be coming straight on into the Seguin, which he testified was then heading probably a little east of south, while the barge was not following in the wake of the steamer, but was considerably out of her true course and well over to the westward, and towards the American side of the river; that the Bell ported, and violently swung several points to starboard in answer to her helm, to avoid the impending collision, but nevertheless, and in spite of the fact that the Seguin had aported her helm, the vessels came together on an angle of about 45 degrees.

On the other hand, the Bell claims that she properly had the Rockefeller about two points on her port bow up to and just before the collision; that on the instant when the Seguin swung to port after passing the Rockefeller the Bell, fearing that the Seguin would come in collision with her, immediately hard aported and swung to starboard, but

the Seguin continued on her sheer or swing to port until she struck the barge a crushing blow on her port side, opposite her No. 3 hatch, injuring her hull. The Bell continued ahead under her port helm for about 700 feet to the Canadian shore where she grounded. The Seguin and the Bell, the principal participants in the collision, charge each other with fault. At the outset of the litigation the Rockefeller was also charged with fault for the disaster; but no testimony has been given attributing blame to her, and counsel for the respondent has not pressed any alleged fault against her, and therefore such charges are considered abandoned.

The river at the point of collision, abreast of Lynn's reporting station in Port Huron, as has been stated, was about 1,000 feet wide, and the steamer and barge were approximately 400 feet from the American shore. Capt. Wilson admits that at the time the Seguin passed the Rockefeller she was heading about a point across the latter's wake. This admission is an important factor against her. In view of her knowledge that the Rockefeller was incumbered with tow, her continuance in such a course certainly was perilous to herself and to the barge. It is probably true that she had not completed her turn from the Ft. Gratiot ranges at the head of the river, to head for the dock at Sarnia, her stopping point, on the Canadian side of the river; but, even if such was the fact, her position and course were critically dangerous and hazardous. According to the undisputed testimony, the joint speed of the vessels through the water was probably a little over 20 miles an hour, and obviously there was danger of coming in collision with the barge almost from the instant the Seguin passed the stern of the Rockefeller and swung to port, as I believe she did, notwithstanding her denial.

In view of the circumstances, I think she negligently and carelessly imperiled the safety of the barge, and her conduct in heading a point across the stern of the towing steamer was inexcusable. She is presumed to have known the customary length of the tow lines in St. Clair river, and she undoubtedly had a fair idea of the combined speed of the vessels and current of the river. Her conceded convergent course could only terminate in taking her almost directly across the tow line or into the barge. That a cloud of smoke enveloped the Bell, assuming such to have been the fact, and obstructed the view of the down-bound steamer, will not exonerate her, or excuse the negligence of her officers. That there was smoke to obscure the view is positively contradicted by numerous witnesses for libellant, and I am persuaded that there was nothing at the time to obscure the view of the Seguin's master and lookout, who were on top of her pilot house. Had they exercised such diligence and reasonable caution as the situation demanded, they would have seasonably seen the barge, and probably recalled that the lights of the towing steamer gave notice to boats and their officers and crew that she had a barge in tow. The situation was such that the burden of avoiding the barge was on the Seguin. She was bound to exercise such a degree of vigilance and carefulness as would avoid interference with the safety of the tow.

Considering the evidence in its entirety, it preponderatingly shows that the Seguin, immediately after she passed the stern of the Rocke-

feller, violently sheered or swung to port. Capt. Wilson testified that she first ported, and later, perceiving the Bell, he hard aported; that the vessel did not swing to starboard, as she should have done, but continued her swing to port. It is suggested that the force of the current interfered to prevent her helm from responding; but, whatever the cause of her port swing, it is evident that she was navigated carelessly and negligently, or that the vessel did not respond to the movements of her wheel. In either case she must be condemned.

The barge was not in fault. She displayed all the lights required by the statute, had a full complement of officers and crew, and her master was on the pilot house, observing the wheel and directing the wheelman. The probabilities were that the tow was following the steamer, having her a little on her port bow, and in my estimation such probabilities are abundantly supported by the evidence. When the alarm signal was blown by the Rockefeller, the barge ported and swung to the east side of the river, the Seguin suddenly showing her green and red lights; but the next instant her red light disappeared, leaving the green only open to view. This certainly was an unmistakable warning of the sharp swing to port of the Seguin and across the wake of the steamer, menacing the safety of the barge. The Seguin blew one whistle, and was answered by the barge with an alarm, and the next thing the Seguin reversed her engines and the crash ensued.

The version of the occurrence by the master of the barge is corroborated, not only by the witnesses who were on the Rockefeller and the Bell, but by seemingly disinterested witnesses on the steamer Cort, and a witness who was in a rowboat in the river, and one who stood on the shore. They contradict the contention that the Bell was farther over toward the American shore than the towing steamer and in the pathway of the Seguin, and that, being in such position in the river, she ported her helm and swung four points to starboard. That theory is believed to be the single ground of fault imputed to the Bell, and, as it is not sustained, in my opinion, by the evidence, the Seguin must be held to have been solely and primarily at fault for the disaster.

A decree, with reference to the clerk to compute the amount of damages to the Bell, may enter, with costs.

In re BURGIN.

(District Court, N. D. Alabama, N. D. September, 1909.)

BANKRUPTCY (§ 68*)—INVOLUNTARY PROCEEDINGS—PERSONS WHO MAY BE ADJUDGED BANKRUPT—OCCUPATION.

Under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), providing that "any natural person, except a wage earner, or a person engaged chiefly in farming or the tillage of the soil, * * * may be adjudged an involuntary bankrupt," the status of an alleged bankrupt as to his occupation is to be determined as of the period when he contracted the debts to be proved and acquired the property to be administered, and where he was at that time engaged in mercantile

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pursuits he cannot defeat the operation of the law by thereafter engaging in an exempt occupation.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 68.*

What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.]

In the matter of one Burgin, alleged bankrupt. On exception to report of special master. Order of adjudication entered.

C. B. Powell and J. W. Tomlinson, for bankrupt.

A. Leo Oberdorfer, for petitioning creditors.

GRUBB, District Judge. The exceptions to the report of the special master are based upon the proposition that the alleged bankrupt, at the time of the commission of the act of bankruptcy, and at the time of the filing of the petition of bankruptcy, was chiefly engaged in farming, and for that reason exempt from being adjudicated a bankrupt. It may be conceded that the burden of proving that the bankrupt was not a person chiefly engaged in farming was upon the petitioning creditors. In the view taken by the court, this would seem to be of little consequence, as the only evidence submitted was the examination of the alleged bankrupt, and the facts were without conflict. The facts show that, at least until May 7, 1904, the date of the sale of the bankrupt's stock of goods, the bankrupt was principally engaged in mercantile pursuits, and not in farming. The debts of the bankrupt were contracted during the period of, and for the benefit of, his mercantile venture. His assets, consisting largely of real estate, or part of them, may be fairly inferred, from the examination and exhibits, to have been acquired during the period he was engaged in trading, and concededly were owned by him during that period, and credit in his mercantile venture extended on the faith of such ownership.

The controlling legal question is whether one concededly engaged in mercantile pursuits, and, not chiefly in farming, during the period when the debts scheduled were contracted, and the assets scheduled acquired or owned, is exempt from adjudication, by reason of a change of occupation thereafter to one of the exempt pursuits. Subdivision "b" of section 4 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423]) provides that:

"Any natural person, except a wage earner, or a person engaged chiefly in farming or the tillage of the soil, * * * may be adjudged an involuntary bankrupt."

The act itself does not otherwise specify the time when the status of the bankrupt is to be determined. Some of the District Courts have construed it to refer to the time of the commission of the act of bankruptcy, rather than of the filing of the petition, going upon the idea that the law should not be so construed as to permit the bankrupt, by a change of occupation between the commission of the act of bankruptcy and the filing of the petition, to defeat the operation of the law. The same reasoning would seem to demand a construction of the law that would prevent the bankrupt from incurring debts and acquiring assets in a nonexempt occupation, and then by ceasing to do business in such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

occupation, and engaging in an exempt occupation, and thereafter committing an act of bankruptcy, to defeat the operation of the law. This construction would require that the status of the bankrupt in this respect be determined as of the period during which he was engaged in the business in which he contracted the debts and acquired or owned the assets subject to administration.

This construction of the subdivision is that adopted by the District Court of the Southern District of Alabama in the case of *In re Crenshaw*, 19 Am. Bankr. Rep. 505, 156 Fed. 638, and by the District Court of the Middle District of Pennsylvania in the case of *Tiffany v. Condensed Milk Co.*, 15 Am. Bankr. Rep. 413, 141 Fed. 444, and is adhered to by this court. In the case of *In re Crenshaw*, supra, Judge Toulmin, speaking about the sufficiency of a petition, which alleged that the bankrupt was engaged in trade when the debts were incurred on which the proceeding was based and the property subject to administration in bankruptcy was acquired and owned, and did not allege that the bankrupt was not engaged chiefly in farming or tillage of the soil, or in wage earning, said:

"But the amended petition does affirmatively allege that respondent was engaged in trade as a merchant, and that the debts incurred by him, and for the collection of which this proceeding in bankruptcy was instituted, were incurred while engaged in the occupation of a merchant in trade, and that the property alleged to have been transferred and concealed was property acquired and owned by him as such merchant. He may have subsequently become a wage earner; but it has been said that the exemption from involuntary proceedings in favor of wage earners is not intended as a means of escape for insolvents whose property was acquired and whose debts were incurred in other occupations recently engaged in. *In re Luckhardt* (D. C.) 4 Am. Bankr. Rep. 307, 101 Fed. 809; *In re Mackey* (D. C.) 6 Am. Bankr. Rep. 577, 110 Fed. 361. If the original petition was defective in the respect referred to, such defect has been cured by the amendment."

In view of this conclusion, it becomes unimportant to determine whether the bankrupt was chiefly engaged in farming from May 7, 1904, until the commission of the act of bankruptcy, or the filing of the petition.

An order adjudicating the respondent a bankrupt will be entered.

MOXLEY v. HERTZ.

(Circuit Court, N. D. Illinois, E. D. December Term, 1906.)

INTERNAL REVENUE (§ 16*)—TAX ON OLEOMARGARINE—"ARTIFICIAL COLORATION."

The use of palm oil as an ingredient in the manufacture of oleomargarine to the extent of one-half of 1 per cent. for the sole purpose, from a business standpoint, of giving to the oleomargarine a yellow color in resemblance to butter, is an "artificial coloration" within the meaning of Act Aug. 2, 1886, c. 840, § 8, 24 Stat. 210 (U. S. Comp. St. 1901, p. 2231), as amended by Act May 9, 1902, c. 784, § 3, 32 Stat. 194 (U. S. Comp. St. Supp. 1907, p. 637), and subjects the product to a tax of 10 cents per pound, and it is immaterial that palm oil is a substance not foreign to oleomar-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

garine, and that incidentally, and in the proportions used in a very slight degree, it affects its quality.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 16.*

For other definitions, see Words and Phrases, vol. 1, p. 516.]

Action by Wm. J. Moxley, a corporation, against Henry L. Hertz, Collector of Internal Revenue. Judgment for defendant.

The plaintiff, Wm. J. Moxley, is a corporation duly organized and existing under the laws of the State of Illinois, having its principal place of business in the city of Chicago, in the northern district of Illinois, and was on the 26th day of March, A. D. 1903, and had been for many years next prior thereto, legally qualified to engage and was engaged in said city of Chicago in the business of manufacturing and selling at wholesale, oleomargarine. The defendant, Henry L. Hertz, prior to and on the 26th day of March, 1903, was, thence hitherto has been, and now is, collector of internal revenue for the first collection district of Illinois.

In June, 1902, and after the passage of the act of Congress passed May 9, 1902 (Act May 9, 1902, c. 784, 32 Stat. 193 [U. S. Comp. St. Supp. 1907, p. 636]), amending the act of Congress entitled "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886 (Act Aug. 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228]), the Commissioner of Internal Revenue officially promulgated and published in the "Revised regulations concerning oleomargarine," published and issued in regular course by the United States Treasury Department, the regulation as to "artificial coloration," in language as follows:

"Regulation as to artificial coloration.

"If in the production of oleomargarine the mixtures of compounds set out in the law of 1886 are used, and these compounds are all free from artificial coloration and no artificial coloration is produced by the addition of coloring matter as an independent and separate ingredient, a tax of one-fourth of 1 cent per pound only will be collected, although the finished product may look like butter of some shade of yellow. For example, if butter that has been artificially colored is used as a component part of the finished product oleomargarine (and that finished product looks like butter of any shade of yellow), as the oleomargarine is not free from artificial coloration, the tax of 10 cents per pound will be assessed and collected. But if butter absolutely free from artificial coloration or cotton-seed oil free from artificial coloration, or any other of the mixtures or compounds legally used in the manufacture of the finished product, oleomargarine has naturally a shade of yellow in no way produced by artificial coloration, and though the use of one or more of these unartificially colored legal component parts of oleomargarine the finished product should look like butter of any shade of yellow, this product will be subject to a tax of only one fourth of 1 cent per pound, as it is absolutely free from artificial coloration that has caused it to look like butter of any shade of yellow."

Which said "Regulation as to artificial coloration" thenceforth continued to be the regulation of the Commissioner's office when the oleomargarine hereinafter referred to was made and sold by the plaintiff.

Under date of March 26, 1903, the defendant, Henry L. Hertz, as collector of internal revenue for the first collection district of Illinois, gave notice to the plaintiff corporation, Wm. J. Moxley, that a tax under the internal-revenue laws of the United States, amounting to \$35,999.80, the same being stamp tax upon oleomargarine, had been assessed against said corporation by the Commissioner of Internal Revenue and transmitted by said Commissioner to said collector for collection.

Thereafter and in due time said plaintiff corporation, Wm. J. Moxley, duly filed and presented to the said Commissioner of Internal Revenue its claim in due form, duly verified by affidavit of its secretary, John Dadie, for the abatement of said assessment in part or in whole.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Thereafter the plaintiff's said claim for abatement was sustained by the Commissioner of Internal Revenue to the extent only of \$7,500 thereof, and as to the balance of said assessment—that is, \$28,499.80—said claim for abatement was overruled by said Commissioner of Internal Revenue and said assessment, as to said balance thereof, was by said Commissioner of Internal Revenue, approved and confirmed.

Thereafter under date of the 11th day of June, 1903, the defendant made peremptory demand in writing upon the plaintiff for the payment of said amount of \$28,499.80 (being the balance of said assessment so reduced as aforesaid), within forty-eight hours after the date of said demand, and simultaneously gave notice to the plaintiff that if said amount so demanded were not paid within said forty-eight hours thereafter said defendant would proceed summarily to collect the same with penalty and interest as provided by the statutes.

Thereafter on the 13th day of June, 1903, said plaintiff, under said threat of summary action by said defendant as collector of internal revenue and under protest duly made in writing, paid to said defendant, Henry L. Hertz, as collector, as aforesaid, said amount of \$28,499.80, and said plaintiff thereupon immediately made demand upon said defendant to refund said amount so paid to him by the plaintiff, which said demand said defendant refused to comply with.

Said assessment, so reduced as aforesaid, to the sum of \$28,499.80 was levied by the Commissioner of Internal Revenue at the rate of 10 cents per pound upon 284,998 pounds of oleomargarine which had been manufactured and sold by the plaintiff in the months of January, February, and March, 1903, and prior to the levying of said assessment. Prior to the sale of said 284,998 pounds of oleomargarine, the plaintiff had paid an internal-revenue tax of one-fourth of 1 cent per pound thereon by purchasing, affixing to the packages containing said oleomargarine and canceling, in the manner required by law, revenue stamps at the rate of one-fourth of 1 cent per pound.

Thereafter, on the 26th day of June, 1903, said plaintiff presented in due form, as provided by law, to the Commissioner of Internal Revenue its, the plaintiff's, claim for the refunding to it of all of said amount of \$28,499.80, so paid by the plaintiff as aforesaid, and thereafter said Commissioner of Internal Revenue did refund and pay to the plaintiff on account of its, the plaintiff's, said claim for refund the sum of \$712.50, being the amount of the tax at one-fourth of a cent per pound previously paid, but said Commissioner of Internal Revenue rejected said claim for refund as to the balance thereof, namely, \$27,787.30, and refused to refund and pay or to authorize the refunding and payment of said balance or any part thereof.

The oleomargarine, on account of which said assessment was levied by said Commissioner of Internal Revenue and said reduced amount thereof was required by him to be paid by said plaintiff, was composed of oleo oil, lard, milk, cream, salt, and two vegetable oils commonly known as cotton-seed oil and palm oil, and of nothing else. The proportion of palm oil present in said oleomargarine was about one-half of 1 per cent. of the total volume of said oleomargarine.

Palm oil is a pure vegetable oil derived from the fruit of palm trees, which grow in certain parts of Africa, and has about the consistence of pure butter. Palm oil consists almost entirely of palmitin and olein, which are the chief constituents of pure butter. Palm oil is perfectly wholesome, is readily digested, and has long been used as an article of food in countries where it is produced. Palm oil was employed in oleomargarine prior to May, 1902, but whether it was intended as coloring matter, or was intended to give the oleomargarine some function as a food, independently of coloring matter, is not shown, nor was the comparative cost between it and other coloring agents, at the time it was thus employed prior to 1902, shown.

The oleomargarine involved in this suit looked like butter of a shade of yellow, and such resemblance to butter of a shade of yellow was caused by the presence of the palm oil used in said oleomargarine. In addition to coloring the oleomargarine in resemblance to butter, the palm oil probably gives to the oleomargarine a slightly better grain or texture, causing it to act more like butter in the frying pan, but such function of the palm oil, other than as

coloring matter, was so slight that except for the coloring imparted to the oleomargarine, the palm oil would not have been actually used in its manufacture.

Upon these findings of fact, I find as a matter of law that the plaintiff is not entitled to recover.

John Maynard Harlan, for plaintiff.

Edwin W. Sims, U. S. Atty., for defendant.

GROSSCUP, Circuit Judge (after stating the facts as above). The palm oil, as a matter of fact, colors the oleomargarine in resemblance to butter. It was employed for that purpose. But for its effect as coloring matter it would not have been employed at all. As a business proposition, therefore, the palm oil was solely employed for the purpose of coloring; so that, were palm oil a substance foreign in its nature to the substances that enter into oleomargarine, its employment under the circumstances found would unquestionably constitute the artificial coloration contemplated by the statute fixing the tax at 10 cents per pound.

Now, is the admixture of palm oil with oleomargarine for the sole purpose (from a business point of view) of coloring the oleomargarine in the resemblance of butter any the less artificial coloration within the meaning of the law, because, incidentally, palm oil is not a substance foreign to oleomargarine, or because palm oil, in the proportions used, has a function that affects, in a very slight degree, the quality of oleomargarine. Upon the authority of *Cliff v. United States*, 195 U. S. 159, 25 Sup. Ct. 1, 49 L. Ed. 139, T. D. 839, decided October, 1904, I feel myself bound to answer in the negative. The precise question decided in the *Cliff Case* may not be the precise question involved in this case, but the court in that case, as I interpret it, discloses the rule of law to be applied to cases arising under this statute, and that rule is, that where the substance employed to color the oleomargarine serves substantially that purpose only, it is artificial coloration within the meaning of the statute.

Under the findings in this case I can not help holding that the only substantial service of the palm oil is to color the product. Except for its coloring effect it was not intended as an ingredient, and, except to an extent so slight that it would not have been utilized had no other purpose been in mind, it is not in reality an ingredient. Indeed, the whole distinction between a substance employed in fact as an artifice and a substance employed in fact as a functional part of the oleomargarine, is clearly brought out, it seems to me in the case before me, and brought out in a way that under *Cliff v. United States* makes the use of palm oil an artifice only within the meaning of the statute.

In re MOORE & MUIR CO.

(District Court, W. D. New York. August 23, 1909.)

No. 3,362.

BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO ACT—INSURANCE BROKERAGE
—“TRADING OR MERCANTILE PURSUIT.”

A corporation chiefly engaged in conducting the business of a general fire insurance agency is not engaged in a “trading or mercantile pursuit,” within Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), and is not subject to the act.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*

For other definitions, see Words and Phrases, vol. 5, pp. 4477, 4478.

What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.]

In the matter of the Moore & Muir Company, alleged bankrupt. On motion to affirm report of special master. Report affirmed, and petition dismissed.

John T. Ryan, for petitioners.

Henry W. Killeen, for alleged bankrupt.

HAZEL, District Judge. The single question presented for decision is whether a corporation organized under the laws of the state of New York, which is mainly engaged in conducting the business of a general fire insurance agency, is amenable to the bankruptcy law. Concededly the corporation in question does not insure property against loss by fire, but simply acts as agent or broker in the procurement of insurance. Insurance companies are not subject to the bankruptcy act. They are neither merchants nor traders. They do not buy or sell commodities. Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423). Does the brokerage of fire insurance involve dealing in a commodity used in business?

Counsel for petitioner argues that the insurance solicited and procured is bought by the assured, and accordingly the bankrupt in selling insurance is engaged in a mercantile pursuit. In view of the decisions in analogous cases, I cannot accept this view, and I think the master correctly applied the principle enunciated in *Laker v. George H. Stapley Company*, 21 Am. Bankr. Rep. 303, and *Re Kingston Realty Co.*, 19 Am. Bankr. Rep. 845, 160 Fed. 445, 87 C. C. A. 406, and cases cited. In *Beechley v. Mulville*, 102 Iowa, 602, 70 N. W. 107, 71 N. W. 428, 63 Am. St. Rep. 479, it was held by the court, in construing a statute forbidding all sorts of business combinations, that insurance is a commodity, and the court said that it is quite common to speak of selling insurance; but in that case the scope of the statute was evidently broad enough to include all kinds of business, and it is not perceived that the court was specially called upon to decide in that case that insurance is a commodity which may be sold. However that may be, there are several cases decided by the Supreme Court of the United States which broadly hold that insurance is not a commodity,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and not a subject or article of trade or commerce. *Paul v. Virginia*, 75 U. S. 168, 19 L. Ed. 357.

The bankruptcy law is restrictive in its applicability to involuntary proceedings against corporations which, *inter alia*, are traders and merchants. The business of Moore & Muir Company was not buying and selling insurance. It is not enough to say that they sold insurance, assuming that such a phrase is used in insurance brokerage. It must have been engaged in trading or a mercantile pursuit, which under the doctrine of *In re New York & Westchester Water Company* (D. C.) 98 Fed. 711, cited with approval by Judge Noyes, speaking for the Circuit Court of Appeals in *Re Kingston Realty Company*, *supra*, would seem to include both buying and selling their goods to merchants, or dealing in goods ordinarily the subject of traffic. As an insurance broker, in my estimation, neither buys nor sells insurance, but more correctly negotiates contracts therefor, his services in that relation do not come within the accepted definition of mercantile pursuit, and therefore the corporation proceeded against does not come within the purview of section 4b of the bankruptcy law, as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025).

The report of the master is affirmed, and the petition dismissed, with costs.

IN RE PROUDFOOT.

(Circuit Court, N. D. West Virginia. January 26, 1909.)

BANKRUPTCY (§ 348*)—DEBTS ENTITLED TO PRIORITY—DISPLACEMENT OF LIENS.
The provision of Bankr. Act July 1, 1898, § 64b (4), c. 541, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), giving priority to wages due to workmen, is not intended to give such priority over debts secured by valid liens.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. § 348.*]

In Bankruptcy. On exceptions to report of master.

Melville Peck, W. T. Ice, Jr., Fred O. Blue, and John Bassel, for exceptors claiming liens.

J. Hop Woods, S. V. Woods, L. V. Holsberry, and Chas. M. Murphy, for exceptors claiming preference as laborers.

S. V. Woods, for trustee.

GOFF, Circuit Judge. The district judge being disqualified, this case has been duly certified and comes before me for decision. The validity of certain liens herein involved has been established by the judgment of the Circuit Court of Appeals for this Circuit, and their priorities are now to be determined. *Crim et al. v. Woodford*, 136 Fed. 34, 68 C. C. A. 584. By virtue of a decree subsequent to the filing of the mandate of the appellate court, the master has reported the debts of the bankrupt, indicating those having preference and finding the priorities of the liens. To this report some of the creditors

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the bankrupt have filed exceptions. It is insisted that the master erred in reporting certain debts of the bankrupt as entitled to priority as wages due to workmen earned within three months before the date of the commencement of the proceedings in bankruptcy. It is also claimed that the master erred in refusing to report certain other creditors as entitled to priority because of their debts as laborers. It is urged by other creditors that the master misconceived the law in holding that their liens—created by deed of trust and by judgment—were not entitled to priority over the claims of all the creditors who set up preference, because of the fact that the amounts due them were for wages earned by them within the period mentioned.

The Circuit Court of Appeals in *Crim et al. v. Woodford*, supra, held that the identical debts now claimed by the exceptors Manown, Moore, and Crim's executors are valid, and plainly within the protection of section 67, subd. "d," of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]). The evidence taken and returned by the master fails to show that any creditors of the bankrupt is because of any equity shown by him entitled to priority over any of said liens. These three claims were given to secure loans made to the bankrupt at the time the liens were given; and, while it appears that the transactions involved took place within four months prior to Proudfoot's bankruptcy, nevertheless the liens are under the bankrupt act as well as under the laws of the state of West Virginia valid, for they were given to secure bona fide loans made at the time they were executed. Such liens are expressly preserved by the direct provisions of the bankrupt act.

The master erred when he held that it was the intention of the Congress to so legislate that the wages due to laborers should be given priority over the secured debts of the bankrupt, as the bankrupt law only provides that such claims shall have priority out of the estate of the bankrupt, or, applying the evident purpose of the act to this case, the wages due to the creditors of Proudfoot, earned within three months before the date of the commencement of the bankrupt proceedings against him, were entitled to priority over other debts not out of the funds derived from the sale of his property, but out of such sum as remained after the satisfaction of the debts duly secured by liens lawfully existing at the time the bankruptcy proceedings were instituted. To hold otherwise would be to disregard the plain intent of the bankrupt law, would treat as null and void the existing provisions of the West Virginia statutes, and would place in jeopardy the validity of the liens of deed of trust, of mortgages, and of those reserved to secure unpaid purchase money heretofore universally recognized as efficacious and as essential to the protection of the business transactions and commercial prosperity of the country. The trustee of Proudfoot came into the possession of the bankrupt's property, subject to all the equities existing against it, and he is required by the law to respect the liens with which he found it incumbered.

Other questions of importance are presented by the various exceptions, but the conclusion I have reached, taken in connection with the fact that the fund in the hands of the trustee will not discharge in

full the secured debts to which I have alluded, renders their consideration unnecessary.

A decree drawn as indicated by this opinion will be entered sustaining and overruling the several exceptions mentioned, and providing for the disbursement of the fund in the custody of the trustee among those entitled thereto, as shown by the liens now declared to be valid and entitled to priority in payment, after the costs, the taxes, and the purchase money still due shall have been paid.

In re ISAAC HARRIS CO.

(District Court, E. D. New York. November 9, 1909.)

BANKRUPTCY (§ 104*)—JURISDICTION OF COURT—RESTRAINING ORDERS.

A restraining order in a bankruptcy proceeding vacated in so far as it applied to persons outside of the jurisdiction of the court, and who had not come within the district to participate in the administration of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 162; Dec. Dig. § 104.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

In the matter of Isaac Harris Company, bankrupt. On motion to vacate restraining order. Sustained in part.

William S. Hoerner, for the motion.

Lord, Day & Lord, opposed.

CHATFIELD, District Judge. As to the attachments levied September 10, 1908, the decision of the United States District Court in the Middle District of Pennsylvania, inasmuch as it has formed a basis for the action of the sheriff of Franklin county, should be considered final in this case with respect to the validity of the attachments levied on the 10th of September, 1908, and this court will not enter into a discussion of the application of section 67f of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), and hence will make no decision on the merits as to whether the four months in question had not expired upon the 11th day of January, when the petition in bankruptcy was filed.

In regard to the application to vacate the restraining order as to others, it is apparent upon the face of the order that, in so far as jurisdiction is assumed over persons in the state of Pennsylvania, such jurisdiction could only be exerted if they are parties to the bankruptcy proceedings, or if they participate in the affairs of the bankrupt estate which is being administered in this district. The decision of the United States District Court for the Middle District of Pennsylvania was apparently made upon the assumption that this court was not intending to attempt any exercise of jurisdiction outside of its territorial limits, and the order in question cannot be vacated, so far as it applies to the creditors, especially if they come within the jurisdiction of the court, in order to participate in the administration of this estate.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

So far as the direction to the sheriff is concerned, no question can now arise, inasmuch as there can be no application to this court to punish him for contempt. But the motion to vacate the order should be granted, in so far as it, by its terms, contemplated orders to a person outside of the territorial jurisdiction of this court, and not personally subject to its orders within the jurisdiction.

The case of *In re Dempster* (decided by the Circuit Court of Appeals of the Eighth Circuit) 172 Fed. 353, not only recites former decisions, but so clearly states the scope of the bankruptcy statute as to make it unnecessary to discuss the question further in this opinion.

The motion, therefore, to set aside the order, will be granted to the extent indicated.

McGRATH v. PHILADELPHIA & R. RY. CO.

(Circuit Court, E. D. Pennsylvania. November 10, 1909.)

No. 336.

RAILROADS (§ 350*)—ACTION FOR INJURY AT CROSSING—QUESTIONS FOR JURY.

In an action against a railroad to recover for an injury to a person at a crossing, where there was conflicting evidence on the questions of defendant's negligence and plaintiff's contributory negligence, the fact that the weight of evidence may be with defendant does not justify the withdrawal of the case from the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

At Law. Action by Theresa McGrath against the Philadelphia & Reading Railway Company. On motion by defendant for judgment notwithstanding the verdict. Motion denied.

See, also, 166 Fed. 332.

Oscar H. Price, P. P. Conway and John M. Vanderslice, for plaintiff.
Wm. Clarke Mason, for defendant.

J. B. McPHERSON, District Judge. The defendant has not moved for a new trial, being content to accept the verdict, if the plaintiff's case was strong enough to require submission at all. I have therefore examined the testimony from that standpoint, with the result that I do not see how the questions of the defendant's negligence and of the plaintiff's contributory negligence could have possibly been withdrawn from the jury. It may be conceded that the weight of the evidence was perhaps with the defendant; but that is not material in considering the present motion. It would be useless to spend time in discussing the conflicting testimony, and I shall confine myself, therefore, to the statement that in my opinion there is sufficient direct and positive testimony in support of the plaintiff's claim to prevent the court from undertaking to decide the two vital questions for itself.

The motion for judgment notwithstanding the verdict is refused, and to this refusal an exception is sealed in favor of the defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

UNION PACIFIC COAL CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 19, 1909.)

Nos. 3,077-3,081.

1. MONOPOLIES (§ 12*)—ANTI-TRUST ACT—TEST OF "UNLAWFUL COMBINATION."

The test of an "unlawful combination" under Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), is its necessary effect upon free competition in commerce among the states or with foreign nations.

A combination, the necessary effect of which is to stifle, or directly and substantially to restrict, such competition, is unlawful under that act.

But if the necessary effect of a combination is but incidentally and indirectly to restrict competition, while its chief result is to foster the trade and increase the business of those who make and operate it, it does not fall under the ban of this law.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1275, 1276; vol. 8, p. 7606.]

2. MONOPOLIES (§ 17*)—ANTI-TRUST ACT—VENDORS NOT FORBIDDEN TO FIX PRICES AND TERMS OF SALE OF COAL THEREBY.

A coal company engaged in mining and selling its coal is not prohibited by the anti-trust act (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), or by the law, from refusing to sell its coal, from selecting its customers, from fixing the price and terms on which it will sell its product, or from selling to different customers for different prices and on different terms.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.*]

3. CORPORATIONS (§ 280*)—CRIMES—STOCKHOLDERS—GUILT OF CORPORATION NOT IMPUTED TO STOCKHOLDER.

A violation of a law by a corporation does not render its nonparticipating stockholders criminally liable therefor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1186; Dec. Dig. § 280.*]

4. CRIMINAL LAW (§§ 741, 1159*)—SUFFICIENCY OF PROOF—EVIDENCE OF GUILT MUST EXCLUDE EVERY OTHER HYPOTHESIS—APPEAL.

Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused.

And where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713, 1727, 3074-3083; Dec. Dig. §§ 741, 1159.*]

5. MONOPOLIES (§ 31*)—EVIDENCE—CONCLUSION.

The Union Pacific Coal Company, Moore, its western sales agent, the Union Pacific Railroad Company, which owned all the stock of the coal company, the Oregon Short Line Railroad Company, and Buckingham, the superintendent of transportation of the railroad companies, were indicted and convicted for combining to restrain interstate commerce by refusing to sell coal to and to transport coal for one Sharp unless he would discontinue an advertisement of sale of coal at a reduced rate.

Held, there was no substantial evidence of any combination between any two of the defendants either to refuse to sell coal to Sharp or to refuse to transport it for him.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 31.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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6. MONOPOLIES (§§ 12, 20*)—COMBINATION BETWEEN CORPORATION AND AGENT—CONSCIOUS PARTICIPATION OF TWO MINDS REQUISITE TO FORM.

A combination between a corporation and its officer or agent in violation of the anti-trust act (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) cannot be formed by the thoughts or acts of the officer or agent alone, without the conscious participation in it of any other officer or agent of the corporation.

The union of two or more persons, the conscious participation of two or more minds, is indispensable to an unlawful combination.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. §§ 12, 20.*]

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Utah.

The Union Pacific Coal Company, the Union Pacific Railroad Company, the Oregon Short Line Railroad Company, James M. Moore, and Everett Buckingham were convicted of a violation of Act July 2, 1890, and bring error. Reversed and remanded.

C. S. Varian and N. H. Loomis (P. L. Williams, on the brief), for plaintiffs in error.

Hiram E. Booth, U. S. Atty., and William M. McCrea, Asst. U. S. Atty.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. This writ of error challenges the legality of the conviction of the Union Pacific Coal Company, a corporation of Wyoming, engaged in mining coal in that state and selling it to retail dealers in Salt Lake City and elsewhere, James M. Moore, its general Western agent, the Union Pacific Railroad Company and the Oregon Short Line Railroad Company, corporations of Utah and common carriers, and Everett Buckingham, general superintendent of the transportation business of these carriers between Green River, in the state of Wyoming, and Salt Lake City, in the state of Utah, of a violation of the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies, commonly called the "Sherman Anti-Trust Act." 26 Stat. 209, c. 647 (U. S. Comp. St. 1901, p. 3200).

The charge in the indictment was that about July 20, 1906, the defendants below combined to force one Sharp, a purchaser of coal from the coal company and a retail dealer therein at Salt Lake City, out of his business, to control and maintain the retail price of coal in that city, and to prevent competition in the sale of coal at retail in Salt Lake City by failing and refusing to sell and to transport to him any of the coal mined by the coal company unless he would discontinue an advertisement he had caused to be inserted in the newspapers to the effect that he would sell storage coal at a reduction of 50 cents a ton from the regular retail price thereof then prevailing in Salt Lake City, and by the refusal of the coal company and Moore to sell to Sharp any

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of its coal, and of the railroad companies and Buckingham to transport any coal for him ever after July 22, 1906.

Many specifications of error in the trial are urged upon our consideration; but the most serious is that at its close the court denied the motions of each of the defendants to instruct the jury to return a verdict against the government, because there was no substantial evidence of the alleged combination of any two of the defendants. It may not be unprofitable, before entering upon a review of the evidence challenged by this specification, to call to mind some of the indisputable rules of law by which it must be decided.

The gist of the offense charged in the indictment was not the refusal of the coal company and Moore to sell coal on the purchaser's terms, or of the railroad companies and Buckingham to transport it. It was the combination so to do, and if there was no combination there was no offense. There was no law which forbade the coal company to prescribe the terms on which it would sell its product to Sharp, or to any other purchaser. There was no law which required the coal company to sell its coal to Sharp on the terms which he prescribed, or to sell it to him at all. It had the undoubted right to refuse to sell its coal at any price. It had the right to fix the prices and the terms on which it would sell it, to select its customers, to sell to some and to refuse to sell to others, to sell to some at one price and on one set of terms, and to sell to others at another price and on a different set of terms. There is nothing in the act of July 2, 1890, which deprived the coal company of any of these common rights of the owners and vendors of merchandise, and if it did not combine with some other person or persons so to do its refusal to sell its coal to Sharp unless he would withdraw his advertisement of a reduction in his retail price of it was not the violation of the Sherman anti-trust act charged in the indictment. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 186, 8 Am. Rep. 159; *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 460, 461, 463, 60 C. C. A. 290, 296, 297, 299, 64 L. R. A. 689; 1 *Eddy on Combinations*, § 292; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 41 L. Ed. 832; *In re Greene* (C. C.) 52 Fed. 104, 115; *In re Grice* (C. C.) 79 Fed. 627, 644; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91, 93; *Brown v. Rounsavell*, 78 Ill. 589.

A corporation is a person, within the meaning of this act. It is another and different person from any of its stockholders, whether they are corporations or individuals; and no corporation can, by violating a law, make any one of its stockholders who does not himself participate in that violation criminally liable therefor.

The act of July 2, 1890, does not denounce every combination to engage in or to conduct commerce among the states or with foreign nations, but those combinations alone which restrain that commerce. It does not denounce every combination which restrains that commerce, but those combinations only, the necessary effect of which is to stifle, or directly and substantially to restrict, free competition in that commerce. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 330, 339, 340, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Addyston Pipe & Steel*

Co. v. United States, 175 U. S. 211, 234, 20 Sup. Ct. 96, 44 L. Ed. 136; United States v. Joint Traffic Ass'n, 171 U. S. 505, 576, 577, 19 Sup. Ct. 25, 43 L. Ed. 259; United States v. Northern Securities Company (C. C.) 120 Fed. 721, 722.

If the necessary effect of a combination to engage in or conduct interstate or international commerce is but incidentally and indirectly to restrict competition therein, while its chief result is to foster the trade and to increase the business of those who make and operate it, it does not fall under the ban of this law. *Hopkins v. United States*, 171 U. S. 573, 592, 19 Sup. Ct. 40, 43 L. Ed. 230; *Anderson v. United States*, 171 U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 458, 60 C. C. A. 290, 294, 64 L. R. A. 689, and cases there cited. There are lawful and unlawful combinations of persons conducting interstate and international commerce, and undoubtedly the former vastly outnumber the latter. There is no presumption that two or more persons who have combined to conduct interstate or international commerce are guilty of a combination in restraint of that commerce.

There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction. *Vernon v. United States*, 146 Fed. 121, 123, 124, 76 C. C. A. 547, 549, 550; *United States v. Richards* (D. C.) 149 Fed. 443, 454; *Hayes v. United States* (C. C. A.) 169 Fed. 101, 103; *United States v. Hart* (D. C.) 78 Fed. 868, 873, affirmed in *Hart v. United States*, 84 Fed. 799, 28 C. C. A. 612; *United States v. M'Kenzie* (D. C.) 35 Fed. 826, 827, 828; *United States v. Martin*, 26 Fed. Cas. 1183, 1184 (No. 15,731); *People v. Ward*, 105 Cal. 335, 341, 38 Pac. 945; *People v. Murray*, 41 Cal. 66, 67; *State v. Hunter*, 50 Kan. 302, 32 Pac. 37; *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361, 366.

We turn to an examination of the evidence in the light of these principles. The defendants naturally divide themselves into two groups, the railroad companies and Buckingham, and the coal company and Moore. There is no evidence that either of the railroad companies or Buckingham ever combined with any one to fail or to refuse, or ever failed or refused, to transport any coal or other merchandise which Sharp offered to any of them for transportation or requested any of them to carry, so that the only question regarding them is whether or not there was substantial evidence that any of them unlawfully combined with the coal company, or with Moore, its Western sales agent, to refuse to sell the product of the coal company to Sharp.

There had been times in winter when the demand for coal in Salt Lake City had been so great that it was impossible for the coal companies and the railroad companies to supply it, and in the summer of 1906, for the purpose of getting as large a portion of the supply for the coming winter into the city in the summer as possible, so that the demand in the winter might not cause a coal famine, as it had done at other times, the coal companies arranged to sell coal which should remain stored with the retail dealers, or with their customers, on August 31, 1906, at a price 25 cents below the regular price for coal sold for general consumption, and the two railroad companies arranged to and did offer a rate of transportation from the mines in Wyoming to Salt Lake City for such stored coal 25 cents lower than the rate on coal sold for general consumption. It had long been, and then was, the practice of the railroad companies bringing coal into Salt Lake City from the mines to collect from the dealers in that city who purchased it both the purchase price of the coal and the freight, to pay over the purchase price to the coal companies which sold it, and to distribute the freight among the carriers that earned it. The reduction on storage coal was to be paid to the purchasers after August 31, 1906, upon proof that the coal remained in store on that day; but the purchasers were charged, and the railroad companies collected in the first instance, the regular price for coal sold for consumption upon all the coal they brought into the city for the coal companies. The reduction in the price was to be refunded after August 31, 1906, upon suitable proof.

The Union Pacific Coal Company had many competitors that were mining coal, selling it, and shipping it to dealers in Salt Lake City, among them four companies which were shipping coal into the city over the Union Pacific Railroad and the Oregon Short Line Railroad. The Union Pacific Railroad Company owned all the stock and a majority of the bonds of the coal company; but Buckingham and the other officers of that company, and of the Short Line Company, at Salt Lake City, bore no official relation to the coal company and they testified that they had no authority over its sales agent, Moore. The general manager of the coal company was one Clark, and his office was at Omaha. He was Moore's superior officer, and he had fixed the coal company's selling price of storage coal by written order. The regular retail price in Salt Lake City was \$5.25 per ton, and the retail dealers, including Sharp, had been and were selling all coal at that price, when on July 17, 1906, Sharp published a notice in the newspapers of the city that he would sell coal for storage at \$4.75 per ton. Gridley, the manager of another coal company which was shipping coal into the city and selling it, protested to Sharp and to Moore, and notified the latter that his company would reduce the retail price to \$4.25 per ton and keep it there all winter unless that advertisement was discontinued. On July 17th Moore asked Sharp to discontinue this advertisement, and told him that the coal company would not sell him any more coal unless he did so. Sharp refused so to do, and on July 18, 1906, Moore stopped shipments of coal to him from the mines of the coal company. On July 20, 1906, Sharp complained to Bancroft, the general manager of the two railroads which brought the coal to the

city, and the latter directed Buckingham, the superintendent of transportation, to investigate the matter. Buckingham called Moore, and talked the matter over with him and Sharp. The latter testified that he told Moore and Buckingham that he had had an understanding with some one other than Moore, who represented him in his absence, to the effect that he might advertise sales of storage coal at \$4.75 per ton, and that he would not take the advertisement out;

"that finally Mr. Buckingham asked what I was to do—no, Mr. Moore said—one of his arguments was that Mr. Gridley had threatened this extra 50 cents cut unless I was forced to take it out of the paper, and that they knew he would do it, and would stay with it—he had done it at some other point—and they all agreed that they could not stand anything of that sort, and that I would have to take it out. I refused to do it, and they wanted to know what I would do. I told them I would go out of business first. Q. What did Mr. Buckingham say to you? A. That is what he said to me—asked me; that is one of the things. Q. What else did he say? A. Then he said he was very sorry that I couldn't see it in their light. Q. What did he say about your getting coal in case you did not do as he asked? A. They simply said, if I didn't take the advertisement out of the paper, I wouldn't get coal. Q. Who said that? A. I think Mr. Buckingham. Q. Had Mr. Moore said anything about that before or after? A. In this conversation? Q. Yes. A. Yes, sir; practically the same thing."

He further testified that Buckingham "agreed with Moore that I could not get any more coal"; that he—

"told me I would have to take it out of the paper, and what would I do if I didn't get the coal. I told him I would go out of business first. He, Mr. Buckingham, told me he was awfully sorry that I could not come to their views—not his view; their view."

He testified that he never tried to get any coal after that, that he could not get any coal of the other coal companies, that he sold all the coal he had, and went out of business. He also testified that his understanding was that Moore did as Bancroft told him, that he had had it work that way, that when he could not get coal from Moore he complained to Bancroft and got it, that he thought Bancroft controlled the railroad deliveries, and that Moore had nothing to do with the railroads. And finally he testified in this way:

"Q. Mr. Bancroft is the general manager of the Oregon Short Line Railroad Company, and he has nothing to do with Mr. Moore has he? A. Yes. Q. What? A. What? Nothing official, except, if he asks Mr. Moore to do a thing, I think he will do it. Before he did it."

Moore testified that he stopped the sales to Sharp on July 18, 1906, because the latter would not withdraw his advertisement of the reduced price; that he did this without any understanding or agreement with Bancroft or Buckingham, or any other officer of either of the railroad companies, or any officer of the coal company, or anybody else; that at the meeting on July 20th he and Sharp stated their positions, and then Buckingham said to Sharp:

"I am just coming between you and Mr. Moore. I haven't anything to do with it, but I think you are in the wrong. If I were you I would get in line, and do business as other coal dealers do."

That neither he nor Buckingham told Sharp at that meeting that he could not get any more coal unless he took his advertisement out

of the papers; that he never made any agreement with Buckingham or any one, at or after the meeting of July 20th, not to sell Sharp any more coal; that he heard, but did not know, that the Union Pacific Railroad Company owned and controlled the coal company, but that he did not mean by that that it owned or controlled it in any other way than by the ownership of the stock; that the business of the coal company in selling and shipping coal was entirely distinct from that of the railroad companies; that the railroad companies bought coal of the coal company and paid for it in the same way that they bought coal of other coal companies and paid them for it; that all the business of the coal company, except its sales, was in Wyoming; and that it had its own general manager and superintendent.

Buckingham testified that he had no control of or authority over Moore; that at the meeting of July 20th Sharp and Moore stated their positions, and Moore said Sharp's orders had been held up, and shipments would not be resumed until Sharp's advertisement was discontinued; and that he (Buckingham) told Sharp he could not do anything for him, and that he thought he was standing in his own light. He also testified that he never told Sharp that unless he took the advertisement out of the paper he could get no more coal, that the reason why he could do nothing for Sharp was that it was not a transportation matter and he had no authority, and that he thought it was understood that the Union Pacific Railroad Company controlled the coal company. Bancroft testified that he was the general manager of the Oregon Short Line Railroad Company and of the Union Pacific Railroad Company west of Green river, that he never had any jurisdiction or control of any of the officers of the coal company, that he took it that the Union Pacific Railroad Company controlled the coal company, and that he had no authority over Moore. There was no other evidence material to the issue whether or not the defendants were parties to an unlawful combination not to sell coal to Sharp.

What was there in any of this evidence inconsistent with the absence of such a combination by Buckingham and the railroad companies? The counsel for the government answer: (1) The fact that the storage rate and the reduction in the price of coal and of the freight charges were announced by joint circulars issued by the railroad companies; but this method of announcement was perfectly consistent with the independent action of the coal company, for the railroad companies collected the price of all the coal brought into the city for the coal companies, as well as the freight which the railroad companies earned. (2) The fact that the price of the coal and the freight were collected by the Oregon Short Line Company; but it had been for years, and then was, the custom for the terminal railroad company at Salt Lake City to collect the price of coal delivered for all the vendor companies, and it is hardly probable that all those companies had long been in a combination not to sell coal to Sharp. (3) The fact that both railroad companies were operated by the same set of officials, and that they paid to all dealers the agreed refund on coal held in storage on August 31, 1906; but there is nothing in this fact to indicate that they combined to stop the sale of coal by the coal company to Sharp, for they refunded

to him in the same way as to others. (4) The fact that by Bancroft's direction Buckingham investigated the disagreement between Moore and Sharp two days after the former had stopped selling and shipping coal to Sharp, and the statement of Sharp, which was contradicted by Moore and Buckingham, that the latter told Sharp that unless he took the advertisement out of the newspapers he would not get any more coal, and that he was awfully sorry he could not come to their view; but there is nothing in this investigation, or even in this statement, inconsistent with the theory that Buckingham and Bancroft had no authority to control or direct Moore's action, that Buckingham's investigation was inspired by the interest of the railroad companies in the freight they might earn, and that there was no combination between them and Moore relative to the latter's refusal to sell or ship coal to Sharp. (5) The fact that Sharp had sometimes applied to Bancroft for coal, and had secured it, when he could not get it of Moore; but that fact is consistent with the absence of any control over Moore in Bancroft, for the latter testified, and this testimony was not contradicted, that he did not know of a coal dealer in Salt Lake City that he had not caused the railroad companies to purchase coal for and to divert it to, when such dealer was short. (6) The fact that Bancroft, Buckingham, and Moore testified that they understood that the Union Pacific Railroad Company owned and controlled the coal company; but the evidence is undisputed that it owned the stock of the coal company. It did, therefore, own and control it in one sense, and there is no evidence that it owned or controlled it in any other way. There is no substantial evidence that either Bancroft or Buckingham had any authority or control over Moore or his sales, and a stockholder of a corporation does not become criminally liable for a combination made by the corporation without conscious participation therein.

From this review of the evidence and of the argument of the counsel for the government, the fact appears that there was no substantial evidence in this case inconsistent with the innocence of Buckingham and the railroad companies, while there was plenary proof that they were not guilty; for the evidence is conclusive and undisputed that the coal company, through Moore, its agent, refused to sell coal to Sharp and stopped shipments to him two days before Bancroft, or Buckingham, or the railroad companies, knew it. They could not have combined to make that refusal and to prevent the sales of the coal after the refusal had been made and the prevention had been effected, and under the evidence they had no power to change the policy and course of the coal company and to compel it to sell coal to Sharp, save by a vote of its stock by the Union Pacific Company at a succeeding annual election for a board of directors that would pursue such a course. The motion to instruct the jury to return a verdict in favor of Buckingham and the railroad companies should have been granted.

There remain for consideration the coal company and Moore. For the reasons which have been stated, the evidence was insufficient to sustain a conviction of either of them of an unlawful combination with Buckingham or with either of the railroad companies. But counsel for the government argue that the testimony is sufficient to convict them of combining each with the other, and they cite *United States v.*

MacAndrews & Forbes Co. (C. C.) 149 Fed. 831, 832, in which an indictment of two corporations and their presidents for a combination in violation of the anti-trust act was sustained against the officers, not on the ground that an unlawful combination of either of them with his corporation could be made by his act as an officer of the corporation without the assent or knowledge of any other officer or agent thereof, but on the ground that the corporation might have done some things and the individuals other things which were utterly different, and yet all these things might dovetail together and produce an unlawful combination; *People v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735, 737, 9 L. R. A. 722, a prosecution for creating and maintaining a nuisance; *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 269, 75 Pac. 924, 105 Am. St. Rep. 74, a prosecution for employing a child under 12 years of age; *United States v. N. Y. Central & H. R. R. Co.* (C. C.) 146 Fed. 298, 301, and *N. Y. Central R. R. Co. v. United States*, 212 U. S. 481, 491, 497, 29 Sup. Ct. 304, 53 L. Ed. 613, a prosecution for giving rebates—cases in which corporations and their officers were convicted, not of any combination, but of violations of specific statutory prohibitions committed by the corporations and the individuals by means of the acts of the latter within the scope of their authority as agents or officers.

But no case has been called to our attention that sustains the position that an agent of a corporation may alone form an unlawful combination between himself and his corporation by his thoughts and acts within the scope of his agency, without the knowledge or participation of any other agent or officer of the corporation. If he may, the distinction between the commission of an offense and a combination to commit it by a corporation vanishes into thin air; for a corporation can act only by an agent, and every time an agent commits an offense within the scope of his authority under this theory the corporation necessarily combines with him to commit it. This cannot be, and it is not, the law. The union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination, and it cannot be created by the action of one man alone. The plan and the act of refusing to sell coal to Sharp unless he would withdraw his advertisement were the scheme and the act of Moore as the agent of the coal company, and of Moore alone. No other agent or officer of the coal company had any knowledge of it, or gave any assent to it, and consequently the scheme and the act failed to evidence an unlawful combination between the corporation and Moore, and the motion to instruct the jury to return a verdict in their favor should have been granted also.

The judgments below must be reversed, and the case must be remanded to the court below, with directions to set aside the verdict and to grant a new trial; and it is so ordered.

GEORGE A. SHAW & CO. v. CLEVELAND, C. C. & ST. L. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1909.)

No. 1,936.

1. CONTRACTS (§ 186*)—CONTRACT FOR RAILROAD CONSTRUCTION—CONSTRUCTION.

A provision of a contract for railroad construction, giving the railroad company the right to apply any money due or to become due under the contract to the payment of liens for labor or materials furnished to the contractor, is wholly for the company's benefit, and does not impose any contract obligation upon it to pay such liens.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 794; Dec. Dig. § 186.*]

2. COURTS (§ 366*)—FEDERAL COURTS—AUTHORITY OF DECISIONS OF STATE COURTS.

The construction of a state Constitution or statute by the highest court of the state is binding upon the federal courts in cases involving rights which arose after such construction was given.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954, 957, 960, 968; Dec. Dig. § 366.*]

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

3. COURTS (§ 366*)—FEDERAL COURTS—VALIDITY OF STATE STATUTE.

Bates' Rev. St. Ohio, § 3231—1, which gives an absolute lien upon the property of a railroad company for supplies or materials furnished for the construction of its road to any contractor or subcontractor, is unconstitutional and void, as an abridgment of the liberty of contract secured by the Bill of Rights of the state Constitution, under the construction placed on such constitutional provision by the Supreme Court of the state.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 366.*]

4. CONTRACTS (§ 2*)—LAW GOVERNING—PLACE OF CONTRACT.

Bates' Rev. St. Ohio, § 3207, which requires a railroad company, contracting for construction work, to stipulate in its contract that it will pay out the contract price to the persons and in the order named therein, conceding its validity, can have no application to a contract made in another state for work to be done in such state.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 2-41, 145; Dec. Dig. § 2.*]

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Action by George A. Shaw & Co. against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

E. C. Pyle, for appellants.

George Hoadly, for appellee.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

LURTON, Circuit Judge. This is a bill asserting a statutory lien in behalf of a subcontractor against a railroad company. The question is quite simple. The Shutt Improvement Company made a contract in the state of Indiana for double-tracking a part of the railway com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany's line which lies in Indiana. It was convenient for the Shutt Company to operate a commissary in aid of their work, for the purpose of furnishing groceries and like supplies to their employes. They bought these goods from the appellants, grocers doing business in Cincinnati, and they were delivered at the station of the railroad company in that city; the railroad company having contracted with the Shutt Company to convey all materials and supplies, needed in carrying out the contract, free of charge. After doing a great part of the job, the Shutt Company broke down, and the railroad company finished the contract work at a cost much in excess of the contract price. The contract price, remaining unpaid when the Shutt Company failed, was applied, as far as it would go, in finishing the work and in relieving the property of such claims as were regarded as liens under the Indiana law. The contract between the railroad company and the contractor expressly provided that the former might thus protect itself by the application of funds due, or to become due, under the contract, in discharge of liens in favor of labor or materials furnished to the contractor. This was a provision wholly for the benefit of the owner, and no contract obligation to pay off such liens was imposed or assumed. The Shutt Company owed the appellants a balance, on account, of some \$12,000 when it abandoned the work. This claim the railroad company refused to pay or assume, because it was advised that it did not constitute a lien upon its road. After paying the expense of finishing the contract work and such claims against the Shutt Company which it was advised were liens, the Shutt Company was indebted to the railroad company in a large sum on account of payments in excess of the contract price. The appellants in no way attached or garnished the fund reserved out of the contract price, and not a dollar of the contract price remained unpaid when this bill was filed. Neither is it shown that the railroad company came under any contract, express or implied, to pay the debt due to appellants by the Shutt Company. Nor was the conduct of the railroad company in dealing with the Shutt Company, or the appellants, in respect to the contract price, such as to constitute it in any way a trustee for any part of the purchase price in respect to appellants.

The liability of the railroad company on account of this claim must, therefore, arise out of some statute directly imposing a lien upon the appellee's line of railway or fastening some charge upon the contract price. The primary claim is that a statutory lien did arise under the law of Ohio. For the appellee it has been urged that, aside from the question of the validity of the Ohio statute, under which complainant below asserted a lien, the statute, if valid, does not embrace groceries and provisions. It has also been urged that these supplies were furnished to be used upon that part of the line of the appellee's railroad which is situated in the state of Indiana, and that, if any lien was created, it was against the property of the company in Indiana, and as a consequence of some Indiana statute. We shall not consider either of these defenses, but for the purposes of the case will assume that groceries and provisions are "supplies," within the meaning of the Ohio statute, and that the sale and delivery within Ohio created a lien

under the Ohio mechanic's lien statute, which is enforceable in Ohio against the railway as a unitary structure.

The result must turn upon the solution of the question of whether there was any valid statutory lien in favor of a subcontractor for supplies furnished a contractor for railroad construction? There are two acts under which appellants claim a direct or implied lien. One is the act of March 20, 1889 (86 Ohio Laws, p. 120), constituting sections 3231—1 to 3231—5, Bates' Revised Statutes of Ohio. That act provides that for supplies and materials furnished to any contractor or subcontractor for the construction of any railroad, embankment, abutment, pier, side track, or excavation, or for the making of any canal, turnpike, street railway, or other public structure, there shall be an absolute lien on the whole of the property on which labor is done, or to which such materials or supplies have contributed, whether same was done for or furnished at the instance of the owner, "or any contractor or subcontractor." The other Ohio act is one of April 6, 1883 (80 Ohio Laws, p. 99), found now as sections 3207 to 3211, Bates' Revised Statutes of Ohio.

We shall first deal with the act of March 20, 1889, particularly that part which constitutes section 3231—1, Revised Statutes, being the section which declares a lien in favor of subcontractors in express terms. Was it competent for the Ohio Legislature, under the limitations of the organic law of the state, to so abridge the right of an owner in respect of his power of contracting as to impose upon his property, against his will, a lien in favor of third persons who should furnish labor, material, or supplies at the instance of a contractor for an improvement upon the land of such owner, and contrary to the arrangement between the owner and the contractor for the payment of the contract price? The precise question was answered in the negative by the Supreme Court of Ohio in the case of *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313. The syllabus of that case, that being the authoritative decision of the Ohio court, reads as follows:

"The inalienable right of enjoying liberty and acquiring property, guaranteed by the first section of the Bill of Rights of the Constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are necessary for the common welfare.

"Liberty to acquire property by contract can be restrained by the General Assembly only so far as such restraint is for the common welfare and equal protection and benefit of the people, and such restraining statute must be of such a character that a court may see that it is for such general welfare, protection and benefit. The judgment of the General Assembly in such cases is not conclusive.

"While a valid statute regulating contracts is by its own force read into and made a part of such contracts, it is otherwise as to invalid statutes.

"The act of April 13, 1894 (91 Ohio Laws, p. 135), in so far as it gives a lien on the property of the owner to subcontractors, laborers, and those who furnish machinery, material, or tile to the contractor, is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract are bound by the terms of the contract between him and the owner."

The Ohio act there held void was the act of April 13, 1894 (91 Ohio Laws, p. 135). The act referred to amended the former act, now section 3184, Bates' Revised Statutes of Ohio, which gave the lien in fa-

vor of one who should do labor or furnish machinery or materials by virtue of a contract "with the owner or his authorized agent," by giving the lien to any one who should furnish labor or materials "by virtue of a contract with or at the instance of the owner or his agent trustee, contractor, or subcontractor." The difference between that act and the one now involved consists in the fact that the amendatory act of 1894 applied only to section 3184, Revised Statutes, which did not, in express terms, refer to corporations, while section 3231—1 applies to railroads and certain other public service corporations. We shall later consider whether this fact takes the present case outside of the authority of *Palmer v. Tingle*.

But it is said that this court, in *Jones v. Great Southern Fireproof Hotel Company*, 86 Fed. 370, 30 C. C. A. 108, held that section 3184, Revised Statutes of Ohio, as amended by the act of April 13, 1894, was not unconstitutional under the Constitution of Ohio, but was valid and enforceable, and that in that view we were affirmed by the Supreme Court in *Great Southern Fireproof Hotel Company v. Jones*, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778. The lien asserted in *Jones v. Great Southern Hotel Company*, and enforced by this court, arose before the Ohio court had decided *Palmer v. Tingle*, and before the Ohio court had decided any case affecting the constitutionality of any act creating a lien in favor of persons having no direct contract with the owner. We were, therefore, not only at liberty, but under obligation, to exercise an independent judgment in respect to the validity of the statute in question. The lien now asserted arose long after the decision in *Palmer v. Tingle*, and, if that decision is to be regarded as a construction and application of the organic law of Ohio, it is obviously our duty to accept that construction and apply it to the case now under consideration, inasmuch as we are not now dealing with rights which arose before that decision, but with rights under contracts made long since that construction.

The obligatory character of *Palmer v. Tingle* does not rest upon the fact that it was a decision in respect to the very statute now involved, for that is not the case. Nor does its obligatory effect rest alone upon the similarity of the lien created under the act now involved with the lien under the later act of 1894. Neither does our obligation depend upon the application of any general rule of statutory or constitutional construction announced in that case, or in *O'Brien v. Wheelock*, 95 Fed. 883, 37 C. C. A. 309, affirmed in 184 U. S. 450, 22 Sup. Ct. 354, 46 L. Ed. 636. No question of statutory construction was involved in *Palmer v. Tingle*, and none is raised here. What the Supreme Court of Ohio decided in *Palmer v. Tingle* was that that part of the organic law of Ohio which declared that the "right of enjoying and defending life and liberty" and of "acquiring, possessing, and protecting property," included and involved the right of any owner of property to make any contracts he pleased in respect of improvements to be erected thereon which did not injuriously affect the public welfare. Coming to the application of that constitutional declaration, thus interpreted, the Ohio court said:

"It was not for the common public welfare that the liberty of contract should be taken away from the owner of a building to enable the seller of materials

to collect their value from a man who never purchased them, and has already fully paid the one with whom he contracted for all that he has received."

When considering the weight to be given to *Palmer v. Tingle*, this court, in recognition of our duty to lean toward an agreement with the Ohio court, though not under obligation to follow it in a case when rights had arisen before that decision, referred to the identity of this constitutional declaration with like provisions in the organic law of other states as raising for our consideration a larger question of constitutional law than might otherwise be the case. In view, therefore, of the fact that the Ohio court had before it no provision of the Ohio Constitution which was peculiar to the Ohio Constitution, we were constrained to differ with that court as to the force and meaning of the words in question as a limitation restraining the Ohio Legislature. In this we were affirmed by the Supreme Court of the United States. But the case is quite different now. The highest court of Ohio, in the exercise of its undoubted authority, construed this declaration in the Ohio Bill of Rights as denying to the Ohio Legislature the power to create a lien upon an owner's property through the unauthorized acts of a principal contractor. The distinction between our obligation in passing upon rights accrued before *Palmer v. Tingle*, and rights which have accrued since, was well stated by Justice Harlan in *Great Southern Hotel Company v. Jones*, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778, when that eminent jurist, for the court, said:

"In our opinion, neither the decisions of *Palmer v. Tingle*, *Young v. Lion Hardware Co.*, 55 Ohio St. 423, 45 N. E. 313, nor any other case in the Supreme Court of Ohio, precluded the Circuit Court from exercising its independent judgment as to the constitutionality of the statute of Ohio here in question. If, prior to the making of the contracts between the plaintiff and McClain, the state court had adjudged that the statute in question was in violation of the state Constitution, it would have been the duty of the Circuit Court, and equally the duty of this court, whatever the opinion of either court as to the proper construction of that instrument, to accept such prior decision as determining the rights of the parties. But, the decision of the state court as to the constitutionality of the statute in question having been rendered after the rights of the parties to this suit had been fixed by their contracts, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute here in question. In making this declaration we must not be understood as at all qualifying the principle that, in all cases, it is the duty of the federal court to lean to an agreement with the state court, where the issue relates to matters depending upon the construction of the Constitution or laws of the state."

But it is said that the Ohio court did not have before it in *Palmer v. Tingle* the particular act now in question, but another, a general mechanic's lien act, and that the acts here involved apply to railroads and other corporate companies, and that the legislative limitation determined by *Palmer v. Tingle* was in respect to the contracts of persons and not of corporations. But it is difficult to see why, if the Ohio Legislature has no power to create a lien against the will of an individual owner of real property in favor of persons having no contractual relations with him, it should have such power simply because the owner is an aggregation of persons with corporate powers. Indeed, the Ohio court in *Palmer v. Tingle* supports its conclusion that the act of 1894 violated liberty of contract by referring to State v.

Lake Erie Iron Company (an officially unreported Ohio case) 33 Ohio Law Bul. 6, by saying:

"It was the infringement of the liberty of contract that induced this court in *State v. Lake Erie Iron Company* (officially unreported) 33 Ohio Law Bul. 6, to hold the statute unconstitutional which required corporations to pay their employes at least twice in each month."

In *Cleveland v. Construction Company*, 67 Ohio St. 197, 65 N. E. 885, 59 L. R. A. 775, 93 Am. St. Rep. 670, the Supreme Court held an act void, as an abridgment of liberty of contract, which denied to municipal corporations the right to agree with contractors and subcontractors as to the hours of labor which should constitute a day's labor. In *Stewart v. Gardner*, 10 Ohio Cir. Ct. R. (N. S.) 408, the circuit court of Lucas county had under consideration the validity of section 3231—1, Revised Statutes of Ohio. The point was made that *Palmer v. Tingle* was not controlling, because section 3231—1 applied to railroads. It was held in an elaborate opinion that the clause of the Ohio Bill of Rights applies not only to individuals, but to private corporations, and that the Legislature was without power to qualify the right of a railroad company to make contracts in respect to construction or improvements which it could not make with respect to individuals. It was held that *Palmer v. Tingle* was a controlling authority, and that so much of section 3231—1 as undertook to give to subcontractors for materials or supplies a lien, without the consent of the owner, was unconstitutional. This judgment directly involved the very act now under consideration, and was affirmed, without opinion, by the Supreme Court of Ohio, in 78 Ohio St. 451, 85 N. E. 1132. The affirmance could not have gone upon any other ground than that of the invalidity of the very act under which appellants now assert a lien. It is true that *Stewart v. Gardner* was decided after the rights of appellants arose, and is not, therefore, so obligatory as *Palmer v. Tingle*. The decision is, however, of weight sufficient to solve any doubt we might have as to the question now raised.

Neither has the appellant shown any right to equitable relief under his prayer for general relief. This contention is bottomed upon section 3207, Revised Statutes, which reads as follows:

"Sec. 3207. (What Contracts for Railroad Work shall Stipulate; Claims: Order of Priority.) Any person, association of persons, or corporation contracting for the construction of a railroad, depot buildings, water-tanks, or any part thereof, shall be liable to and shall pay to each person performing labor or furnishing materials stipulated for in the contract with the owner of the road, under a contract express or implied with the original contractor, or with any subcontractor, for the whole or any part of the work stipulated in the original contract with the owner of the railroad; and the railroad company shall provide, in its contract with any person, association of persons, or corporation for the construction of its road, or any part thereof, that payments under its said contract shall be made in the following order of priority: First, to the persons performing labor or furnishing materials, or furnishing boarding on the order of any contractor or subcontractor to persons employed by them, or either of them, in furnishing materials or labor for or in the construction of such railroad, without preference. Second, to any subcontractor, any balance due under his contract after payment of his or their liability to persons performing labor or furnishing materials or boarding, under his or their contract. Third, to any contractor, or construction company intervening between a subcontractor and the railroad company, in the order of such in-

tervention from such subcontractor upward to the owner of the railroad, any balance due after payment by the company, of amounts found due in the order of priority above stipulated."

That section, by providing that the contracting railroad owner shall pay out of the contract price "each person" who shall labor or furnish materials or supplies stipulated for in the contract, in the order named in the section, regardless of any contract relation between the owner and such person, manifestly interferes quite as much with the owner's liberty of contract as if an independent lien had been declared in favor of each person so to be paid. Indeed, the restraint upon the owner's right of liberty of contract is even more effectual, for the owning railroad is required to stipulate in its contract that it will pay out the contract price to the persons and in the order named in the section.

Aside from the obvious fact that, if section 3231—1 et seq. is obnoxious because the owner is subjected to liability to persons with whom he has no contract, this section is void for the same reason, there is the further difficulty in this case, namely, the contract made by the railroad company was made in the state of Indiana, to be wholly performed by the Shutt Company in that state. A contract made in Indiana, to be exclusively performed in that state, was not subject to the requirement of the Ohio statute that the owning railroad shall provide, in its contract, for the payment of the contract price to labor and supply claims in the order named in the statute. No such provision was inserted in the contract with the Shutt Company, and no ground exists upon which we can hold that the term is to be read into the agreement for the benefit of persons having no contractual relations with the railroad company.

Neither is there any principle of general equity upon which appellants can obtain any relief against the appellee. No facts are shown which raise any trust, or in any way constitute the relation of debtor or creditor, between appellants and appellee. No fraud was practiced upon which a liability can be raised, and the appellants must look alone to the Shutt Improvement Company for the balance of their account.

Decree affirmed.

LOUISVILLE & N. R. CO. v. WOMACK et al.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1909.)

No. 1,947.

1. RAILROADS (§ 359*)—INJURIES TO TRESPASSERS ON TRACK—DEGREE OF CARE REQUIRED.

Under the common law a railroad company owes no duty to a mere trespasser, on its tracks without the consent of any one having authority to permit his presence, except to do him no intentional or wanton injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1238, 1239; Dec. Dig. § 359.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. RAILROADS (§ 400*)—INJURY TO PERSONS ON TRACK—ACTIONS—QUESTIONS FOR JURY.

Evidence held sufficient to warrant the submission to the jury of the question whether the employés of a railroad company, in charge of the engine of a freight train, which collided with a hand car, complied with Shannon's Code Tenn. § 1574, subsec. 4, which provides that the engineer, fireman, or some other person on the locomotive shall be kept always upon the lookout ahead, and that when any person, animal, or other obstruction appears on the road the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident; there being evidence that the persons upon the hand car saw the engine when 200 yards distant, but that those on the engine did not see the hand car until within a car's length.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1367, 1373; Dec. Dig. § 400.*]

3. APPEAL AND ERROR (§ 263*)—QUESTIONS PRESENTED BY RECORD—NECESSITY OF EXCEPTIONS TO INSTRUCTIONS.

It is the settled rule of the federal courts that a charge not excepted to below cannot be assigned as error in a court of review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.*]

4. APPEAL AND ERROR (§ 241*)—REVIEW—ESTOPPEL TO ALLEGE ERROR.

A motion by defendant at the close of the evidence for a directed verdict, although not required by the practice of the Circuit Court of Appeals to specify the grounds on which it is based, will not be considered by such court as embracing the question of the applicability of a state statute to the facts of the case, where it was tried by both parties on the theory that the statute was applicable, and submitted to the jury by the court on such theory by instructions to which no exceptions were taken.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 241.*]

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Action by Mary Womack and others, by N. S. Nicholson, as next friend, against the Louisville & Nashville Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. H. Frantz, for plaintiff in error.

M. R. Waite, for defendants in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

LURTON, Circuit Judge. This is an action of tort for the alleged negligent killing of Levi Womack, the father of the plaintiffs below, who sued by their guardian, N. C. Nicholson. There was a jury, verdict for \$1,000, and judgment thereon. The railroad company has sued out this writ of error.

It is assigned as error that the court denied the request of the plaintiff in error that the jury should be instructed to find a verdict for the railroad company. The deceased came to his death through a collision between a hand car and a freight train. He, together with seven others, four of them being women, had obtained one of the railroad company's hand cars and were operating it for their own pleasure upon the main track of the railway company's line in the early morning of June 17, 1906. The point where they began their perilous ride was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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a mile or more north of where the company's line in Polk county, Tenn., crosses the bridge over the Hiwassee river. The car proceeded south, and upon reaching a point upon the trestle approaching the bridge came suddenly into collision with a train coming from the south, with the result that five of the occupants of the hand car were killed. There was some evidence that a special gang section foreman consented—though saying at the time that it was against the company's rules—that John Brinkley, one of his gang not that day on duty, might take the car out for a pleasure ride with some of his friends; he assuming the care of it. It was clearly shown that the company's rules absolutely forbade the use of such cars, except in the service of the company, and that the foreman had no authority to consent to any such use of the car. Brinkley was one of the men killed in the collision. The friends of Brinkley who were taken upon the car were neighboring young men, not in the service of the company, and their wives or sisters.

The trial judge, upon the facts of the case, instructed the jury that the occupants of the car were trespassers, and guilty of negligence in being where they were. This was plain law, and it followed that under the common-law counts of the declaration there could have been no recovery, in the absence of evidence that they were actually seen by the men operating the engine of the freight train in time to have stopped the train before a collision.

In *Railroad v. Meacham*, 91 Tenn. 428, 431, 19 S. W. 232, the court, in reference to an action for injury sustained in jumping from a timber train, which came into collision with a freight train, the plaintiff being on the train without the consent of any one having authority to permit his presence, reversed a judgment for the plaintiff, saying:

"The only duty due by the railroad company to the one who is an intruder upon its train, not used for transporting passengers, is to refrain from wantonly, willfully, or intentionally injuring him. If the proof had developed that the collision in this case was designed and brought about with the intent and for the purpose of injuring the defendant in error, although an intruder, he would be entitled to recover; otherwise, he would not."

In *Railroad v. Williford*, 115 Tenn. 108, 88 S. W. 178, it was held that one riding on an engine, not in the performance of any duty, is in a place of unnecessary danger, and that the only duty of the company toward such person is to avoid injury by any wanton or willful act.

In *Kansas City, etc., Railroad v. Cook*, 66 Fed. 115, 121, 13 C. C. A. 364, 370, 28 L. R. A. 181, we had to consider the care required from a railroad company at common law in respect to a trespasser upon its tracks in the yards of the company. In that case the court, after saying that the plaintiff was where he was without the invitation or consent of any one having authority to suspend the rules of the company forbidding the use of the tracks in the yards by strangers, said:

"Having no legal right to be where he was, the company stood in no such relation to him as it would to one at a street crossing, or to a passenger, or to an employé whose duty kept him in the yard. *Aerkfetz v. Humphreys*, 145 U. S. 420, 12 Sup. Ct. 835, 36 L. Ed. 758. It was negligence per se for one to intrude himself into such a place, and his presence there imposed no particular duty upon the company, except that general duty which every one owes to every other person to do him no intentional wrong or injury. Its lia-

bility for failure to discharge this duty can only arise when it becomes aware of the danger in which he stood."

This case has been approved by this court in *Felton v. Aubry*, 74 Fed. 350, 356, 20 C. C. A. 436, and *B. & O. Ry. v. Anderson*, 85 Fed. 413, 416, 29 C. C. A. 235.

In *Singleton v. Felton*, 101 Fed. 526, 528, 42 C. C. A. 57, 59, this court, in a case where a trespasser upon a construction train was injured through a negligent collision, said:

"Actionable negligence presupposes some duty owed to the person asserting a right of action by the defendant, and a breach of that duty. What was the relation between the deceased and the receiver? What duty was due by the receiver to him? He was not a passenger. The train was a construction train, and persons other than employes were rigidly excluded therefrom. He knew the rule of the railroad in this particular. He did not have the permission of the conductor or other employe on the train as an excuse for his presence, and thus we are not called upon to deal with the question as to whether the consent of an employe, who had no power to consent, would create a relation and impose a duty towards him. His presence on the train was unknown to those operating it. He was therefore unlawfully upon a train not intended for passengers, and, but for his own wrongful conduct in intruding himself there, would not have lost his life. He was not willfully injured. There was no intent to bring about the collision which cost him his life. His presence on the train being unknown, the rule which requires the exercise of ordinary care to avoid unnecessary injury to a trespasser after his presence and danger are observed has no application. The defendant, upon the facts, owed no duty to the deceased, and no action will lie for the negligence of the servants of the plaintiff by which the collision occurred. Actionable negligence consists in the failure to exercise that degree of care towards the plaintiff which was due to the plaintiff by the defendant under the circumstances of the case. That the servants of the defendant were under an obligation to exercise care in the movement of trains in order to prevent collisions may be conceded. This duty they neglected. But that was not a duty owed to the deceased under the facts of this case, and the breach of duty by which the collision occurred was not a duty to the deceased."

To the same effect are the cases of *St. L. & S. F. Ry. Co. v. Bennett*, 69 Fed. 525, 16 C. C. A. 300, and *Northern Pacific Railway v. Jones*, 144 Fed. 47, 49, 75 C. C. A. 205.

Stripping the case of all else, the trial judge submitted the plaintiff's case solely upon the count which charged a violation of the Tennessee statute regulating the operation of railway trains, and upon the question as to whether the railway company had complied with that statute. The applicable statute is as follows:

Shannon's Code Tenn. § 1574, subsec. 4:

"Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

Shannon's Code Tenn. §§ 1575, 1576:

"Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur."

"No railroad company that observes, or causes to be observed, these precautions shall be responsible for any damage done to person or property on its road. The proof that it has observed such precautions shall be upon the company."

It will be observed that by the express terms of the statute the burden of showing compliance with the statute is placed upon the railroad company. The observation in *Virginia & S. W. Railway Co. v. Hawk*, 160 Fed. 348, 87 C. C. A. 300, that the burden was upon the plaintiff to show noncompliance was pure obiter, being in no way involved in the case. It was an erroneous statement of the law, for we have in many cases recognized and applied the statute as controlling in this court.

The construction of this statute by the Supreme Court of the state has also been regarded as furnishing a rule of decision for this court, when such interpretation is plain and consistent. The undoubted interpretation of this statute by the Tennessee court is that the precautions prescribed are mandatory, and that, while an impossibility is not to be understood as required, nevertheless every precaution required must be followed so far as time will permit. Although that eminent jurist, Justice Cooper, in *Holder v. Railroad*, 11 Lea (Tenn.) 176, 178, expressed grave doubt as to the correctness of the ruling that the omission of a precaution which would have been plainly useless is ground of liability, yet it is well settled that there is a statutory liability whenever there is a failure to comply fully with the statute, so far as time will allow, and that it is no defense to show that the omission could not have contributed to the accident. *Chattanooga Transit Company v. Walton*, 105 Tenn. 415, 420, 58 S. W. 737.

This disposes of the exception reserved to the charge because the court charged the jury that if the whistle was not blown the statute was not complied with, if there was time to blow, although the failure to blow had nothing to do with the collision.

So, also, has the statute been construed as entitling the plaintiff to recover in a case when the statute was applicable, irrespective of his own contributory negligence, however great. *L. & N. R. R. Co. v. Burke*, 6 Cold. (Tenn.) 45; *Railway Company v. Foster*, 88 Tenn. 672, 13 S. W. 694, 14 S. W. 428; *Railroad Company v. Acuff*, 92 Tenn. 26, 20 S. W. 348. This construction as to the absolute character of the statutory liability has been repeatedly followed by this court. *Western & Atlantic Ry. v. Roberson*, 61 Fed. 592, 603, 9 C. C. A. 646; *Byrne v. Kansas City, etc., Railway*, 61 Fed. 605, 614, 9 C. C. A. 666, 24 L. R. A. 693; *Rogers v. Cincinnati, etc., Railroad*, 136 Fed. 573, 69 C. A. 321.

The learned trial judge, notwithstanding the character of the deceased as a trespasser guilty of great negligence, instructed the jury, in accordance with the settled construction of the Tennessee statute, that such negligence must be regarded as a mitigation of damages, but would not go in bar of the action. In view of the arbitrary character of the statute in imposing an absolute liability, regardless of the negligence of the plaintiff, the Tennessee court has construed it as for the benefit of the general public, and not applicable to employes while about the service of the company. *L. & N. R. R. v. Burke*,

6 Cold. 45; *Railroad v. Rush*, 15 Lea, 145, 149; *Railroad v. Holland*, 117 Tenn. 257, 96 S. W. 758.

For the same reason the court has limited the operation of the statute to cases in which the intent that it should apply is manifest. Thus, in *Railroad v. Rush*, 15 Lea (Tenn.) 145, 149, it was said by the court, speaking by Justice Cooper:

"But in view of the stringent terms of the act, and the manifest object of the Legislature, the court has not extended its provisions to every case which might be embraced in its general language."

Thus it has been held not to apply to a passenger on a train injured by a collision brought about through failure to comply with its terms. The liability in such a case must depend upon common-law principle. *L. & N. R. R. Co. v. McKenna*, 75 Tenn. 313.

In *Holder v. Railroad*, 11 Lea (Tenn.) 176, it was held that there was no statutory liability unless the injury was the direct result of being struck by a moving train. An animal running ahead of a moving train was injured by jumping off of a trestle. It was held that, not having come into collision with the train, the liability would depend upon common-law principles.

In *Railroad v. Reidmond*, 11 Lea (Tenn.) 205, and *Railroad v. Howard*, 90 Tenn. 144, 19 S. W. 116, it was held that the statute does not come into operation until the person, animal, or obstruction comes within striking distance of the train. We followed and applied this construction in *Rogers v. C., N. O., etc., Railway*, 136 Fed. 573, 69 C. C. A. 321.

In *Railroad v. Burke*, 6 Cold. (Tenn.) 45, and *Railroad Company v. Rush*, 15 Lea (Tenn.) 145, 150, it was said that:

"The statute was intended for the benefit of the general public, not for the servants of the company."

In accord with this are *Railroad v. Robertson*, 9 Heisk. (Tenn.) 276, and *Haley v. Railroad*, 7 Baxt. (Tenn.) 239, where it was ruled that the statute did not apply to employes about its yards.

In *Cox v. Railroad*, 2 Leg. Rep. 168, it was held to have no application to a stranger in the switching yards. Nor in any case where the plaintiff is a servant whose negligence contributed to the collision. *Railroad v. Rush*, 15 Lea, 145.

In *Railroad v. Hicks*, 89 Tenn. 301, 17 S. W. 1036, the statute was held not applicable to a railway employé using a railway velocipede in discharge of his duty.

In *Railroad v. Holland*, 117 Tenn. 257, 96 S. W. 758, it was again held that the statute is for the benefit of the general public only, and was not applicable to an employé using a velocipede for his own convenience and without consent of the company.

In *Rogers v. Railroad*, cited before, we held the statute not applicable to men doing construction work, whose duty kept them on or about the track, although not the direct servants of the railway company, but employes of a contractor doing such work for the company.

The court below submitted the case to the jury upon the single question as to whether the statute had been complied with, though he expressed the opinion that every requirement of the statute had been

complied with which was possible after the car was seen or could have been seen, saying very plainly, however, that they must for themselves determine this question of fact. Upon this single issue the jury manifestly found for the plaintiff. It is now urged that there was no such conflict in the facts as to make an issue to go to the jury, and that the court erred in not directing a verdict. Upon this point we have carefully examined the record, and are convinced that there was some material evidence upon which it was right to take the opinion of the jury. Thus, the men upon the engine say that they were upon the lookout ahead and did not see the approaching hand car until they were practically within a car length of it, and that they put on the brake and shut off steam, but before the brake could take effect the collision occurred, and that there was no time to do anything more. The speed of the train was about 15 miles per hour, and that of the hand car about the same. The survivors upon the hand car say that they saw the stack and front of the engine at a distance of 200 yards; that they applied the brake, and did all they could to stop the car; that it was slowing down, but, seeing a collision almost certain, they jumped off. Now it is plain that if the train could be seen by those upon the hand car at a distance of 200 yards, the lookout upon the engine ought to have seen the hand car nearly as soon. The only obstacle to a clear vision for a mile or more was a summer morning fog hanging on the river where it was crossed by the railway bridge. There was a conflict of opinion as to the thickness and height of this fog at this bridge, and as to its effects in hiding the approach of the train and hand car to each other. It cannot be said that there was not material evidence from which the jury might have inferred that, if the men on the engine had been as watchful for persons or obstructions upon the track as the statute, under the construction of the Tennessee court, required them to be, they might have seen this hand car before they say they saw it, and might have had time to have done more than they actually did do when they did see it. If, therefore, the statute was applicable upon the facts of the case, there was no error in letting the plaintiff go to the jury upon the question of whether it had been complied with so far as possible.

The learned counsel for the plaintiff in error now urge very strongly that upon the undisputed facts of this case the statute was not applicable, and that it was error to submit to the jury any question as to whether its rigid requirements had been complied with. They urge that, if it was not applicable, the company was under no other duty with respect to the plaintiffs as trespassers upon its hand car than to do all that could be done after this hand car was actually observed to be in danger of coming into collision with the train. It is also said that under the ruling in *L. & N. R. Co. v. McKenna*, 75 Tenn. 313, the statute does not apply when a passenger is injured in consequence of a collision which might have been avoided by observance of the statute, and that the liability must rest upon common-law principles; that under this construction of the statute, the statute had no application, even if the deceased be regarded as rightfully being transported as a passenger upon one of the company's vehicles. The difficulty which lies in the way of considering the case in either aspect is

that the case was tried out below upon the theory that the statute was applicable and had been complied with. The court so charged the jury, and no exception to this was reserved. Nothing is better settled than that a charge not excepted to below cannot be assigned as error in a court of review. Some of the cases in which this plain rule of practice has been applied are *Rogers v. Ritter*, 12 Wall. 317, 320, 20 L. Ed. 417; *Upton v. McLaughlin*, 105 U. S. 640, 644, 26 L. Ed. 1197; *Storm v. U. S.*, 94 U. S. 76, 81, 24 L. Ed. 42, and *Express Co. v. Kountze Bros.*, 8 Wall. 358, 19 L. Ed. 457.

But it is said that the denial of a peremptory instruction includes every ground upon which it ought to have been granted, whether stated or not. We have never regarded this court as concluded by the reasons stated by a trial judge for his action upon a motion for a peremptory instruction upon the close of the evidence. If the ruling was right upon any ground, it would be folly to reverse. Neither have we required that the grounds or reasons upon which such an instruction was asked should be always stated by counsel and shown by the record, when such denial is relied upon as error under an exception reserved, as seems to be the practice in the Seventh Circuit Court of Appeals. *Adams v. Shirk*, 104 Fed. 54, 43 C. C. A. 407. We have indulged the presumption, whether such a motion was allowed or disallowed, that it embraced an insufficiency of evidence upon any clear issue upon which the case was submitted to the jury. But we think this practice should not apply when it involves, as it does here, the necessity of holding that the court ought to have peremptorily instructed the jury upon a matter of law in direct conflict with the theory upon which the parties had tried the case, and with the charge of the court that the statute was applicable, to which no exception was taken. It is not just to the parties, nor to the trial judge, to permit this question to be raised for the first time in this court, when, as here, it is shown upon the record that the converse of the point now made was ruled by the court below, and no objection reserved.

Judgment affirmed.

ERIE R. CO. v. SCHULTZ.

(Circuit Court of Appeals, Sixth Circuit. November 16, 1909.)

No. 1,922.

1. TRIAL (§ 143*)—QUESTIONS FOR JURY—CONFLICTING EVIDENCE.

Where the question whether the watchman at a railroad crossing lowered the gates while a certain train was passing might have had a bearing on a case on trial, and the watchman's testimony was contradictory, the question was one for the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

2. RAILROADS (§ 328*)—ACCIDENTS AT CROSSING—CONTRIBUTORY NEGLIGENCE.

Plaintiff was driving with a load of lumber over the tracks at a street crossing of defendant's railroad, when the wagon was struck by a passing engine and he was injured. There were six tracks, and on the outside track, which was the second from that on which he was struck, cars

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were standing, which obstructed the view. There were gates at the crossing in charge of a watchman, which were up when plaintiff drove in; but whether they were closed when a train passed, just prior to that, or whether, if not, plaintiff observed the fact, was left uncertain by the evidence. Plaintiff was familiar with the crossing and knew it was dangerous. *Held*, that it was his duty to stop and listen before driving on the through track, where he was struck, if his view was so obstructed that he could not see, and that in failing to do so, and in driving on the track without exercising any care whatever to ascertain whether a train or engine was approaching, he was guilty of contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1057-1070; Dec. Dig. § 328.*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Action by August F. Schultz, guardian of John Balke, against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

I. T. Siddall, for plaintiff in error.

R. B. Newcomb, for defendant in error.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

SEVERENS, Circuit Judge. The defendant in error brought this action as guardian for John Balke, who is alleged to be insane, against the Erie Railroad Company, to recover damages for an injury to his ward, resulting from the negligence of that company in failing to close its gates at a street crossing in the city of Cleveland, or otherwise give him warning of an approaching engine when he was attempting to cross its tracks. The case was tried before a jury, and there was a verdict and judgment for the plaintiff.

The circumstances of the case appear to be these: The tracks of the company at the place where the accident and injury happened run approximately east and west. The street called Broadway, on which Balke was traveling, runs nearly north and south, slightly diagonally. There were gates on the north and on the south sides of the tracks, of which there were six in number, which were raised and lowered by a watchman in a tower near by, in order to prevent persons using the street from coming upon the tracks while trains or locomotives without trains were passing or about to pass over the crossing. About midday of November 5, 1906, Balke, a fairly intelligent man, about 55 years of age, familiar with the locality, was driving a two-horse wagon heavily loaded with lumber, coming from the south and proceeding across the tracks to the north. Shortly before he got to the railroad, a freight train passed through going east. The gates were up when Balke came to the track. A string of freight cars was standing at his right on the south track, which was used as a dead or storage track. He passed over that track, and over the one north of it, on which the freight train passed east, and was going over the next one, which was the main line for west-bound trains, when his wagon was struck in the rear wheel by an engine backing down from the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

east. Balke, who was sitting on the load, with his legs hanging over to the east, was thrown over his load to the ground, falling upon his back, and receiving a severe injury at the back of his head. It was several months before he got about, and ever since the accident he has given indications of physical impairment, and also of serious mental disturbance, on account of which the plaintiff was appointed his guardian.

It is not questioned that the gates were standing up, and that no warning was given Balke as he came upon the railroad. The negligence of the company is beyond doubt. The matters of controversy relate to the question of contributory negligence on the part of Balke. It seems clear from the record that he drove upon the tracks, and that he continued to advance, absorbed in meditation, until his horses were almost up to the track on which the engine was coming from the east, if they were not already upon it, when he was aroused to his peril by the shout of a man near by coming from the north. He then looked first one way and then the other, lashed his horses with his whip, and got partly over. It is urged in his exoneration that he had a right to assume that the way was clear from the fact that the gates were up, and that his view to the east was obstructed by the cars standing on the storage or dead track.

Before we take up the question which we shall mainly consider, it is necessary to state some further facts. The watchman who operated the gates from the tower testified that while the freight train was passing east he took a bucket and went down the ladder for some coal, and when he was part way up the ladder, returning, he became alarmed, and going up quickly saw Balke's peril, and called out to him to stop, which Balke did not do, because, as the witness thought, he did not hear him. His testimony as to whether he put down the gates for the freight train was conflicting. At one time his testimony indicated that it was improbable, if not impossible, that he put them down. At another he affirmed the contrary. It was his duty to have put the gates down, and his testimony that he did so was self-serving. It was a question for the jury to determine what was the right inference to be drawn. The court construed all of his testimony upon that point to mean that he put the gates down for the freight train and lifted them afterwards. But, as we have said, it was a question for the jury to settle.

Upon this subject counsel for the defendant below requested the court to instruct the jury as follows:

"(4) If you find from the evidence introduced in this case that just before the accident a train passed on the tracks, and that the gates were not lowered while such train passed, and that this occurred in the presence of Balke, then he would have noticed that the gates were not being operated, and would have no right to rely upon them; and if his view of the track as he approached it was so obscured by cars standing upon the side track that his vision could be of no service in enabling him to know of the approach of a train, then it was his duty to listen for the train, and, if necessary, because of the noise of his wagon or the noise of the train which had just passed, then he should have stopped to listen before driving upon the crossing; and if you find that he would not have been injured, but for his failure so to do under such circumstances, then plaintiff cannot recover, and your verdict should be for the defendant.

"(5) If Balke knew that the gates were not lowered for a train that passed on the east-bound track, then it became his duty to use all reasonable precautions for his own safety, in light of the fact that they were not in use; and such care required that he shall look for an approaching train or engine, and, if he could have seen the engine in time to have avoided the collision, had he looked, he was himself negligent, which would preclude him or his guardian from recovery."

If the facts were as assumed in these requests, particularly the fifth, it would take away the ground for the assumption by Balke that the way was clear because the gates were up; for he would have known that they were not being operated, and therefore that he must look out for himself. The situation was practically the same as if there were no gates there. And in that case his heedlessness was so gross, when he should have been alert and watchful, that the imputation of negligence would be unavoidable. The place was one of grave danger. Trains and engines running light were frequently passing to and fro. He had a heavy load, which could not be quickly moved out of the way. True, there was a string of cars standing on the dead track, which for a time would obscure his view to the east. Whether he could have seen the engine in time to have stopped after passing that obstruction soon enough to have avoided the danger is in fair doubt. It seems from the record probable, but not certain, that he could. If he could not, it was his duty to stop and listen. But he took no care whatever. His conduct was the same as if there had been no railroad crossing there. Apparently he assumed that, the gates being up, he had no need to watch. That it is incumbent on one crossing a railroad, who cannot, on account of obstructions, look along the track, to stop, if necessary, to listen, has been often held.

In the case of *Shatto v. Erie Railroad Co.*, 121 Fed. 678, 59 C. C. A. 1, where a string of cars prevented Shatto from looking along the track of a railroad crossing a city street, Judge Day, delivering the opinion of this court, said:

"Once through the opening by a horse's length, and he was practically upon the main track, with no probable means of escape from death or injury. He could see nothing, and a strong wind from the south was blowing up the track, and carrying the sound of any approaching train from the north away from him. Under such circumstances, he was bound to use the only sense which could help him to avoid danger with the more vigilance."

Judge Thayer used similar language in delivering the opinion of the Circuit Court of Appeals for the Eighth Circuit in *Chicago, etc., R. R. Co. v. Pounds*, 82 Fed. 217, 27 C. C. A. 112, where he said:

"A railroad track is in itself a warning of danger, because trains may be expected at any moment. Therefore the courts have repeatedly declared that a person is as a matter of law guilty of contributory negligence, if he drives upon a crossing without making a vigilant use of his senses of sight and hearing. If either of these senses is impaired, or for any reason cannot be exercised to advantage, he ought to be the more vigilant in the use of the other."

In *Chicago & N. W. Ry. Co. v. Andrews*, 130 Fed. 65, 72, 64 C. C. A. 399, several other cases are cited where the same rule was applied to like conditions. And in the case of *McCann v. Chicago, M. & St. P. Ry. Co.*, 105 Fed. 480, 44 C. C. A. 566, it was said by the

Court of Appeals for the Seventh Circuit of the negligence of the plaintiff in such circumstances that:

"If he could not hear, he was under all the more obligation to use the senses he had."

There can be no doubt that it is the generally accepted rule of decision. Exceptional circumstances may exist in which it may be less strict, as in the case of *C., N. O. & T. P. R. Co. v. Farra*, 66 Fed. 496, 13 C. C. A. 602, where a woman was driving down through a deep cut upon a railroad with two small children, one of them in her lap, in a carriage, at a time when she knew no regular trains were passing, and was struck and injured by a special train moving 40 or 50 miles an hour. She could not see the train until she got down to within a few feet of the track. She had not stopped, but she was attentive to the situation, and had been listening to hear any passing train, and her horse was walking. We sustained a judgment for the plaintiff; but we recognized the general rule, Judge Lurton, who delivered the opinion, saying:

"The general rule would, of course, demand that a vigilant use should be made of the eye in looking and of the ear in hearing. The failure to exercise these faculties by one approaching a crossing would be such a departure from the observance of that degree of caution exercised by prudent persons at such crossings, as to raise, under ordinary circumstances, an inference of negligence, about which reasonable men would not disagree."

Thus far we have considered the case upon the assumption that there was evidence from which the jury might have found that the gates had not been put down for the freight train going east, and that Balke knew this; and upon that state of facts, we have held that he was not entitled to recover. The learned judge assumed the facts to be otherwise, and charged the jury as if the facts were established according to his understanding. He said:

"What was the conduct of Balke, under all the circumstances and conditions that surrounded him as he was crossing those tracks? The open gates were an invitation to him of safety. As I said a moment ago, that does not mean that he must not use his faculties to discover whether there is danger or not; but it does mean that he is in a different position, that his mind is less charged with a sense of danger, than occurs when a person approaches a railroad crossing at which there are not gates and a gateman."

Upon the question whether the court should have instructed the jury that the plaintiff was not entitled to recover because of his own negligence, a majority of the court are of opinion that the judge would not have been justified in taking that course. This view is induced largely by the fact that the record does not show with sufficient clearness whether Balke could have seen the approaching engine for a sufficient time after he had passed the obstruction and got a view to the east to have enabled him to stop before he drove upon the track. As upon a new trial the situation may be more definitely shown, we forbear further discussion of this aspect of the case.

The judgment must be reversed, and a new trial awarded.

UNITED STATES v. ATLANTIC COAST LINE R. CO.

(Circuit Court of Appeals, Fourth Circuit. July 14, 1909.)

No. 893.

1. ACTION (§ 18*)—CIVIL OR CRIMINAL—INTERSTATE CARRIERS OF LIVE STOCK—TWENTY-EIGHT HOUR LAW.

An action by the United States against a railroad company to recover the penalty imposed for violation of Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), relating to the carriage of live stock and known as the "Twenty-Eight Hour Law," is a civil suit, with all the incidents of such a suit.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 95-104; Dec. Dig. § 18.*]

2. CARRIERS (§ 37*)—INTERSTATE CARRIERS OF LIVE STOCK—TWENTY-EIGHT HOUR LAW.

It is no defense to such an action for "knowingly and willfully" violating the statute that the defendant made rules requiring its employes to comply with the same, and that its failure to do so was through the negligence of an employe and in violation of its rules.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*]

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk.

Action by the United States against the Atlantic Coast Line Railroad Company to recover the penalty for violation of the twenty-eight hour law. Judgment for defendant, and plaintiff brings error. Reversed.

This is a writ of error to a judgment of the District Court for the Eastern District of Virginia, rendered in an action of debt wherein the United States was plaintiff, and the Atlantic Coast Line Railroad Company, a corporation engaged in interstate commerce, was defendant. This action was brought to recover a penalty of five hundred dollars for a violation of Act June 29, 1906, c. 3594, § 1, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), known as the "Twenty-Eight Hour Law." The first section of the act reads as follows: " * * * No railroad, express company, car company, common carrier other than by water, or the receiver, trustee or lessee of any of them whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: Provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contingencies hereinbefore stated: Provided, that it shall not be required that sheep be unloaded in the nighttime, but where the time expires in the nighttime in case of sheep the same may continue in transit, to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours."

The declaration states that on the 15th day of April, 1907, the defendant company was, and has ever since been, a common carrier and railroad corporation, operating a road over which cattle, sheep, swine, and other animals are conveyed from the state of North Carolina into the state of Virginia, and that on the said 15th day of April it undertook and promised to convey from Aulander, in North Carolina, to Norfolk, in Virginia, certain cattle, namely, three calves, for which a bill of lading in due form was made out and delivered by the defendant to the consignor; that on the same day the calves were loaded by the defendant in one of its freight cars at Aulander for transportation to Norfolk, which car was not supplied with food and water; and that in conveying the said calves between the points above mentioned the defendant knowingly and willfully kept the same continuously confined in said car for a period longer than 28 consecutive hours, to wit, for 50 consecutive hours, without unloading them in a humane manner into properly equipped pens for rest, water, and feeding. The defendant pleaded *nil debet*, upon which plea issue was joined, and thereupon the parties filed a written stipulation, waiving a jury, and submitting the whole matter of law and fact to the court.

The following is the agreed statement of facts upon which this case was determined by the lower court:

"On April 15, 1907, Conductor E. L. Hollingsworth, on north-bound local freight train, carrying cars known as 'pedlers,' used for picking up freight at various stations en route, at Aulander, N. C., loaded on one of these pedlers cars three calves, crated, consigned to Mr. C. R. Robinson, Norfolk, which were duly entered on waybill, copy of which is hereto attached, and at the same time he received from the agent at Aulander a conductor's live stock report, form 265, copy of which, with blanks unfilled, is hereto attached for illustration, upon which were entered the notations as indicated on the waybill. This train had a small engine and was overloaded with cars, and the conductor was directed to leave five or six of the cars at Ahoskie, with the waybill for the same, to be picked up by a following through freight train. The conductor did not examine the bill upon which the calves were noted, and when he left the car containing the same at Ahoskie, to be picked up by a later through freight train, he failed to call the agent's attention to the fact that it contained these calves. For this reason the car was not forwarded promptly, and arrived at Pinners Point on the night of April 16th, and, there being no facilities for the delivery of live stock at night to the Union Stockyards in Berkeley, the parties to whom delivery was to be made, they were delivered to the consignee on the 17th inst. The company has rules which are delivered to train masters, yard masters, station agents, conductors, and others concerned in the transportation of live stock, and posted in the bulletin books at designated points, which conductors are required to read and sign, the latter to inform the train master that they had read the circular, which prohibits the carrying of live stock for more than 28 consecutive hours without being within that period fed and watered, copy of circular hereto attached. In addition to this circular, the company has a rule, which station agents and conductors are required to obey, that upon the shipment of live stock telegraphic notice is sent to the superintendent of the district over which the shipment moves, who in turn is required to notify the station of destination. These rules are rigidly enforced, and a violation of them, when brought to the attention of the proper official, is followed by suspension or dismissal as the gravity of the case may require. In this particular case, the offending conductor, Hollingsworth, made a statement, copy of which is hereto attached, admitting his fault in not obeying the rules of the company, and he was promptly discharged from the service of the company for this and other violations of the rules, before the institution of this suit. The calves were not unloaded for rest, water, and feeding between the time they were loaded at Aulander, on the 15th of April, 1907, at 10:30 o'clock a. m., and their arrival at Pinners Point, and were not unloaded until the 17th of April; they having been kept continuously confined in the car and in the crate in which they were shipped during the time just stated."

L. L. Lewis, U. S. Atty., for plaintiff in error.

Wm. B. McIlwaine and D. Tucker Brooke, for defendant in error.

Before PRITCHARD, Circuit Judge, and KELLER and McDOWELL, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). The statute under which this action was instituted is entitled:

"An act to prevent cruelty to animals while in transit by railroad or other means of transportation from one state or territory or the District of Columbia into or through another state or territory or the District of Columbia," etc.

Thus it will be seen that the purpose of the statute is to prevent any common carrier engaged in transporting interstate commerce from confining cattle, sheep, swine, or other animals in cars, boats, or vessels for a longer period than 28 consecutive hours without unloading the same in a humane manner into properly equipped pens for rest, water, and feeding, for a period of at least 5 consecutive hours—

"unless prevented by storm or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight."

The enactment of this law does great credit to our lawmakers, and it should be construed in the spirit in which it is written. Humane instinct forbids that we should cruelly treat or otherwise abuse dumb animals. It is true that, by virtue of Divine authority, they are under the dominion and control of man; yet we are taught from the same source that we should use all means in our power to prevent them from being subjected to unusual or cruel treatment. It was undoubtedly the purpose of Congress in the enactment of this law to make ample provisions for the protection of animals while being transported by interstate carriers.

According to the greater weight of authority, a suit of this character is treated as being a civil proceeding. In the case of *Atcheson v. Evart*, 1 Cow. 389, 391, which was an action to recover statutory penalty, Lord Mansfield said that:

"Penal action is as much a civil action as an action for money had and received."

Also in the case of *Jacob v. United States*, 1 Brock, 520, 525, Fed. Cas. No. 7,157, Chief Justice Marshall, in discussing this phase of the question, said that:

"Such an action is a 'civil cause' under the ninth section of the judiciary act of 1789 (Act Sept. 24, 1789, c. 19, 1 Stat. 76), defining the jurisdiction of the District Courts."

The principal question to be determined is as to whether the defendant company "knowingly" and "willfully," within the meaning of the statute, kept the calves in question continuously confined in the car in which they were loaded, as stated in the declaration, for a period longer than 28 consecutive hours, without unloading them for rest, water, and feeding. The duty enjoined upon the company by the statute is plain and explicit, and as to its true meaning there can be no

doubt. The only instance wherein the company is released from performing this duty is—

“when prevented by storm or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight.”

The proper construction of the foregoing provision must necessarily determine the question involved in this controversy. It is insisted by counsel for plaintiff in error that this is a penal statute, and that it was passed in the interest of the public, imposing upon the company a penalty as a punishment for doing a prohibited act, and that the words “knowingly” and “willfully” import an evil intent, and, therefore, in order to sustain a verdict in favor of the plaintiff, it must appear that the act complained of was knowingly and willfully committed in the sense in which these words are used where one is charged with a criminal offense. It has been decided a number of times that the statute in question is not a criminal one, and that it should not be construed according to the strict rules by which courts are governed in criminal cases.

In the case of *Armour Packing Co. v. U. S.*, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400, it was held:

“But no evil intent is essential to an offense which is merely *malum prohibitum*. The simple purpose to which the act forbidden, in violation of the statute, is the only criminal intent requisite to the conviction of a statutory offense which is not *malum in se*. Bishop on Statutory Crimes, § 596b; 1 Bishop's Criminal Law (8th Ed.) pt. 4, §§ 343, 345.”

This case was finally carried to the Supreme Court of the United States. That court, in passing upon this point, said (209 U. S. 85, 28 Sup. Ct. 437, 52 L. Ed. 681):

“While intent is in a certain sense essential to the commission of a crime, and in some classes of cases it is necessary to show moral turpitude in order to make out a crime, there is a class of cases within which we think the one under consideration falls, where purposely doing a thing prohibited by statute may amount to an offense, and that the act does not involve moral turpitude or moral wrong.”

In the case of *N. Y. Cent. & H. R. R. Co. v. U. S.*, 165 Fed. 833, 91 C. C. A. 519, the Circuit Court of Appeals for the First Circuit, in passing upon this question, said:

“The word ‘willfully’ is sometimes used in statutes and indictments, and sometimes omitted from them, for very different reasons. In order that there shall be a punishable evil intent, the criminal law ordinarily requires that there shall be a knowledge of facts, and when with a knowledge of the facts is combined an injurious result which the actor foresaw, or might reasonably have foreseen, all the law ordinarily implies by the word ‘willfully’ is accomplished.”

In the case of *United States of America v. Union Pacific Railroad Company* (decided January 15, 1909) 169 Fed. 65, the Circuit Court of Appeals for the Eighth Circuit, in referring to a suit of this character, said:

“The defendant denies that its failure to unload the said live stock in accordance with the law was in any way willful or from unavoidable cause which could have been anticipated by the exercise of due diligence and foresight, but, on the contrary, avers that the said failure was wholly caused by

the great and unusual press of business, both on the tracks of the defendant and its stockyards, causing delays at the meeting points of its trains, and failures of its engines, both those carrying the cars aforesaid and those drawing other trains, which affected and delayed the train carrying the said live stock, and alone caused the said live stock to be confined beyond the time limited by law. Counsel for defendant contend that the word 'willfully,' as employed in the statute, necessarily implies an evil purpose or bad motive, and have in their brief collected and reviewed many cases dealing with this word. We find no occasion, however, to follow them through this maze of authority. The word is here employed in connection, not with a crime, or offense *malum in se*, but with an offense purely statutory subjecting the offender to a civil action only. In view of our former rulings on this question, we are of opinion, and so hold, that as here employed the word means only the intentional doing of an act forbidden by the statute. * * * To hold that some evil purpose or bad motive must be shown in order to constitute a cause of action under section 3 of the act of June 29, 1906, would, in our opinion, thwart the obvious purpose of the legislation. It can hardly be conceived that any reputable carrier would deliberately and designedly, because of ill will or other malevolent feelings towards the dumb animals or their owners, fail to conform to the reasonable and humane requirements of the law. If the law be operative only to restrain the possible exercise of such evil and perverse disposition, it would have little, if any, scope of operation."

As appears from the agreed statement of facts, Conductor Hollingsworth, on a freight train carrying cars known as "pedlers," used in picking up freight at various stations en route, at Aulander, N. C., loaded on one of these cars three calves, crated, consigned to Mr. C. R. Robinson, at Norfolk. It also appears that the shipment was duly noted on the waybill, and that the conductor received from the agent at Aulander a conductor's live stock report, form 265, upon which was entered the notations as indicated on the waybill. It appears from the testimony of the conductor that the train had a small engine, and, being consequently overloaded with cars, he was directed to leave five or six of the cars at Ahoskie, with the waybills for the same. It also appears that the conductor did not examine the waybill upon which the calves were noted, and, when he left the car at Ahoskie, he failed to call the attention of the defendant's agent at that place to the fact that it contained the calves in question; that, owing to his failure to do so, the car was not promptly forwarded and delivered, and that the car containing the calves did not reach Pinners Point until the 17th day of April, two days after their shipment, and were kept confined continuously during that time in the car in which they had been loaded at Aulander until the day on which they were delivered at Pinners Point. It also appears that the calves were not unloaded for rest, water, and feeding between the time they were loaded at Aulander and the time they were unloaded at Pinners Point.

It is true that the defendant company, by its rules, which are delivered to train masters, yard masters, station agents, conductors, and others employed in the transportation of live stock (and which conductors are required to read, sign, and to inform the trainmaster that they have read the circular), prohibits the carrying of live stock for more than 28 hours without being, within that period, properly fed and watered. It also appears from the statement of facts that the company has a rule to the effect that upon the shipment of live stock telegraphic notice is sent to the superintendent of the district over which the ship-

ment moves, and who, in turn, is required to notify the station of destination; that these rules are rigidly enforced, and, in case there is a violation of them, the party thus offending is suspended or dismissed, as the gravity of the case may require. Conductors and station agents are required to obey this rule. It also appears that the conductor in this instance admitted that he did not obey the rules of the company, and it further appears that he was discharged from the service of the company for this and other violations of the rules before the institution of this suit.

That the failure of the conductor to examine the waybill upon which the calves were noted, and his failure to call the attention of the defendant's agent at Ahoskie to the fact that it contained these calves, was inexcusable negligence on his part, cannot be denied. But it is insisted by defendant below that, inasmuch as the company took the precautions hereinbefore mentioned to insure a strict compliance with the law on the part of its conductors, agents, and other persons, such action on its part is sufficient to relieve the company from liability, notwithstanding its agent, the conductor, wholly neglected to perform the duties enjoined upon the company by the statute. And the question naturally arises as to whether this is a valid defense under the statute. It is well settled that a corporation can only act through its agents, and, such being the case, it necessarily follows that a lack of foresight and due diligence on the part of those acting as agents in complying with the statute is negligence. Therefore, in this instance, we think the corporation has, within the meaning of the statute, "knowingly" and "willfully" failed to comply with the law, notwithstanding the fact that there may have been no evil motive or intent in the transaction. In other words, we think a negligent failure to comply with the law, with a knowledge of facts as shown in this instance, is willful failure.

The case of *Montana Central Railway v. U. S.*, 164 Fed. 400, 90 C. C. A. 388, involved a shipment of horses, and the answer filed therein averred, among other things, that long prior to the time the shipment in question was made the defendant company, by printed circulars and otherwise, addressed to its agents, notified them of the conditions and requirements of the act, and also stated to them that they were required to conform strictly with the requirements of the same, and that afterward a circular was issued, addressed to all agents, yard masters, and others in the employ of the company, again requiring of them strict compliance with the law, and that both of these circulars were duly posted. It was further averred that the failure to unload the horses for rest, water, feeding, etc., was due to the forgetfulness and unintentional neglect of its train dispatchers at Great Falls, etc. This case was heard by the Circuit Court of Appeals for the Ninth Circuit, and, in disposing of the contention of the defendant to the effect that, inasmuch as it had taken the pains to advise its agents and other employes as to the provisions of the statute, and had also compelled all such persons to conform strictly to the instructions contained in the circulars for the observance of the act, Judge Ross said:

"The sole defense is that the statute imposes the penalty only on the carrier who 'knowingly' and 'willfully' fails to comply with its provisions; and it

is earnestly contended for the plaintiff in error that the company here did not 'knowingly' and 'willfully' confine the horses for the time and under the circumstances stated. Its counsel insists that the case, if not a criminal one, is at least of a criminal nature, and that to it should be applied the same strict rules of construction and of evidence which are applied in criminal prosecutions. In that contention he is supported by the cases of *United States v. Louisville & N. R. R. Co.* (D. C.) 157 Fed. 979, and *United States v. Illinois Central Railroad Company* (D. C.) 156 Fed. 182. But we are unable to take that view of the matter. We do not understand the statute to make a violation of its provisions a crime. It is true that a penalty is imposed for its violation; but the penalty is a pecuniary one only, which Congress expressly provided shall be recovered by civil action in the name of the United States, having, as we think, the ordinary incidents of a civil action. This view is in accord with that taken of the same and of a similar statute in the case of *United States v. Southern Pacific Railroad Company* (D. C.) 157 Fed. 459, *United States v. Central of Georgia Railway Company* (D. C.) 157 Fed. 895, *United States v. Philadelphia & Reading Railway Company* (D. C.) 160 Fed. 696, and *United States v. Baltimore & Ohio S. W. R. R. Co.* (C. C. A.) 159 Fed. 33, 86 C. C. A. 223. The company, being a corporation, could, of course, only act through agents, and its answer expressly alleges that the horses in question were confined on its cars in violation of its statutes by reason of the oversight, forgetfulness, and unintentional neglect of its train dispatchers. As was held by the court below, we think the facts as expressly alleged in the answer negative the claim that the failure to rest, feed, and water the horses was not the result of knowledge and willfulness on the part of the company. It knew through its agents, and through them only could know, that the horses were loaded on its cars, when their transportation commenced, where it should rest, water, and feed them as required by the statute, instead of doing which, through its agents, it continued to carry them in its cars longer than the statutory period of 28 hours without rest, feed, or water. When the company did this, according to its own averments, by and through the only means it transported or could transport them, at all, namely, its agents, we do not think that it can be heard to say that it did not do so 'knowingly and willfully.'

It cannot be reasonably contended that the failure of the company in this instance to unload the calves "in a humane manner into properly equipped pens for rest, water, and feeding," was due to "storm or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due care and foresight." It was admitted by the conductor that he neglected to examine the waybill upon which the calves were noted, either before or at the time he left the car containing the same at Ahsokie. This was clearly negligence on his part, and on account of which he was very properly removed by the company. The negligence of the conductor in this respect was the negligence of the company, and clearly renders the corporation liable under this statute.

If the publication of circulars, as well as rules, delivered to train masters, yard masters, station agents, and others concerned in the transportation of live stock, and posted on bulletin boards at designated points, which conductors are required to read and sign (and the latter to inform the train master that they have read the circulars), which prohibits the carrying of live stock for more than 28 hours without being within that period properly fed and watered, is sufficient to relieve the company from liability for the acts of its servants and agents, the corporation would thus be enabled to practically nullify the statute and render its provisions nugatory. The defendant bases its defense upon the ground that a corporation can, in advance, by the pub-

fication of letters, circulars, and otherwise, as to the duties to be performed by its servants, agents, etc., placed itself in a position where, notwithstanding the fact that its agents may violate the law with impunity, the corporation cannot be reached by the statute which was passed for the express purpose of requiring at its hands the performance of a duty which is imperative and cannot be avoided, except as hereinbefore stated. A simple statement of the proposition clearly shows the fallacy of the theory as a defense in this instance relied upon by the defendant.

We have carefully considered the various cases cited by counsel for defendant in support of their contention; but we do not think that we are governed by the rule laid down in these cases in the consideration of this controversy. It follows, from what we have said, that the judgment of the court below must be reversed. Inasmuch as this case was tried wholly upon an agreed statement of facts, we would, if the sum recoverable by the United States were definitely fixed by the statute, direct the entry of a judgment therefor; but, inasmuch as section 3, Act June 29, 1906, prescribes a penalty of not less than \$100 nor more than \$500 for a violation of its provisions, there is here matter of discretion to be exercised by the trial court, and the course followed in *Rathbone v. Board of Com'rs*, 83 Fed. 125, 27 C. C. A. 477, by the Circuit Court of Appeals for the Eighth Circuit, is not here applicable.

The judgment of the court below is therefore reversed, and the case will be remanded for further proceedings in accordance with the views herein expressed.

Reversed.

WALKER ROOFING & HEATING CO., Inc., v. MERCHANT & EVANS
CO. et al.

(Circuit Court of Appeals, Fourth Circuit. July 13, 1909.)

No. 883.

1. BANKRUPTCY (§ 91*) — INVOLUNTARY PETITION — CORPORATION — NATURE OF BUSINESS—BURDEN OF PROOF.

On an involuntary bankruptcy petition against a corporation, the burden is on petitioner to show by a preponderance of the evidence that the corporation conducted a business which could be properly termed "manufacturing," "trading," or "mercantile."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137, 138; Dec. Dig. § 91.*]

2. BANKRUPTCY (§ 72*)—INVOLUNTARY BANKRUPTCY—"MANUFACTURING CORPORATION."

The term "manufacturing," as used in the bankruptcy act of 1898, authorizing involuntary bankruptcy against corporations engaged in manufacturing, embraces only such corporations as are engaged in manufacturing as a business and selling their wares on the market, doing those things

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

usually done by those who not only manufacture their wares and goods, but place them on the market for sale either by wholesale or retail.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 17; Dec. Dig. § 72.*]

For other definitions, see Words and Phrases, vol. 5, p. 4364; vol. 8, p. 7716.

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

3. BANKRUPTCY (§ 72*)—INVOLUNTARY BANKRUPTCY—CONSTRUCTION CORPORATION—MANUFACTURING.

Where a corporation's articles provided that the corporation's activities should be the roofing of buildings and other structures, the installation of heating apparatus, the construction of houses and other structures, and the carrying on of a general roofing, heating, and construction business, and such was the corporation's principal business, its manufacturing being only incidental thereto, it was not engaged in manufacturing within the bankruptcy act of 1898, and was not subject thereto.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 17; Dec. Dig. § 72.*]

4. BANKRUPTCY (§ 91*)—CORPORATIONS—CORPORATE BUSINESS—EVIDENCE.

Evidence that a corporation's predecessors in business had sold considerable merchandise was irrelevant on the issue whether the corporation was a manufacturing or business corporation within the bankruptcy act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 138; Dec. Dig. § 91.*]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk, in Bankruptcy.

Involuntary bankruptcy proceeding by the Merchant & Evans Company and others against the Walker Roofing & Heating Company, Incorporated. From an order adjudging defendant a bankrupt, it appeals. Reversed.

In this case a petition for involuntary bankruptcy was filed against the appellant by three creditors, and a receiver appointed. It is alleged in the petition that the company "is and has been engaged principally in manufacturing, trading, and mercantile pursuits," and the act of bankruptcy charged is its execution of a deed of general assignment. The company, answering, denied the allegations as to the character of its business, and denied that it is within the purview of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). The matter was referred to the referee, who held that it was not such a corporation as was amenable to the bankrupt law; that it was engaged in roofing and installing steam heat in buildings, and manufacturing nothing except as incident to the particular job; that, although it kept on hand cornices and things of that kind, this was simply to enable it to carry out its own work. In the report of the referee was a summary of the evidence. The creditors excepted to this report, and, after argument, the district judge adjudged the company to be a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy. From that order this appeal was granted.

Robert M. Hughes (W. W. Starke and J. D. Hank, on the brief), for appellant.

Edward R. Baird, Jr. (G. R. Swink, on the brief), for appellees.

Before PRITCHARD, Circuit Judge, and KELLER and McDOWELL, District Judges.

PRITCHARD, Circuit Judge (after stating the facts as above). The only question to be determined is as to whether the appellant company "is and has been engaged principally in manufacturing, trading, and mercantile pursuits." The burden is on the petitioner in a proceeding of this character to show by a preponderance of evidence that the company conducted a business which could be properly termed "manufacturing," "trading" or "mercantile." In *re Taylor*, 102 Fed. 728, 42 C. C. A. 1; *Chicago Co.* (D. C.) 104 Fed. 67; In *re Quimby*, 126 Fed. 167, 61 C. C. A. 111; *Loveland, Bankruptcy* (3d Ed.) 276, 277.

The referee, in his report, among other things, made the following statement as to the facts upon which he based his report:

"Several witnesses were examined, and, except for the statement that the alleged bankrupt, in the course of its business, occasionally allowed the machinery of its establishment to be used for cutting out plates of tin roofing for other concerns, there was no evidence of any kind which differentiated this case from the case of *McNichol Construction Company*, decided by the Judge of this court, in which it was held that a construction company was not a manufacturing company within the meaning of the statute. The alleged bankrupt in this case was engaged in putting on roofing and installing steam heat in buildings. It manufactured nothing; its duties simply being to go on the roof of the house and cut tin, or other roof covering, to suit the particular job, and to complete the work in that particular. It is true that it kept on hand cornices and things of that kind, but this was simply in order to enable it to carry out its general purpose, and not for the purpose of sale in the general course of trade."

The following is a summary of the evidence taken before the referee:

"The record shows: That prior to July 18, 1908, F. B. Walker conducted a general roofing and heating business in the city of Norfolk, Va. That in conducting said business he operated a shop or plant in which was installed certain machinery. That he carried a stock of materials on hand. On July 18, 1908, this business was transferred to the Walker Roofing & Heating Company, Incorporated, which continued the business until August 6, 1908, when it executed a general deed of assignment to J. D. Hank, trustee. A petition in bankruptcy was filed about August 29, 1908. The receiver in bankruptcy, John W. Oast, Jr., testified that on his appointment as such receiver he took charge and caused a careful inventory to be made. This inventory showed machinery on hand of about \$903, stock on hand of about \$2,600; that the machinery consisted of two cornice brakes, squaring machine, a set of rollers, etc., used for the purpose of making cornice work from galvanized iron in sheets, cutting, edging, soldering, and rolling tin from box tin, and also used for the purpose of making furnace casings, heating pipes, gutters, etc., and also other small machinery in the factory; that in stock there was considerable box tin and galvanized iron in sheets; that from an inspection of the books there were no present contracts on hand sufficient to use this material in stock; that the only merchandise exchanged since the transfer to the company was with the Columbia Stove Company at actual cost. Mr. Odendthal of that company testified that the exchange was purely for accommodation, and the goods were billed at cost; that the books showed a large number of accounts with various concerns and people in this city for merchandise, and no labor was charged. One of these accounts was examined, and it showed that in less than one year merchandise had been delivered to the Bohn Roofing & Cornice Company engaged in similar business, to an amount of about \$900, of which amount about \$34 was returned in kind, and the balance paid for in cash. That these accounts were, however, contracted before the incorporation of the company now sought to be adjudicated bankrupt, and were sold altogether at

cost. F. B. Walker, testifying in behalf of the alleged bankrupt, stated that their principal business was roofing and heating; that they did not manufacture anything; that they did not use the machinery to manufacture anything; that the company had not bought any material, except for particular contracts, and the material was used, or to be used, on these particular contracts; that the company purchased tin in rolls as well as in boxes, and purchased some castings and piping already made up, and some cornice work made up. He also testified that the company had bought about \$2,000 of box tin and galvanized iron in sheets; that they did only contracting business, and, in explaining the accounts referred to by the receiver, stated that they exchanged materials with other dealers when in need of a particular kind of material, and that same would be returned in kind and vice versa. Geo. B. Crow, for petitioners, testified that he was in a similar business, and was acquainted with the alleged bankrupt's business; that the cornice brackets referred to by the receiver were used for the purpose of making up cornice designs, and that these designs were made up from sheets of galvanized iron; that the designs can be purchased made up, but there is a saving in the price of more than 25 per cent.; that box tin is not placed on a roof in that shape, but that it is cut, squared, edged, soldered, and rolled; that it can be purchased either in boxes or in rolls, but that the price of box tin is about 25 per cent. cheaper than rolled tin."

In enacting this provision of the bankruptcy law it was evidently the purpose of Congress to exempt construction and other companies from its provisions where manufacturing is incident to the principal business in which they are engaged. While it was the purpose of Congress to subject those engaged in manufacturing, trading, and mercantile pursuits to the provisions of the bankruptcy act, nevertheless those who framed the act in question were undoubtedly cognizant of the fact that in many instances manufacturing is a part of and an incident to the main business, and yet in such cases it cannot be said that manufacturing is the principal business in which such companies are engaged. It is the manifest intention of the act to reach those who are engaged in manufacturing as a business, and as such sell their wares on the market and do those things that are usually done by those who not only manufacture their wares and goods but place them on the market for sale either by wholesale or retail.

In this instance there is a lack of proof to show that the appellant was principally engaged in manufacturing, trading, or mercantile business. This court in the case of *Butt v. MacNichol Construction Company*, 140 Fed. 840, 72 C. C. A. 252, held that a construction or contracting company did not come within the term "manufacture." That opinion is based upon the principle that, even though such companies may make things for use in their construction work that would be "manufactured" if made by a company for that special purpose, yet the making of such things by a construction company is only incident to their principal business and constitutes but a step in finishing the final product—such, for example, as a house, which, when completed, is permanently attached to the soil and thereby becomes a part thereof, and in itself is not to be classed among those things that are subject to sale or exchange as incident to manufacturing, trading, or mercantile business.

See, also, *Contractors' Co. v. Hill Co.*, 148 Fed. 832, 78 C. C. A. 522; *Hall & Kaul Co. v. Friday*, 158 Fed. 593, 87 C. C. A. 23; *Kings-*

ton Realty Co., 160 Fed. 445, 87 C. C. A. 406; N. Y. Tunnel Co. (C. C. A.) 166 Fed. 284.

One of the best means of ascertaining the character of the business of a particular company is by an examination of the provisions of its charter in that respect. The following, contained in the charter of the appellant company, is an explicit statement as to the purposes of the company:

"The purposes for which it is formed are to roof buildings and other structures, to install heating apparatus in the same; and contract for and build houses or other structures and engage in a general roofing, heating, and construction business."

While it has been held that the charter of a company is not conclusive in this respect, yet this, among other things, is evidence which should be considered in determining the question as to the character of the business in which this company was engaged at the time the petition was filed herein. Not only does the charter limit the extent and character of the business in which this corporation was engaged, but it clearly defines the same; and this, taken in connection with the other evidence before the referee, shows conclusively that this company did not have any principal business not contemplated by its charter.

Act March 2, 1867, c. 176, 14 Stat. 517, was much broader in its scope in this respect than the present law. It included "all moneyed business or commercial corporations and joint stock companies," while section 4 of the present act includes only "corporations engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits." That the modification of this provision of the act of 1867 in this respect as found in the present law was intended to inure to the benefit of the debtor, for the reasons hereinbefore stated is unquestioned. This is fully borne out by the rule announced in the case of Philadelphia & Lewes Trans. Co., *In re* (D. C.) 114 Fed. 403; U. S. Hotel Co., *In re*, 134 Fed. 225, 67 C. C. A. 153, 68 L. R. A. 588; and Mac-Nichol Construction Co., *In re*, 140 Fed. 840, 72 C. C. A. 252.

It appears from the evidence that this company within less than a year had delivered to the Bohn Roofing & Cornice Company engaged in a similar business, merchandise amounting to about \$900, of which amount about \$34 was returned in kind and the balance in cash, and this fact is relied upon to support the contention that this company was engaged in a trading and mercantile business. However, the record shows that these accounts were contracted before the company now sought to be adjudged a bankrupt was incorporated and were sold altogether at cost. This evidence, therefore, was not material in so far as the issue involved in this controversy is concerned, and does not in the slightest degree tend to support the contention that the business in which the appellant was engaged is subject to the provisions of the bankruptcy law. The whole course of business carried on by the appellant clearly indicates that its principal business was that of roofing, heating, and construction; and that the articles manufactured and thus kept on hand were merely used as incidental to the business in which the alleged bankrupt was engaged.

We have carefully considered the cases relied upon by the appellee, and are of the opinion that they are not applicable to the case at bar.

For the reasons hereinbefore stated, the judgment of the lower court is reversed, and the case is remanded with instructions to proceed in accordance with the views herein expressed.

Reversed.

WEIR et al. v. ROUNTREE.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1909.)

No. 3,086.

1. COMMERCE (§ 10*)—NEGLIGENCE OF CARRIER—LIABILITY—LAW GOVERNING.

The liability of a railroad company for an injury resulting from its negligence, in the absence of any controlling federal statute relating to interstate commerce, is governed by the law of the state where the injury occurred, whether statutory or the common law as construed by its courts.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. § 10.*]

2. CARRIERS (§ 307*)—LIABILITY FOR NEGLIGENCE—INJURY TO EXPRESS MESSENGER—CONTRACTS LIMITING LIABILITY.

Under the provisions of Gen. St. Kan. 1901, §§ 5857, 5858, making railroad companies liable for all damages to persons or property caused by their negligence, and for injuries to employes through their negligence or that of other employes, which, as construed by the Supreme Court of the state, render void any contract limiting such liability, a contract between an express company and a railroad company that the former shall indemnify and save the latter harmless against any liability on account of the injury or death of any employé of the express company while in the cars or about the platforms of the railroad company, whether resulting from its negligence or otherwise, and a second contract between the express company and an employé by which the employé assumes all risks of accidents or injuries while riding on the cars of any railroad, and expressly ratifies the contract between the express company and railroad company, and agrees to save the express company harmless from any liability thereon, wherever such contracts were made, are not available as a defense to an action against the railroad company by the widow of the employé to recover damages for his death, occurring in Kansas through the alleged negligence of the railroad company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1252; Dec. Dig. § 307.*]

Limitations of liability for personal injuries to passengers, see note to Clark v. Greer, 32 C. C. A. 301.]

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Suit in equity by Levi C. Weir, W. H. Damsel, and Charles Steele, president and trustees of the Adams Express Company, against Amy J. Rountree. Decree for defendant, and complainants appeal. Affirmed.

E. L. Scarritt (William C. Scarritt and Elliott H. Jones, on the brief), for appellants.

Eugene F. Ware (Biddle & Lardner, Edwin Frieze, and Ware, Nelson & Ware, on the brief), for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. In this case complainants, as president and trustees of the Adams Express Company, filed their bill in the Circuit Court against Amy J. Rountree, alleging that the Adams Express Company entered into a contract with the St. Louis & San Francisco Railroad Company, whereby the railroad company engaged to transport express matter for the Adams Express Company over its line of road, and the employes having charge of the express matter should be transported over the road, for a consideration named, and it was a part of the contract between the said express company and the railroad company that the—

“said express company should indemnify and save harmless the said railroad company from all claims, demands, damages, actions, costs, and charges to which the said railroad company may be subject, or which it may be required to pay by reason of any injury or loss of life suffered or sustained by any agent or employé of the said express company while in, upon, or about any of the cars or station platforms of the said railroad company, whether such injuries or loss of life arise from the negligence of the employes of the said railroad company or otherwise.”

The bill further alleged that in January, 1904—

“one H. R. Rountree entered into an agreement in writing with the said express company at the city of Omaha, in the state of Nebraska, for his employment with it as an express messenger, whereby the said Rountree did express and agree that, whereas, the duties of said employment may require that he should be in, upon, or about, or travel on, the cars and conveyances of certain railroad companies and that the said railroad companies require of the said express company as a condition of their permitting said Rountree to be in, upon, or about, or travel on, their cars in the performance of said duties, that they should be indemnified by said express company against and released from all liability for and in respect of any damage or injury which might be sustained by the said Rountree, or for his death, in the course of such employment, whether same be occasioned by the negligence of said railroad companies or otherwise, in consideration of the premises and of his employment as aforesaid at a stipulated rate of compensation he, the said Rountree, did assume all risks of accidents and injuries which he might meet with or sustain in the course of his employment, whether occasioned or resulting by or from the gross or other negligence of any corporation engaged in operating any railroad, or of any employé of any such corporation, or otherwise, and whether resulting in his death or otherwise, and did thereby expressly agree to indemnify and save harmless the said express company of and from any and all claims which might be made against it at any time by any corporation under any agreement which the said express company had theretofore made or might thereafter make, arising out of any claim or recovery by him, the said Rountree, on his part, or by or on the part of his representatives, or any damages sustained by him or them by reason of any injury to him or by reason of his death, whether such injury or death resulted from the gross negligence of any such railroad corporation or any employé of any such corporation or otherwise, * * * and he did thereby expressly ratify all agreements theretofore made by the said express company with any corporation owning any railroad, and especially the said contract hereinbefore mentioned between the said express company and the said St. Louis & San Francisco Railroad Company, relative to the ultimate liability of the said express company to save said railroad company harmless from damages occasioned to the said Rountree through the negligence of the said railroad company or its employes, and he, the said Rountree, did expressly agree to be bound by said agreement as fully as if he were a party thereto.”

The bill further alleges that while he was upon the St. Louis & San Francisco Railroad, in charge of certain express matter being carried and conveyed upon the line of said road, and while the said train was near the city of Columbus, in the state of Kansas, on or about February 14, 1906, said train and the car in which the said Rountree was being carried and conveyed as aforesaid was wrecked, and thereby the said Rountree was so injured that his death resulted therefrom a short time thereafter. The bill further alleges that the defendant Amy J. Rountree, widow of said H. R. Rountree, deceased, has commenced an action in the district court of Cherokee county, Kan., against said St. Louis & San Francisco Railroad Company, to recover the sum of \$10,000 as her damages alleged to be sustained by reason of the death of said H. R. Rountree, caused by the negligence of said railroad company and its employes, etc. The bill further alleges that the railroad company, in its answer in said action, set forth the contract referred to between the said railroad company and the said express company, and the contract between the express company and said H. R. Rountree, but that the district court of Cherokee county, Kan., has sustained a demurrer to said answer, holding that such contracts were void and did not constitute a defense to said action.

Complainants in their bill pray that the court order and decree that the defendant Amy J. Rountree execute and deliver to the said St. Louis & San Francisco Railroad Company a good and sufficient release, under hand and seal, of all claims, demands, and causes of action arising out of the injury or death of the said H. R. Rountree, hereinbefore referred to, or connected with or resulting therefrom, to be of the same force and effect as though the same had been executed by the said H. R. Rountree under his hand and seal during his lifetime, and that a writ of injunction issue, commanding the said Amy J. Rountree, her agents and attorneys, and all persons claiming to act under her authority, direction, or control, to absolutely desist and refrain from prosecuting her said claim against the St. Louis & San Francisco Railroad Company in the district court of Cherokee county, Kan.

To the bill thus filed by complainants the defendant answered, in which she admitted the contract between the express company and the railroad company and the contract between the express company and said H. R. Rountree, exactly as stated in the bill of complaint. Other allegations as to jurisdiction, etc., were admitted. The answer contained the following allegation:

"The defendant says that part of the services of the said H. R. Rountree, besides those of express messenger, as stated in complainant's bill, were the duties of baggage master of the train on which he was employed; that the express company property was carried in the baggage car, and that he not only had charge of the express matter, but also of all of the baggage on the train, consisting of the trunks and property of the passengers, carried in the said baggage car; and that it was part of his duty and employment to care for and handle said baggage. Wherefore defendant alleges that he was an employe of the railroad company, as such baggage master, which was a duty and service separate from the express business, and no part thereof. The defendant says that the said Rountree was killed by, through, and on account of the gross negligence of the said railroad company while he was in its employ as baggage master as aforesaid. Suit was brought on October 5, 1906, against

said railroad company in the said district court of Cherokee county, Kan., a court of general jurisdiction, by this defendant, setting forth that the death of the said Rountree was caused by the gross negligence of the said railroad company in the operation of its trains, and took place while he was in the express and baggage car of the railroad company, in charge of the express matter and of the baggage of the said train, and in the employ of the said express company and in the employ of the said railroad company as baggage master as aforesaid in the said car."

Other allegations were contained in the answer, which are unnecessary to be considered here.

Complainant did not file a replication to said answer, but, on the 7th day of May, 1909, filed a motion as follows (after entitling the case):

"Now come the plaintiffs in the above-entitled cause and respectfully move the court to enter a decree in this cause in their favor, conformable to the prayer of the bill of complaint, upon the allegations of the said bill of complaint and of the admissions and statements of facts contained in the answer of the defendant, for the reason that upon the facts so established the plaintiffs are entitled to the relief prayed for."

Hearing was had on the 8th day of May, and a decree entered that plaintiffs were not entitled to the relief prayed for, from which decree the plaintiffs have taken this appeal.

One reason why plaintiff is not entitled to the relief asked is that the injury and death occurred in the state of Kansas, and the rights of the widow are to be measured according to the laws of that state. We need not stop to inquire whether or not the contract in question was valid according to the laws of Nebraska, where executed, as the widow is not basing her action upon such contract, but upon the statute law of Kansas. Whether such contract is available as a defense to her action we think determinable according to the laws of Kansas.

Penn. R. R. Co. v. Hughes, 191 U. S. 477, 24 Sup. Ct. 132, 48 L. Ed. 268, was a case in which the plaintiff shipped a horse from Albany, in the state of New York, to Cynwyg, in the state of Pennsylvania. The bill of lading contained a clause limiting the carrier's liability to a stipulated value in consideration of the rate paid, the shipper having been offered a bill of lading without such limitation on payment of a higher rate, but he signed a memorandum accepting the contract at the lower rate. The horse was injured in the state of Pennsylvania by reason of the negligence of the carrier. The owner brought suit in the state of Pennsylvania, and the common law, as administered in Pennsylvania, held that such limitations in the contract were invalid. In the state of New York, where the bill of lading was issued, such limitation was valid. The Supreme Court held that the question was a local one, to be administered according to the law of the state where the injury occurred, and, in the absence of a statute, prohibiting limitations of that character in the contract, it was to be governed by the common law, as construed by the courts of that state. It was further held that, as Congress had not, in the exercise of its power over the interstate commerce, legislated with respect to such contracts, that it was open to the states to determine the validity of such a contract. The court cited the case of Chicago, Milwaukee, etc., R. R. Co. v. Solan,

169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688, and quoted therefrom the following:

"A carrier exercising his calling within a particular state, although engaged in business of interstate commerce is answerable according to the law of the state for acts of nonfeasance or of misfeasance committed within its limits. * * * The rule prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law."

The court then said:

"We can see no difference in the application of the principle based upon the manner in which the state requires this degree of care and responsibility whether enacted into a statute or resulting from the rules of law enforced in the state courts. The state has the right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, *a contract to the contrary notwithstanding.*" (Italics our own.)

Martin v. Pittsburg & Lake Erie Ry. Co., 203 U. S. 284, 27 Sup. Ct. 100, 51 L. Ed. 184, was a case in which a postal clerk was injured by reason of the derailment of a train in Pennsylvania. The statute in that case provided:

"When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employ  , the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employ  , provided that this section shall not apply to passengers."

It was held that it was a local question, for the state to determine, whether or not the postal clerk was a passenger, and as to the validity of a statute of that character.

Sections 5857 and 5858, Gen. St. Kan. 1901, are as follows:

"Sec. 5857. That railroads in this state shall be liable for all damages done to persons and property, when done in consequence of any neglect on the part of the railroad companies.

"Sec. 5858. Every railroad company organized or doing business in this state shall be liable for all damages done to any employ   of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employ  s to any person sustaining such damage."

The Supreme Court of that state, construing these sections, have held that a railroad company could not contract in advance for the waiver and release of the statutory liability imposed upon every railroad company organized or doing business in that state, and that a contract in contravention of this statute was void. Kansas Pac. Ry. Co. v. Peavey, 29 Kan. 169, 44 Am. Rep. 630; Chicago, Rock Island & Pac. Ry. Co. v. Martin, 59 Kan. 437, 53 Pac. 461. In the latter case it was said:

"It is an action instituted by his widow, as administratrix, under section 418, Gen. St. 1897, for the benefit of herself and the children of the deceased. It is to recover their damages resulting from the death of the husband and father. It is to recover for the injury to them, rather than to the deceased. Against their rights the deceased had no authority to contract. The cause of action for which the plaintiff sues never accrued to him. It could only accrue

as a result of his death. His stipulation, even if binding on himself, is no defense against the statutory right of the plaintiff."

Again, it is apparent from the facts that it was not contemplated that the contract of employment between Rountree and the express company should be wholly performed within the state of Nebraska, where the contract of employment was entered into, but that the service to be rendered was to be in different states. For that reason we think the law of the place of performance, and where the cause of action accrues, should govern. *Stone v. U. P. R. R. Co.*, 32 Utah, 185, 89 Pac. 715. To illustrate: Suppose a railroad company operating a line of road in two or more states should employ A. to render service for it as a brakeman, the contract of employment being made in a state in which A. could recover from the railroad company for an injury caused by the negligence of a fellow servant, and he should sustain an injury in a state in which recovery could not be had because of the negligence of a fellow servant. We do not think that it could be successfully contended in such case that, because the contract was made in the state in which the recovery could be had, it would operate to give him a cause of action in the state where the injury took place, contrary to the laws of such state; and the converse of the rule must also be true.

For the foregoing reasons, plaintiff is not entitled to the relief prayed, and the decree is affirmed.

BALDI v. CEDAR HILL COAL & COKE CO.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1909.)

No. 2,934.

1. MASTER AND SERVANT (§ 118*)—OPERATION OF MINES—STATUTORY PROVISIONS—"TRAVELING WAY."

The place in which plaintiff and another were working in a coal mine when plaintiff was injured by falling rock, while designed for a passageway when completed, but which was then completed only a part of the way, *held* not to have been a "traveling way," within the meaning of the Colorado statute requiring mining companies to timber traveling ways, but in the nature of a room, for which the company was required to furnish the timbers, to be placed by the workmen.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 118.*]

2. APPEAL AND ERROR (§ 1048*)—REVIEW—DISCRETION OF COURT—PERMITTING LEADING QUESTIONS TO WITNESS.

Permitting leading and suggestive questions to a witness, over objection, may constitute reversible error, where the answers elicited are the only basis in the evidence for an instruction given on a material issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4141; Dec. Dig. § 1048.*]

3. MASTER AND SERVANT (§ 235*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—PLACES TO WORK—CARE REQUIRED OF SERVANT.

When it is the duty of a master to exercise ordinary care to furnish a reasonably safe place for an employé to work, the employé has the right to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

assume that such duty has been performed, and is not required to exercise care to discover unknown dangers, which are not plainly observable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 710-722; Dec. Dig. § 235.*]

In Error to the Circuit Court of the United States for the District of Colorado.

Action by Dominick Baldi against the Cedar Hill Coal & Coke Company. Judgment for defendant, and plaintiff brings error. Reversed.

L. J. Stark and George S. Redd (George Stidger, on the brief), for plaintiff in error.

Julian G. Dickinson, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. In this case the plaintiff and one Artizoni were engaged in removing coal, dirt, and rock through a place which, when completed, was to be used as a passageway or entry. They were to receive 50 cents per ton for the coal removed, 50 cents per car for the rock, and \$1.50 per lineal yard for the work done. The entryway or room had been constructed to such an extent that the face of the room was in the neighborhood of 38 feet from the entrance. On or about July 17, 1907, while the plaintiff and Artizoni were working this place, a piece of rock fell from the roof, striking plaintiff on the foot, injuring it to such an extent that his foot was amputated a short distance above the ankle. This action was brought by plaintiff, and the negligence alleged upon the part of defendant was that it negligently and willfully failed to furnish timbers for the purpose of propping the roof of the mine, and negligently and willfully failed to place timbers in the working place of said mine; the theory of the plaintiff being that this was an entryway, which it was the duty of the defendant, under the statute of Colorado, to timber and keep a careful watch over, to see that all loose coal, slate, and rock overhead was carefully secured against falling. The provision of the statute of Colorado claimed to be applicable is found in Sess. Laws 1885, p. 138, and is as follows:

"Sec. 4. The owner or agent of every coal mine shall employ a practical and competent inside overseer, to be called a 'mining boss,' who shall keep a careful watch over the ventilating apparatus, and the airways, traveling ways, pumps, timbers, and drainage; also, shall see that, as the miners advance their excavations, all loose coal, slate and rock overhead are carefully secured against falling in or upon the traveling ways, and that sufficient timber, of suitable length and sizes, is furnished for the places where they are to be used, and placed in the working places of the mines."

Under the facts in this case, we do not think the place where they were working was a traveling way at the time of the injury. The fact that it was contemplated to be a traveling way, and the excavation was being made for that purpose, did not constitute a traveling way until its completion. It was the same as what has been designated as a "room," in which coal is mined, and under the statute it was the duty of the defendant to furnish to plaintiff and his companion, Arti-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

zoni, the timbers necessary for protecting the roof of the excavation from falling as the work progressed. But it was not the duty of the defendant to place the timbers. This was the duty of the plaintiff and Artizoni. But it was the duty of the defendant to furnish the necessary timbers in the room. Whether or not the necessary timbers were furnished, or timbers furnished as requested and called for by Artizoni and plaintiff, the evidence is conflicting and unsatisfactory. The evidence in this respect, however, was sufficient to go to the jury.

Error is assigned based upon the overruling of objections to questions asked a witness for defendant, which questions and answers thereto, were as follows:

"Q. These men were to look after their own working place, were they, to see if it were safe? A. Yes. Q. These men were under contract to drive this entry, so that it would be a permanent place for pulling through or hauling coal on cars? A. Correct."

These questions were each objected to as being leading and suggestive. The objections were well taken. The witness had been interrogated as to the duties of plaintiff and Artizoni, the arrangement under which they were doing their work, and, while the witness had previously answered without objection that the work for which they were employed was customary work mining coal, taking the responsibility of all other things, digging coal and taking care of the place, these questions objected to were suggestive of the fact, that had not been answered, that they were to see that the working place was safe, and that they were under contract to complete this entryway as a permanent place for pulling through and hauling cars of coal. The vital importance of the evidence elicited by these questions is fully understood, when we consider the following portion of the instructions of the court to the jury, which was duly excepted to:

"It will be necessary, in the consideration of the evidence, for you to first determine whether or not the plaintiff and Artizoni were to drive this entry and turn it over to the company as a completed entry. If you find that to be the fact, then the plaintiff cannot recover under any condition or any circumstances that you might arrive at, because in that event it was incumbent upon plaintiff and his associate to keep the way in a safe condition until completed, and under such conditions the company would have nothing to do with it until completed."

There was no other evidence, excepting the answers to these questions, objected to as leading and suggestive, from which the jury would be authorized to find that the plaintiff and Artizoni were working under a contract by which this entry was to be completed and turned over to the defendant as a completed entry. They were working, so far as the other evidence indicates, as the ordinary miner usually works, and under no special contract. The defendant, it is true, contemplated that, after their work had reached a given point, and connected with another entryway, this place in which they were working should be used thereafter as an entrance. Leading and suggestive questions and answers thereto are not always prejudicial; but, in view of the instruction thus given, and the fact that the answers to the questions objected to were the only evidence upon which the instruction could be fairly based, it is apparent that it was prejudicial error, for which a new trial must be granted.

A further portion of the charge excepted to was in the following language:

"Now, even though you might find that the defendant is guilty of negligence as charged, yet if you further find and believe from the evidence that the plaintiff knew of this dangerous place in the roof, or by exercise of reasonable care on his part for his safety he could have found out and avoided it, then he cannot recover, because in that event he would be guilty of contributory negligence, would have assumed the risk, and his recovery is barred."

This portion of the charge was only applicable upon the theory that it was defendant's duty to provide a safe place for plaintiff to perform his work, and its statement of the law relative to assumed risk was erroneous in this: That it placed upon the plaintiff the exercise of care to find out whether or not the condition of the roof was dangerous. When it is the duty of the master to exercise ordinary care to furnish a reasonably safe place for the employé, such employé only assumes the risk of those dangers which are known to him or which are plainly observable. He has a right to assume that the master has performed his duty, and it is not incumbent upon the employé to exercise care to discover unknown dangers which are not plainly observable. *Choctaw, Okla. & Gulf R. R. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96.

The judgment is reversed, and a new trial granted.

MAINE & N. H. GRANITE CORP. v. HACHEY.

(Circuit Court of Appeals, First Circuit. November 11, 1909.)

No. 812.

MASTER AND SERVANT (§ 190*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—
NEGLIGENCE OF "FELLOW SERVANT."

Plaintiff was employed by defendant at its stone quarry, and engaged in breaking waste rock, working beside a large pile, on which the rock were dropped from time to time by a derrick. The derrick was in charge of a boss derrickman, whose duty it was, under instructions from defendant, to operate the same, and also to give warning to plaintiff and other workmen when rock were about to be deposited on the pile. On one occasion he neglected to give such warning, and a rock slid down the pile and injured plaintiff. *Held*, that the giving of such warning signals was a part of the work of operation, in which the boss derrickman acted as a "fellow servant" of plaintiff, and not as representative of the master in the performance of a nondelegable duty to provide a safe place to work, and that his negligence gave plaintiff no right of recovery against defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 471; Dec. Dig. § 190.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

In Error to the Circuit Court of the United States for the District of New Hampshire.

Action by Joseph Hachey against the Maine & New Hampshire Granite Corporation. Judgment for plaintiff, and defendant brings error. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Frank S. Streeter and Fred C. Demond (Streeter & Hollis, on the brief), for plaintiff in error.

Bernard Jacobs (Drew, Jordan, Shurtleff & Morris, on the brief), for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. This is a writ of error for review of the rulings of the Circuit Court in an action for negligence. Upon the conclusion of the plaintiff's testimony the Granite Corporation moved for the direction of a verdict in its favor, and upon a denial of this motion duly excepted. Its exception raises the question whether, upon the facts, the negligence which resulted in personal injuries was that of a fellow servant or of the master, the Granite Corporation.

Hachey was employed by the Granite Corporation in its quarry at Redstone, N. H. He was engaged in breaking up waste rock, or "grout," beside a large pile of grout about 30 feet in height. Pieces of waste rock were deposited upon this grout pile from time to time by a derrick. The danger from falling stones was such as to require that the men working at or near the grout pile should receive a warning whenever rock was to be dropped from the derrick upon the slanting grout pile.

The derrick was operated by machinery, and was in charge of a boss derrickman, whose duty it was to see that the stones were properly raised, swung, and deposited upon the grout pile, to give proper signals to the engineer, and also to give warning to the workmen in the vicinity of the grout pile in time to enable them to go to a place of safety while stones were dropped upon the pile. The boss derrickman usually had one or two men under him as helpers.

It is agreed that it was the duty of the boss derrickman to give timely warnings, either personally or by sending one of his helpers to do it. The warning was given by **shouting**, or at times by rolling a small stone near the men at the foot of the pile. The men working at or near the grout pile were accustomed to rely upon receiving a signal before the dumping of rock. The pile of grout obstructed the view of the derrick, and the attention of the men at work breaking up rock was so engaged that the giving of signals to them was required as a regular accompaniment of the operation of the derrick. It is agreed that it was customary for the derrickman to give the signals personally or through one of his helpers.

Upon the present record it must be assumed that the boss derrickman, Bessanti, was guilty of negligence in dropping a heavy stone on the grout pile without giving warning. The stone slid and fell upon Hachey, inflicting serious injury. Hachey was without fault in the matter.

The Granite Corporation, plaintiff in error, conceding the negligence of Bessanti, the boss derrickman, contends that his failure to give warning of the movement of the derrick and of the dropping of stone was a negligent performance of the duties of a fellow servant of Hachey. The defendant in error contends that under the circumstances

the master, in order to make the place at the side of the grout pile a reasonably safe working place, was bound to give warning, and that the person employed to give warning was performing a part of the master's nondelegable duty.

In support of the contention that in respect to the duty of giving warning of the dropping of stone the boss derrickman was not a fellow servant, but a representative of the master, the defendant in error suggests a distinction between the failure to observe a rule necessary in maintaining a safe place and the failure to observe a rule promulgated for the successful operation of the work. It is argued that the giving of a warning signal was not a work of operation, and that it was distinct from the duty of handling the rock. Such a division of the duties of the boss derrickman into two parts—that is, the operation of the derrick and moving of rock, wherein he would be a fellow servant, and that of giving warning, wherein he would not be a fellow servant—is not sound. Those cases which, in general terms, state it to be the master's duty to give warning to inexperienced servants or of special dangers are not applicable to the facts of the present case, though they may furnish some general phrases which seem to give support to the argument of the defendant in error. The general proposition that it is the duty of the master to give warning is not to be so extended as to require him to give in person or to insure the giving by others of all those special signals or shouts which are so associated with the work of operation as to become part of it. The employment of different men in different parts of the general work requires under many circumstances the giving of signals as an accompaniment of the work itself, in order that there may be co-operation in the movement of the men. The giving of such signals is a part of the work of operation. Such signals are rather the giving of information of what one workman is about to do, in order that his fellow workmen may have knowledge of it and conduct themselves accordingly, than the giving of orders which are to be considered as the orders of a master. *Standard Oil Company v. Anderson*, 212 U. S. 216-226, 29 Sup. Ct. 252, 53 L. Ed. 480. The master may intrust to a competent servant the work of shouting or otherwise signaling when he is about to hoist or to lower away, and it is not the master's fault if such a servant fails to inform his fellow servants of the movement of the machine under his charge.

The evidence does not show any failure of the master to make reasonable provision that proper signals should be given. The uninterrupted custom of the work at the quarry shows that there was no defect in the system established by the master. The authorities do not support the contention that the master is an insurer of the sufficiency of the means that he selects for giving signals. There can be little doubt that the boss derrickman, who controls the movements of the derrick by signaling the engineer, is a suitable, if not the most suitable, person to intrust with the duty of giving warning of the proposed movements of the derrick. By the course of business, with which Hachey by many years of experience had become familiar, the duties of operating the derrick and of giving notice of its operations were related and associated duties intrusted to a fellow workman. Reason-

able provision for giving warning having been made, the danger that this workman might be negligent in a single instance in the performance of his duty was a risk assumed by Hachey.

It being conceded that it was the general duty of the boss derrickman both to operate the derrick and to give signals of its operation, the fact that shortly before the accident the general superintendent of the quarry gave him special instructions to look out for the men behind the grout pile did not change his status as a fellow servant or enlarge the master's liability for his failure of duty. The authorities cited by the plaintiff in error amply sustain its contention that the negligence of Bessanti was of a fellow servant, and not the negligence of the master. Among them are *Alaska, etc., Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390; *McLaine v. Head & Dowst*, 71 N. H. 294, 52 Atl. 545, 58 L. R. A. 462, 93 Am. St. Rep. 522; *Northern Pacific R. R. Co. v. Charles*, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; *Martin v. Railroad Co.*, 166 U. S. 399, 17 Sup. Ct. 603, 41 L. Ed. 1051; *Hermann v. Mill Co. (D. C.)* 71 Fed. 853; *Fortin v. Manville Co. (C. C.)* 128 Fed. 642. See, also, *Kreigh v. Westinghouse & Co.*, 214 U. S. 249-256, 29 Sup. Ct. 619, 53 L. Ed. 984; *Perry v. Rogers*, 157 N. Y. 251-255, 51 N. E. 1021 et seq.; 26 Cyc. 1338.

The judgment of the Circuit Court is reversed, with costs of appeal to the plaintiff in error.

DALE v. DENVER CITY TRAMWAY CO.

(Circuit Court of Appeals, Eighth Circuit. November 1, 1909.)

No. 3,083.

1. NEGLIGENCE (§ 93*)—IMPUTED NEGLIGENCE—NEGLIGENCE OF A CHAUFFEUR IMPUTABLE TO OCCUPANT OF CAR.

The negligence of the driver of an automobile is not imputable to an occupant, who is riding as the guest of another and has no control over the movements of the car.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 147; Dec. Dig. § 93.*]

Negligence of driver of vehicle imputed to persons riding with him, see note to *Davis v. Chicago, R. I. & P. Ry. Co.*, 88 C. C. A. 497.]

2. NEGLIGENCE (§ 119*)—ACTIONS—EVIDENCE ADMISSIBLE UNDER PLEADINGS.

Under the settled doctrine of the federal courts, a municipal ordinance, to be admissible in evidence in support of a charge of negligence, must be pleaded.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 206; Dec. Dig. § 119.*]

3. STREET RAILROADS (§ 90*)—COLLISION WITH VEHICLE AT CROSSING—NEGLIGENCE.

A street railway company is not chargeable with negligence, which renders it liable for the killing of a passenger in an automobile by a collision between such machine and a car at a street crossing, where the car was not being run at an excessive speed, and the automobile, which had been proceeding along the same street a short distance ahead of the car, suddenly turned across the track so close to the car that the motor-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

man could not stop before the collision occurred, a movement which he was not bound to anticipate.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 191, 192; Dec. Dig. § 90.*]

In Error to the Circuit Court of the United States for the District of Colorado.

Action by Russell Dale against the Denver City Tramway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Robert I. Gregg (R. H. Gilmore, on the brief), for plaintiff in error.

Howard S. Robertson (Gerald Hughes, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. This is an action brought by plaintiff to recover damages for the death of his wife, caused by the alleged negligence of the defendant. The facts disclose that Mrs. Dale, a resident of Chicago, Ill., was visiting friends in Denver; that on September 20, 1907, she, with a number of other ladies, was the guest of a friend at a tea party, after which the hostess hired an automobile and took her guests about the city sight-seeing. At about 6 o'clock in the evening they were going west on Eighth avenue in an automobile at a speed of from 15 to 18 miles per hour, until they reached Newport street, which crossed Eighth avenue, when, just as it made the turn to cross defendant's tracks on Newport street, the automobile slackened its speed to 7 or 8 miles per hour. Eighth avenue, at the point in question, was in a sparsely settled portion of the city, and the street but little traveled. The street car track was laid in the center of the avenue, and there was no travel on the avenue on the south of the track; the only travel being upon the north side, in a pathway about 8 feet distant from the outer rail of the street railway track. One of defendant's street cars going west on Eighth avenue traveled some two lengths in the rear of the automobile for about a block before reaching Newport street, at the crossing of which a collision occurred between the automobile and the street car, from which Mrs. Dale sustained injuries resulting in her death. The automobile was one having a top; the rear curtain being down, and the side curtains being up. There were seven occupants of the automobile; Mrs. Dale being one of three persons sitting in the rear seat.

That the chauffeur was guilty of gross negligence in turning the automobile to cross the track, not having taken reasonable precautions to ascertain whether or not the street car was close behind him, does not admit of doubt; but Mrs. Dale, the deceased, was an occupant of the automobile as a guest, and did not have charge of, or control, its movements. The negligence of the chauffeur, therefore, is not imputable to her. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652.

There is some evidence to the effect that the street car was making a speed of from 18 to 20 miles per hour. On the trial plaintiff offered

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in evidence a municipal ordinance which granted the right to operate street cars upon certain streets, at a speed not exceeding 15 miles per hour, to the introduction of which defendant objected, for the reason that the ordinance had not been pleaded, and also for the reason that it was incompetent, irrelevant, and immaterial, which objection was sustained. The complaint was based upon the common-law doctrine of negligence. The negligence on the part of the company was charged as running the street car at an excessive rate of speed, and not giving warning of its approach by the sounding of a gong or the ringing of bell.

The weight of authority and settled doctrine, of the federal courts at least, is that a municipal ordinance, to be admissible in evidence, must in some manner be referred to in the pleadings. *Robinson v. Denver City Tramway Co.*, 164 Fed. 174, 90 C. C. A. 160, and cases cited. We are, however, cited to two recent decisions of the Supreme Court of Colorado, *Griffith v. Denver Consolidated Tramway Co.*, 14 Colo. App. 504, 61 Pac. 46, and *Denver Tramway Co. v. Martin*, 44 Colo. 324, 98 Pac. 836, holding that, when the action was not based upon the violation of an ordinance but upon negligence in running the car at an excessive rate of speed, then an ordinance prescribing the rate of speed may be given in evidence, though not pleaded, for the reason that the purpose of a pleading was to set forth ultimate rather than evidential facts; that the ultimate fact proper to be pleaded was the negligent speed of the car; that the speed being in violation of the ordinance was merely an evidential fact to support the ultimate fact. The violation of the terms of the ordinance not alone being negligence per se, so as to create a cause of action, but simply a fact or circumstance to be considered in connection with other facts and circumstances in determining whether or not the ultimate fact, to wit, the negligent speed of the car, was established, it is, therefore, urged upon us with much force that the admissibility of the ordinance as evidence in the case involved the construction of pleadings only, and that the federal court, under the conformity act, should follow the decision of the state Supreme Court in this regard. We need not now stop to determine the correctness of this view. The ordinance was one adopted by the town of Montclair, in June, 1898, and authorized the Colfax Electric Railway Company to lay its tracks and operate its cars on Colfax avenue, Center avenue, and Geneva avenue of that town. The town of Montclair is now a part of the city and county of Denver, and the evidence discloses that Eighth avenue, the place where the accident occurred, was within the limits of the former town of Montclair; but there is an entire absence of evidence to show that the defendant was operating its cars on Eighth avenue by authority of and subject to the provisions of that ordinance. Hence it was not material to any issue in the case, and the objection to its introduction was properly sustained.

At the close of all of the evidence, upon motion of defendant, the court directed a verdict for the defendant. This is alleged as error. There was no whistle upon the street car, but a gong, and we think it clear from the evidence that the motorman sounded the gong at Oneida street (being the first street back from Newport); that he had

proper control of his car, and as soon as the automobile turned to cross the track he immediately put on the brake, released the current, and sounded the gong, all of which was ineffectual, as it was but a moment between the time the chauffeur turned his car to cross the track and the collision. The speed at which the street car was going was not, considering the sparsely settled portion of the city and the small amount of travel upon the streets in that section, a negligent rate of speed. While the motorman knew and saw that the automobile was traveling ahead of him in the same direction, he was not bound to anticipate that the automobile would attempt to cross the track without reasonable precautions being taken to ascertain the approach of the car. *Ohio & M. Ry. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; *Atlanta, etc., R. R. Co. v. Lovelace*, 121 Ga. 487, 49 S. E. 607; *Western & A. R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802; *Macon & I. S. Electric St. Ry. v. Holmes*, 103 Ga. 655, 30 S. E. 563.

We think there was a failure to show actionable negligence on the part of defendant, and the judgment is affirmed.

GENERAL ELECTRIC CO. v. SMITH.

(Circuit Court of Appeals, First Circuit. November 12, 1909.)

No. 837.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ELECTRIC SAFETY FUSE.

The Thalacker patent, No. 502,541, for an electric safety fuse, the essential feature of which is the use of an auxiliary fuse, so placed that it may be seen, and which will be destroyed when the main fuse is blown, as an indicator of the condition of the main fuse, was not anticipated, and discloses invention, and is entitled to a fairly broad construction; also *held* infringed.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Suit in equity by the General Electric Company against Fred B. Smith for infringement of patent. Decree (170 Fed. 593) for defendant, and complainant appeals. Reversed.

William K. Richardson and Alexander D. Salinger, for appellant.

John P. Bartlett (Henry B. Brownell, on the brief), for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. This was a bill in equity to restrain the infringement of letters patent No. 502,541, issued August 1, 1903, to Thalacker. The following claims are in issue:

"1. In an electric safety fuse, the combination of a main safety fuse, an auxiliary safety fuse, and a box or casing completely enveloping the main fuse, but so constructed as to permit the condition of the auxiliary fuse to be seen.

"2. In an electric safety fuse, the combination of a main fuse, an auxiliary fuse, and a casing completely enveloping the main fuse, but only partially enveloping the auxiliary fuse."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"4. In an electric safety fuse, the combination of a main fuse, an auxiliary fuse, overlying and underlying portions of insulating material, and an inclosing casing, said casing provided with an opening through its top portion whereby the conditions of the auxiliary fuse may be observed."

The defendant denied the validity of the patent and its infringement. The learned judge of the Circuit Court found that no infringement had been committed, and he dismissed the bill. The complainant thereupon brought the case to this court by appeal.

Unprotected safety fuses, when "blown" or fused by the current, often "arc," and spatter the fused metal over neighboring objects, sometimes igniting them. If the safety fuse be suitably inclosed, the dangers above stated are largely obviated; but the condition of the fuse cannot be known without breaking open the box or casing, and a wire supposed to be dead may prove to be alive, to the damage of an employé who handles it. To obviate the dangers last mentioned, Thalacker's patent was issued. It covers an auxiliary fuse in shunt with the main fuse. The former is so much exposed to observation that its condition can at any time be ascertained, and the condition of the main safety fuse be inferred therefrom.

"In order to make a safety fuse which shall have none of the faults mentioned, I combine with a strip of fusible metal, completely inclosed in a non-conducting box or case, an auxiliary fusible strip so located and connected as to be seen at all times, and which will be destroyed when the main fuse, which is out of sight, is 'blown.'"

The destruction of the auxiliary fuse at the time of the destruction of the main fuse is secured by the attempted passage through the former of an excessive current, no part of which can be carried through the latter after it is blown. This device to manifest the condition of the main safety fuse we consider to be the primary object of the Thalacker patent, as disclosed in the claims in suit and in the specifications. For two purposes, both to prove the patent invalid, and, if it be valid, to limit its scope narrowly, the defendant put in evidence a considerable number of patents, American and British. We need refer to only three.

In the Edison patent, No. 264,659, notice of the blowing of the main fuse is given by a bell carried on an auxiliary conductor in shunt. The auxiliary conductor is not blown by the blowing of the main fuse; but the passage of the excessive current through the auxiliary conductor does no more than ring the bell. The arrangement of the Edison patent is different from that of the Thalacker patent, and is ill-adapted to many places for which the patent in suit was intended. In the Edison device, the auxiliary conductor is not a fuse. Its condition is not seen, as in Thalacker's first claim, but heard. It is not partly enveloped in the casing, as is stated explicitly in Thalacker's claims 2 and 4, and, by implication, in claim one read in the light of the specifications. Its mode of operation is different.

In the patent to Van Depoele, No. 417,122, the combustion of the safety fuse ignites a small cord or other fragile support sustaining a semaphore. The destruction of the support releases the semaphore, which drops out of the inclosing box. The Van Depoele device contains no auxiliary fuse in the proper sense of the word, and its prac-

tical operation is open to numerous objections which do not lie against the patent in suit.

In the British patent to Mordey, No. 19,076 of 1890, the patentee sought principally to set out the advantages of packing a safety fuse in a porous substance which should take up some of the heat engendered by the fusing as well as the minute particles of molten metal. The patent in suit suggests, as old in the art, a nonconducting box or a packing of thin strips of nonconducting material. Mordey's "finely divided or pulverized nonconducting material" may be preferable as a packing. The comparison is not in question here. Again, Mordey states that:

"A small space is or may be left uncovered by this material at some portion of the tube or vessel, to enable the position and condition of the fuse conductor to be observed."

He here refers to an observation, not of the auxiliary, but of the main, fuse, the need of which observation Thalacker sought to avoid. Still again, Mordey says:

"For large currents I prefer to use a small fuse constructed as above described, or otherwise according to my invention, and to shunt it by an ordinary fuse, or by an electro magnetic or other cut-out. This ordinary fuse or cut-out is arranged to carry practically the whole current. In the event of an excessive current, the ordinary fuse melts, or the cut-out acts, but does so with a scarcely perceptible spark. The final rupture of the circuit then occurs in the small special fuse."

Here Mordey's "ordinary fuse," which carries practically the whole current, is fully exposed, and the small packed and covered fuse does not serve as an indicator, but only to prevent the ordinary fuse from "arcking." This effect it produces by itself taking the final break in the current, and so relieving the ordinary fuse. As is said by Prof. Cross, the complainant's expert:

"If the current becomes excessive, the ordinary fuse melts, or the cut-out acts, but with a scarcely perceptible spark, and the final rupture of the circuit then occurs in the small special fuse."

This operation has nothing to do with the patent in suit. Where the Mordey patent uncovers "a small portion of the fuse conductor," there is no auxiliary fuse; and where Mordey shows an auxiliary fuse, the main fuse is quite uncovered, and no indicator is needed or employed.

Of the elements in Thalacker's first claim the main safety fuse and the box or packing which envelop it are old in the art. The gist of Thalacker's patent consists in the combination with these old elements of an auxiliary fuse, whose condition is at all times conveniently observed, so that by reasonable inference the condition of the main fuse may be known. This combination appears to us novel and unanticipated by any of the patents cited. The invention goes beyond the mere details shown, and the patent should receive a construction correspondingly broad. As was said by the learned judge of the Circuit Court:

"While these patents show that Thalacker was not the first to provide an inclosed fuse with an exterior conductor, they contain no suggestion of the use of the auxiliary fuse for indication."

If this be true, we find little difficulty with the issue of infringement. The defendant's device differs from that of the patent in suit only in

the formation of its safety fuse. Instead of a small fuse, purely metallic, in shunt with the main fuse, the defendant has employed a fine wire connecting the main safety fuse with a paste, which conducts the current into the metal cap of the covering case and so returns it to the main line. When the main fuse is blown, the current passing through the highly resisting wire portion of the auxiliary fuse ignites a part of the paste and renders it a nonconductor. The condition of the auxiliary fuse is known, not by looking at the broken wire through a small hole in the covering, as in the patent in suit, but by the discoloration of the paste shown through a similar hole. We regard these differences as immaterial.

Both the complainant and the respondent have argued the questions of invention and infringement without reference to any distinction among the three claims in suit. Therefore we have not analyzed the differing language of these claims, and have confined ourselves to showing that the first claim duly sets out Thalacker's patentable invention and that the defendant has infringed Thalacker's patent.

The decree of the Circuit Court is reversed, the case is remanded to that court, with directions to enter a decree in favor of the complainant on claims 1, 2, and 4, and to proceed otherwise in accordance with law, and the appellant recovers its costs of appeal.

GEORGE FROST CO. et al. v. SAMSTAG et al.

(Circuit Court, S. D. New York. July 16, 1909.)

No. 9,639.

PATENTS (§ 328*)—INFRINGEMENT—HOSE SUPPORTER.

In the Gorton patent, No. 552,470, for a hose supporter, neither claim 2 nor claim 4 can be construed to cover a supporter having a shankless button, and the patent is not infringed by the device of the Molloy patent, No. 804,756.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Bill by the George Frost Company and Robert Gorton against Henry F. Samstag, Moritz Hilder, and Julius Hilder, for infringement of letters patent No. 552,470, for a hose supporter, granted to Robert Gorton December 31, 1895. On final hearing. Bill dismissed.

A. D. Salinger, for complainants.

Edmund Wetmore and George D. Seymour, for defendants.

PLATT, District Judge. The Cohn Case (C. C.) 112 Fed. 1009, affirmed 119 Fed. 506, 56 C. C. A. 185, has settled the proposition for this circuit that the owners of the Gorton patent, 552,470, are entitled to the benefits to be gained by substituting rubber or its equivalent for metal in constructing the button member of the combination, when the button has a shank. The only claim thus far sustained is claim 1, which is as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

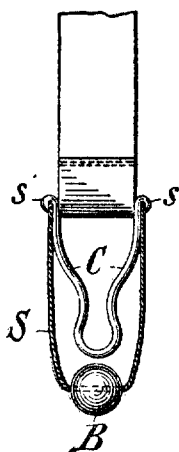
"1. In a hose supporter, the combination of the webbing, the loop having an opening large at one end and narrower at the other, the button supporting plate, and the button composed of the central support and the surrounding rubber portion, substantially as set forth."

This claim clearly included a rubber shank, and so the entire thought of the courts was devoted to buttons with shanks, and no final thought about a broader construction has, up to now, entered any judicial mind. In this suit the owners go a step further, and rely for the broadening of their right upon claims 2 and 4, which are:

"2. In a hose supporter, the combination of the webbing, the loop having an opening large at one end and narrower at the other, and the rubber button, substantially as set forth."

"4. In a hose supporter, the combination of the webbing, the supporting plate attached thereto, the button or stud mounted thereon and having a flanged head of rubber, the loop, also attached to the webbing and having an opening large at one end and narrower at another, substantially as and for the purpose set forth."

Fig. 9.



They insist now that they are entitled to be protected in the use of a rubber button which has no shank at all. They reach this conclusion by pointing to Fig. 9 of the patent, and insisting that claims 2 and 4 are drawn to meet that construction, and that claim 2, at least, is not directed toward any of the other drawings prepared to illustrate the invention.

Judge Wallace, when he wrote the opinion in 119 Fed. 505, 56 C. C. A. 185, seemed to think that the button or stud must have a shank, and I am free to say that to speak of a shankless button as a working member of such a combination as the patentee was presenting is about as senseless a proposition as to talk about a headless man being a useful element in any combination. Constructing the loop, which coacts with the button, with an opening large at one end and narrower at the other, makes a shank, or the equivalent of a shank, absolutely essential to the button member of the combination. What sense would there be in the large opening, if it were not intended to permit the head of the button to pass through it? What sense would there be in narrowing it up at the other end, if it were not to enable it to come into contact with the narrower shank? The more one studies the specifications and claims of the patent in suit, the more incongruous the introduction of Fig. 9 appears to be.

If we eliminate Fig. 9, the invention assumes harmonious and symmetrical proportions, and can be understood by a man of reasonable intelligence. Every reading of the claims makes Fig. 9 look more like an interloper. To fit in at all with the other statements of the patentee, it is essential that the rubber ball suspended by a string in Fig. 9 shall, when it enters into working combination, compose both the head and shank of a rubber button.

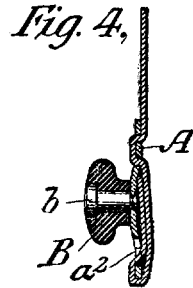
The present issue has never before been brought forward, except when a preliminary injunction was asked for in the old Samstag Case. 116 Fed. 982. Judge Lacombe then found that the alleged infringing buttons had metallic shanks uncovered by rubber or any other material, which shanks engaged with uncovered metallic loops. He did not think the patent had been construed broadly enough to hold that such a device infringes. If the metal of the shank engaged with the metal of the loop to any appreciable extent, I should believe the present suit to be entirely devoid of merit; but I understand the contention now to be that, because of the goose-neck construction of defendants' device, they have produced an article which has no shank, and that metal does not come into contact with metal in the use to which the device is put.

The complainant says that this fact is evidenced by the patentee's statement in lines 77 to 90 of the specifications in the Molloy patent, 804,756, under which defendants' structure is made. It would seem to me, however, that in defendants' structure, when the fabric has been placed over the button and the loop drawn up so that the narrower part comes under the button, there must be more or less bite between the metal of the loop and the metal just beneath the rubber button upon which the button is set and supported. If this is true to any appreciable extent, then there is certainly the bite of metal on metal, which to my mind is, from any viewpoint, beyond the scope of the patent in suit, which so plainly places the stress of the invention in the bite of metal upon rubber.

Claim 4 can be dismissed with a word. It is impossible to rid this claim of a shank, because it calls for a supporting plate and a button or stud mounted thereon, in combination with a loop large at one end and narrower at another. The flanged head of rubber is plainly intended to cover such a construction as is illustrated in Fig. 4. The defendant infringes no such construction.

The only debatable ground is found in and about claim 2. Is it intended therein to claim the shankless button of Fig. 9, as well as the shanked button of Fig. 4? Except for the incidental allusions to Fig. 9, the dominating functional idea of the patent is to hold the fabric between the shank and metal loop, or between a button in which both shank and top is made of or covered with rubber and a metal loop. The fabric then settles into the rubber, and is not liable to be accidentally displaced while in use. This latter notion is an essential one to the proper functions of the patented construction, and is, indeed, forced into the patent by reason of the patentee's earlier invention, which had a rubber button and a clamping jaw.

This accidental displacement while in use would be largely absent from a construction prepared to conform to Fig. 9, unless the narrower part of the metal loop should coact with a portion of the rubber button as with a shank. Mr. Livermore, whose views as to claim 1 were sanctioned by the courts in the Cohn Cases, has vouchsafed no light upon the present issue. When the Sulzbacher Case (No. 8,062, no written



opinion) was up on affidavits, he said, about the rubber button of claim 2, that he understood it to mean a button of which the whole exterior, both head and shank, were of rubber. So reading it, he would be forced to find both a head and shank in the rubber ball of Fig. 9, and it is possible that he has disappeared from the case for that reason.

Defendant says that Fig. 9 is a distinct invention by itself, and does not belong in the patent in suit, and that, if it can be used to broaden claim 2, that claim is anticipated by the Knight British patent. Gorton, the patentee, testified that he made the sketch, Complainant's Exhibit C, in March, 1891, which shows the construction illustrated in Fig. 9 of his patent, and he makes no attempt to carry his conception of the Fig. 9 construction back of that date, thus bringing the Knight British patent into force as a clear anticipation of that conception.

The broad conception of the patent in suit was carried back of the Knight patent in the Cohn Case, but the decision on claim 1 of the patent in suit would not let in the suspended ball construction of Fig. 9. I deem it unnecessary to follow out that line of thought, because in my view of the case Fig. 9 cannot be used to broaden claim 2 into a claim for a shankless button.

This controversy is interesting, and deserves more elaborate treatment; but the time at my disposal is so limited that I am compelled to say these few words and pass along.

There is no infringement, and therefore the bill should be dismissed, with costs.

SOCIÉTÉ ANONYME, ETC., BENEDICTINE v. HYGRADE WINE CO.

(Circuit Court, S. D. New York. August 6, 1909.)

TRADE-MARKS AND TRADE-NAMES (§ 95*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction to restrain alleged unfair competition denied, where the article sold by defendant bore a label which conformed to an order of court made in a suit by complainant against the manufacturer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. § 95.*]

In Equity. Suit by the Société Anonyme, etc., Benedictine against the Hygrade Wine Company. On motion for preliminary injunction. Motion denied.

George H. Tucker, Jr., for complainant.

Alexander & Green, for defendant.

LACOMBE, Circuit Judge. As to so much of the case as is not disputed upon affidavits, it appears that the liqueur sold by defendant is manufactured by the "A. de Claremont Company" and is sold by defendant with the label stating origin, which this court ordered to be affixed to the bottles sold by the Claremont Company as a condition for denying preliminary injunction in the suit against it. To refuse to allow a resale of the articles once sold in conformity with such order, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

label being unchanged, would practically amount to a modification of the former order by restricting the sale of Claremont goods.

For this reason, only, application for preliminary injunction is denied.

CHADELOID CHEMICAL CO. v. CHICAGO WOOD FINISHING CO. et al.

(Circuit Court, S. D. New York. September 30, 1909.)

EQUITY (§ 404*)—MASTERS—TAKING PROOFS—OBJECTIONS TO EVIDENCE.

In taking testimony before a master in an equity suit in a federal court, questions objected to for irrelevancy and immateriality should be answered, leaving such objections to be ruled on at final hearing.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 891; Dec. Dig. § 404.*]

In Equity. Suit by the Chadeloid Chemical Company against the Chicago Wood Finishing Company and others. On motion to compel witnesses to answer questions. Sustained in part.

Duncan & Duncan, for complainant.

Wm. R. Davis, for defendants.

LACOMBE, Circuit Judge. The objection of "incompetency" is raised to all the questions; but nothing has been suggested, either in brief or argument, to show on what theory such an objection is based. The only real objections are that the testimony sought to be elicited is "irrelevant and immaterial"; but, under the well-known rule laid down by the Supreme Court in *Blease v. Garlington*, 92 U. S. 1, 23 L. Ed. 521, the questions should be answered, and the relevancy and materiality be ruled on at final hearing.

The patent has not been submitted, and without it the court cannot be sure that the questions in schedule B, numbered 11 to 14, are not an unwarranted attempt to get trade secrets of defendant's composition.

This motion to require answers to them is therefore denied.

HUDSON-FULTON CELEBRATION COMMITTEE v. HESS et al.

(Circuit Court, S. D. New York. September 29, 1909.)

BONDS (§ 5*)—BOND REQUIRED IN JUDICIAL PROCEEDING—FORMAL REQUISITES.

A bond, signed by a bonding company alone, may be accepted as a compliance with an order requiring a party to a suit to file a bond to secure a payment, but not prescribing its form.

[Ed. Note.—For other cases, see Bonds, Dec. Dig. § 5.*]

Suit by the Hudson-Fulton Celebration Committee against Emil C. Hess and others. On motion for approval of bond. Motion granted.

S. O. Edmonds, for complainant.

Maurice B. Gluck, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LACOMBE, Circuit Judge. The order merely required the complainants to "file a bond in the sum of \$5,000 to secure payment." Nothing was prescribed as to the form, whether it should be executed by a principal and surety, or by the guarantor alone. The bond offered is a sufficient compliance with the terms of the order, and it appears, from the copy of the charter of the National Surety Company, that it has power to make such bonds.

The papers now submitted meet the criticism advanced as to proof of execution, and the bond is approved, and may be filed nunc pro tunc as of September 24, 1909.

In re TETER.

(District Court, N. D. West Virginia. November 2, 1909.)

1. FRAUDULENT CONVEYANCES (§ 277*)—WIFE'S PROPERTY—DELIVERY TO HUSBAND—PRESUMPTIONS—RIGHTS OF HUSBAND'S CREDITORS.

Under the law of West Virginia, where a wife delivers money or property to her husband, which he uses in his business, the presumption is that a gift was intended; and parol testimony of the husband and wife of a private understanding between themselves that the transaction should be considered a loan will not overcome such presumption as against creditors of the husband after his insolvency.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 799, 809-814; Dec. Dig. § 277.*]

2. TRUSTS (§ 44*)—FRAUDULENT CONVEYANCES (§ 299*)—EXPRESS TRUSTS—VALIDITY OF PAROL TRUST IN LAND—HUSBAND AND WIFE.

Parol trusts in land must be established by evidence clear, strong, and unquestionable; and the uncorroborated testimony of husband and wife is insufficient to establish a trust in favor of the wife in property purchased in the name of the husband as against his creditors, especially after the lapse of many years.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66, 68; Dec. Dig. § 44;* Fraudulent Conveyances, Cent. Dig. § 884; Dec. Dig. § 299.*]

3. BANKRUPTCY (§ 188*)—TRUSTS (§ 81*)—EQUITABLE LIEN—CONTRIBUTION BY WIFE TO PURCHASE OF PROPERTY.

The wife of a bankrupt filed a petition, alleging that some 29 years prior to the bankruptcy her husband's father conveyed to him certain land, which he still owned, valued at \$3,000, taking his notes for \$1,000, which it was agreed petitioner should pay out of money received from her relatives, and should have a corresponding interest in the land, or a lien thereon for the amount contributed by her. According to the testimony of herself and her husband, she furnished him the money to pay the notes, which, when paid, together with the deed, which was unrecorded, were delivered to her to retain as security. Nothing was done to vest her with any legal interest in or lien on the property prior to the bankruptcy, except that, some 10 years after the purchase, she set up her claim in a creditors' suit brought against her husband and others, which was afterward dismissed. *Held*, that such evidence was not sufficient to establish a resulting trust in her favor in the land, nor to give her an equitable lien as against the bankrupt's creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 188;* Trusts, Cent. Dig. §§ 115-118; Dec. Dig. § 81.*]

In Bankruptcy. In the matter of Thomas B. Teter, bankrupt. On review of order of referee. Reversed.

Mary Sophia Teter, wife of the bankrupt, has filed herein her petition, in which she alleges that she was a daughter of Braxton B. Durrett, a man of large estate, and was married to Teter March 5, 1874; that his father, Jesse Teter, on February 3, 1880, executed to him a deed for two tracts of 167 and 20 acres of land, for a stated consideration of \$1,000, of which \$250 is recited to have been paid, and the residue, \$750, was payable in three installments, of \$250 each, for which notes were given and a vendor's lien retained upon the land—a life estate in favor of Elizabeth Teter, wife of said Jesse Teter, the grantor, being also reserved in the 167-acre tract, the said Elizabeth Teter being still alive and holding such estate, and Jesse Teter, the grantor, being now dead. It is then charged that Jesse Teter by this deed in fact advanced to his son, the bankrupt, \$2,000, the land being in fact valued at \$3,000, and that such advancement was made with the express understanding that, when the deed was delivered, petitioner, Mary Sophia Teter, wife of the bankrupt, should pay, out of advancements made to her from her father's estate, and not received from the estate of her husband, the \$1,000 provided on the face of the deed to be paid for the land; that she did furnish, and, through her husband, paid to Jesse Teter, the \$1,000 out of her separate estate, and the notes for the deferred payments, as also the deed for the land, was delivered to her, with the distinct understanding that she was to have conveyed to her the land in value to the extent of such payment, or that a vendor's lien was to be retained upon the land to secure its repayment to her; that said notes and deed have always since remained in her possession, the deed unrecorded, no part of the money having been repaid her; and she charges that such money, so paid by her, constitutes an equitable lien and charge upon the lands superior to all others, except as to the life estate in the 167-acre tract in favor of Elizabeth Teter. It is then charged that her husband, the bankrupt, was entirely free from debt until 1892, when he became surety upon a bond of Williamson, sheriff, upon which bond the state recovered a judgment, instituted a general creditors' bill against Williamson and his sureties, in which an order of reference was made, and a release of liability on the part of the bankrupt was secured, but, before such release was obtained, her petition in said cause was filed, setting forth her rights, as here urged, and in support of which the depositions of Jesse Teter, Minnie M. Teter, Worth Teter, Floyd Teter, and herself were taken; that the depositions of Jesse Teter, Minnie M. Teter, and Worth Teter, now all dead, have been lost from the files of said cause, and cannot be found, but she files verified copies of her petition, and the depositions of herself and Floyd Teter, so filed in the said cause of the state, the prosecution of which, it is alleged, has been abandoned. The prayer of the petition is that she be declared a creditor of the bankrupt to the extent of the \$1,000 so paid by her into the land, and that this sum, with its accrued interest, be given priority of payment out of the proceeds of sale of the lands. This petition, filed before the referee on May 16, 1909, has been contested by the trustee, who has filed before the referee his exceptions and objections thereto, as also by the creditors. Depositions of petitioner, Floyd Teter, O. G. P. Durrett, and Thomas B. Teter, the bankrupt, have been taken, and the referee has determined to uphold her claim, and give it, to the extent of the \$1,000 and its interest, priority of payment out of the proceeds of the sale of the 167 and 20 acre tracts, subject to the life estate of Elizabeth Teter in the 167-acre tract. At the instance of the trustee and unsecured creditors, this decision of the referee is brought here for review.

William T. George, for trustee.
Harry H. Byrer, for creditors.
Samuel V. Woods, for claimant.
J. Blackburn Ware, for bankrupt.

DAYTON, District Judge (after stating the facts as above). The agreement charged to have been made at the time the two tracts of land were conveyed by his father to the bankrupt was that the petitioner should pay the \$1,000 and have conveyed to her the land in value to

the extent of such payment, or that a vendor's lien was to be retained upon the land to secure her the repayment of her money. Neither of these things has ever been done, and, after the lapse of 29 years, the question arises whether the pleading and evidence justifies equity and good conscience to do either for the relief of petitioner, against the creditors. The decision of the referee is in effect to charge this \$1,000, with its accumulated interest, in the nature of a purchase-money lien, upon the land, as having priority over all other debts except the life estate of Elizabeth Teter. This practically means that the wife of the bankrupt shall absorb the whole value of the lands, and the creditors shall take nothing.

It seems to me this is clearly untenable. Taking the most favorable view possible of this ruling, and quoting the testimony alone of Mrs. Teter, it seems clear that the deed was made direct to her husband by his father; that the lands were worth at the time \$3,000; that she took no written evidence of the agreement; that she did not pay the \$1,000, or any part of it, to the grantor, Jesse Teter, but "furnished" it to her husband, partly in money and partly in stock, apparently, which he sold, who paid it to his father, who surrendered the notes to her husband as paid, and he in turn delivered them over to her, with the deed. She says the deed was delivered to her, and has been in her possession since about six months after its date, and the notes were delivered to her by her husband as of the times when he discharged them. They were not assigned to her, and her sole claim to enforce an equitable lien against the land in her favor, independent of oral agreement with her husband, rests upon her possession of the title deed and these notes. I can find no authority warranting me to hold the possession of this deed and of these notes, under these circumstances, as constituting an equitable assignment to her by Jesse Teter of the existing vendor's lien in his favor.

A vendor is not ordinarily compelled to receive payment for and assign to a third person such a lien. Jesse Teter, the father-in-law, might have been entirely willing to have done so; and it is incomprehensible why he did not do so, if at the time it was contemplated to secure this petitioner this money by and through his existing vendor's lien. Therefore, independent of all questions of trust relations, the whole matter resolves itself into this: Mrs. Teter loaned her husband this money, for which she took from him no note or evidence of debt of any kind. With this money he paid off and discharged the vendor's lien to his father. The only way Mrs. Teter sought to secure herself for the money so loaned her husband was, six months after its execution, to take possession of the deed and these notes, as her husband paid and delivered them to her. They were living together, and her possession was in fact his. A line of decisions in this state has fully established the principles that where a wife delivers money or property of her own to her husband, which he uses in his business, the presumption is that such delivery was intended as a gift, and when the facts and circumstances tend to show that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony of the husband and wife of a private understanding between themselves that the transaction should be considered or was in-

tended as a loan to the husband by the wife, and not a gift, will not, as against the creditors of an insolvent husband, rebut the presumption of a gift. *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871; *Maxwell v. Hanshaw*, 24 W. Va. 405; *McGinnis v. Curry*, 13 W. Va. 29; *Bank v. Atkinson*, 32 W. Va. 203, 9 S. E. 175. And in this last case it is held that the fact that the wife's claim for money of hers received by her husband from the sale of her lands was barred by limitation tends strongly to repel her claim as against her husband's creditors.

This money of Mrs. Teter was received by her husband, it may be assumed, at various times between February 3, 1880, the date of the deed, and September 1, 1885, when the last note was payable. The evidence does not clearly establish the amount in a sum exceeding \$811.50, unless we assume she increased the sums received by her from her father and aunt by investment and loans at interest, which are not shown by the evidence. The first effort attempted to secure repayment of this money was not made until after her husband had become Williamson's surety on his sheriff's supplemental bond, and judgment for \$10,000 had been rendered in favor of, and a chancery suit had been instituted for its enforcement by, the state. Then she filed her petition in this chancery suit, asserting her claim as a debt due her, based upon the same facts set forth here. The exact date of the filing of this answer is not shown; but it was not filed before 1895, because the suit was not instituted until that year, and it is probable it was not filed until the following year, 1896, when her depositions were taken in support of it. Thus for 10 years, at least, she allowed this money to remain in her husband's hands, with no written evidence of it having been loaned to him, with him in full possession of the land, with no assignment from her father-in-law of the notes, which she says her money paid, although such assignment could have been taken from him any time prior to his death, with no judgment taken by her, no trust or mortgage lien taken on the land, although such actions could have been taken at any time apparently, in short, with nothing done in accord with legal methods to indicate that this money was to be saved to her as her separate estate.

It is true that great reliance is made upon the facts that the deed was not recorded, but, together with the notes, when paid off by her husband, were placed in her custody, as claimed, for security for her debt. That this was the purpose of withholding the deed from record, instead of for other reasons, such as the existence of the life estate outstanding in Elizabeth Teter, and that she had the custody of the deed for the purpose of security, is alone proven by the husband and wife. It does not impress me, if this evidence be admitted to be sufficient to establish the facts claimed (although the authorities cited seem clearly to hold it is not), that the mere possession of these papers alone constituted any security for this debt. It could vest no title in her to the land, nor could it give her any lien upon it, nor could it, with no assignment of any kind, transfer to her the vendor's lien retained by the grantor upon it. We must necessarily sympathize with the wife, who must lose her money by reason of the bad management of her husband; but at the same time we cannot forget that the relation of husband and wife is such that their transactions with each other must be closely scru-

tinized. The temptation to husband and wife to shield each other, as against creditors, when insolvency comes, is almost irresistible to most people. If we were to hold that a man could pay off his purchase-money notes secured by vendor's lien, place these notes and his deed in his wife's custody, and thereby empower her, 29 years afterwards, when he was bankrupt, and after he had executed a trust upon the land for a large amount (as Teter sets forth in his schedule he has done), to revive and enforce the vendor's lien to the extent of the notes and accumulated interest in her favor, because it is claimed she allowed him to use her money, the door to fraudulent transactions between husband and wife as against innocent creditors would be thrown wide open.

Nor do I see how the contention can be here upheld that a resulting trust as to the land has been established in her favor, for several reasons: First, because the evidence is not sufficient to establish it; second, because the petitions filed, both here and in the abandoned chancery cause of *State v. Williamson*, do not claim this measure of relief, but, on the contrary, insist upon repayment of the \$1,000 and its accumulated interest as a debt secured by equitable lien, by virtue of her possession of the deed and notes and her husband's oral agreement that they should constitute such lien as security; and, third, because I do not think the facts, if admitted are sufficient to establish such trust.

In support of the first proposition, it is to be noted that the courts of the country pretty generally, and the Supreme Court of Appeals of this state particularly, have fully established the principle that trusts in land by parol must be established by evidence clear, strong, and unquestionable. *Hudkins v. Crim*, 64 W. Va. 225, 61 S. E. 166; *Armstrong v. Bailey*, 43 W. Va. 778, 28 S. E. 766; *Hatfield v. Allison*, 57 W. Va. 374, 50 S. E. 729; *Faulkner v. Grantham*, 55 W. Va. 317, 47 S. E. 78; *Jesser v. Armentrout's Ex'r*, 100 Va. 666, 42 S. E. 681. The uncorroborated testimony of husband and wife is insufficient to establish an express trust in favor of the wife in property purchased in the name of the husband, against a creditor of the husband seeking to subject such property to the payment of his debt. *Cheuvront v. Horner*, 62 W. Va. 476, 59 S. E. 964; *Pickens v. Wood*, 57 W. Va. 480, 50 S. E. 818. The evidence in this case is that of the husband and wife, of Floyd Teter, the husband's brother, and of O. G. P. Durrett, the wife's brother. The last two testify alone from information, and what they have understood and heard. Durrett says:

"I did not see the \$1,000 paid; but it was my understanding that it was paid by my sister, Sophia Teter. That was understood as a family transaction at the time. It was my understanding that Jesse Teter gave the \$2,000."

Again:

"My recollection is that it was something over \$500 she got from her father and aunt, and part of this she got in stock from my father. I don't know what she got for the stock when she sold it. I know it was over \$100 she got from her aunt; but just the exact amount I can't recall."

And in answer to the question:

"Please state, if you know, whether your sister, Mrs. Sophia Teter, had the custody of the deed from Jesse Teter to her husband for this land, and whether

she had surrendered to her the several purchase-money notes as they were paid"

—he answers:

"That was my understanding all the time that she had the deed, and it was my understanding that the notes were given to her."

And again in answer to the question:

"Do you know whether there was any understanding between Jesse Teter and Sophia Teter and T. B. Teter, at the time this deed was executed in 1883 (deed was executed in 1880), as to whether Sophia was to have any part of the land, or other security for the money, recited in the deed as the \$1,000 consideration?"

—he answers:

"I remember hearing my father speak to her concerning this matter, advising her to make herself secure for the money that she had paid into this land; that it should be deeded to her in so far as her money paid for it. That was about the time of the transaction. But if Mr. Teter should die she would only get one-third of what her money paid for."

He then says:

"There was an understanding among them at that time, and in the family, that she was to be secured in the land to the extent that her money paid the purchase price," that this was "well understood" by Jesse Teter, T. B. Teter, and the Teter family, as also he thinks it "well understood in the neighborhood that she had the deeds and the notes."

Floyd Teter's testimony is in no particular more positive than Durrett's. He says:

"His understanding was that his [bankrupt's] wife was to get some money from her father and pay him [Jesse Teter] something back—something out of the farm."

He says she was to pay, he thinks, \$1,000, and "I always supposed that she had a deed for it until this thing came up." He says: "I always understood it was Benton's wife's money" that paid the down payment, but admits he does not know who paid it, that he did not know who had possession of the deed, supposed it was in the family, and does not know why it was never recorded. He thinks the notes were turned over to Benton's wife, but has never seen them.

The evidence of both the husband and wife is significant. The wife says she gave T. B. Teter the \$250 to pay the down payment, furnished to T. B. Teter the money to pay the deferred payments, that the deed was left in her possession to secure her in the money that she had furnished, that her husband, T. B. Teter, delivered the notes to her when he brought them home, to secure her money that she had given him to pay on the land, that the deed was never recorded because she was never recompensed for the money that she had paid in the land, and it was left in her possession to secure her for the money that she had paid. The husband testifies that it was his intention to convey her the 187 acres, and he turned over to her the deed and the notes her money paid on the land, and she was to hold them for security, and that is the reason the deed was never recorded. He further says:

"At the time the deed was made, my wife was sick, and she didn't go along; and when I came back she was dissatisfied that it wasn't made to her, and I

just turned over to her the title papers, and told her I would make it to her later. It just went along and was neglected. I was in good circumstances, and my father was in good circumstances, and it was just neglected."

Do not these statements clearly cast doubt upon the character of this transaction? Was the agreement that Mrs. Teter was to be "secured" in the repayment of her money by deposit with her of the deeds and discharged notes (an ineffectual way to secure money as against subsequent creditors and purchasers, as we have seen), or was she to be repaid by a conveyance of the land? If the husband had remained in good circumstances, would such conveyance have continued "just neglected" for all time? Is it not apparent, from this evidence, that these people, in sore financial straits, are not certain whether they should claim under the plea of equitable lien, or equitable assignment of the vendor's lien, or under the plea of a resulting trust in and to the land? And does not a doubt arise whether it was ever intended to seek an enforcement of either, unless it be against creditors? If so, why, after the release of the state's judgment against the husband as Williamson's surety, and the abandonment of the state's suit, was the conveyance of this land to Mrs. Teter still neglected until now, after a lapse of 29 years after the transaction is alleged to have commenced, he has become involved again, and bankrupt?

Nothing would be more natural than for one so holding to seek speedily and constantly to resolve such holding into a solid and lasting holding by deed about which no question could be raised. Therefore this long lapse of time, taken in connection with the other circumstances and the relationship of husband and wife, throws such doubt upon the alleged purpose to establish originally such trust as to constrain me to hold that it is not proven by that clear, strong, and unquestionable evidence which the law requires.

But, finally, admit the facts, and I do not believe them sufficient to establish such trust. In the case of *In re Henderson* (D. C.) 142 Fed. 568, I reviewed the whole history of the origin of trusts by parol in Virginia and West Virginia as disclosed by the decisions of the courts of last resort in these two states. Incidentally it may be remarked that this case was reversed by the Circuit Court of Appeals for this circuit (*Henrie v. Henderson*, 145 Fed. 316, 76 C. C. A. 196), upon the sole ground that the court in bankruptcy had no jurisdiction, after sale of bankrupt's lands confirmed, to enjoin the bankrupt's trustee, making the sale, from conveying to the purchaser the land at the instance of one seeking to enforce a resulting trust in such purchase. After the dismissal of the bill, Henderson, the claimant of the trust, instituted his suit in the circuit court of Wood county to establish the trust and to enjoin the trustee in bankruptcy from conveying the land to Henrie, the purchaser. The injunction prayed for was granted, a motion to dissolve overruled, and an appeal taken to the Supreme Court of Appeals,¹ where it was held that Henderson had right to maintain his cause for a specific performance of the oral contract, but that the state courts did not have jurisdiction to enjoin conveyance by the trustee, he being a federal officer, and such injunction would be an interference with the order or judgment of a federal court. It therefore directed a dissolution of the injunction.

¹ 61 W. Va. 183, 56 S. E. 369.

It would seem that the effect of these decisions is practically that a trustee in bankruptcy, who has sold the land of the bankrupt, such sale being confirmed by the referee, becomes *sui generis*, with jurisdiction in no court to control his subsequent actions. However, the legal principles relating to trusts of this character, determined by me in the original cause, I understand to be in effect affirmed by the decision of the Supreme Court of Appeals of the state. I there held: First, where one, before a sale, agrees to buy land in his name, for the benefit, in whole or in part, of another, who pays the purchase money, or his aliquot part thereof, an express trust arises, enforceable in equity; second, where one buys land under executory agreement, and afterwards, before, however, legal title is passed, verbally agrees that, if another will pay the purchase money, he shall have the land, and that other does so, the trust is enforceable in equity; third, both express and constructive trusts in lands can be created, declared, and proven by parol evidence.

It seems to me the facts here do not prove a trust to have been established under these principles. Such trusts would have to be enforced by a decree directing conveyance to the *cestui que* trust of the land, or such part thereof as she paid for. *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329; *Murry v. Sell*, 23 W. Va. 475; *Shaffer v. Fetty*, 30 W. Va. 248, 4 S. E. 278. No oral agreement to hold in trust or payment, made after legal title has passed can constitute such trust good against the statute of frauds. Nor will such resulting trust ever arise in favor of one paying for land conveyed to another, where such payment is only a loan to such other person. *Currence v. Ward*, *supra*; *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176. *Smith v. Turley*, 32 W. Va. 14, 9 S. E. 46, to my mind, presents many parallel conditions to this one. It is there doubted whether a resulting trust arises in favor of a wife, if the husband acquires property with her separate estate, and without her knowledge and consent takes title in his name. If so, it is held (1) the proof must be clear and explicit to establish that fact especially against the husband's creditors; (2) long lapse of time will defeat its enforcement; and (3) it must arise at the time title is taken. No subsequent oral agreement or payment will create it.

In this case it seems very clear, from the evidence of both husband and wife, that she was not present when the conveyance was taken from Jesse Teter; that she did not pay to Jesse Teter the \$250 down payment, but "furnished" the money to her husband, who paid it; that he took the deed to himself, without her knowledge and consent at the time, and subsequently, when she expressed her dissatisfaction, he deposited with her the deed and notes as security for her money, which he had used, intending to convey to her the land (apparently, from his statement, the whole of it); but this, owing to his being in good circumstances, he "just neglected" to do. With this it seems Mrs. Teter was content, made no effort to secure such conveyance, took no evidence of the debt, and no other security therefor, and sought to assert no claim to, interest in, or lien upon the land until 10 years after, when her husband was in danger of losing it as Williamson's surety. When this danger passed, she seems to have been satisfied to leave the matter in exact *statu quo* for 19 years longer, when her husband's bankruptcy makes the loss of the land to her husband inevitable. I am very clear-

ly of the opinion she has no resulting trust in and to the land to enforce, that she has no assignment legal or equitable to the vendor's lien, and no such equitable lien by reason of her possession of the deeds and notes as will give her priority over creditors. At the most, she has only an unsecured claim for her money used by her husband, long since barred by limitation, which I understand has been pleaded by the trustee against it.

The decision of the referee will be reversed.

BERWIND-WHITE COAL MINING CO. v. METROPOLITAN S. S. CO.

AMERICAN TRUST CO. v. SAME. In re ENGLIS.

(Circuit Court, D. Maine. September 18, 1909.)

No. 625.

MARITIME LIENS (§§ 18, 38, 46*)—STATUTORY LIENS FOR CONSTRUCTION—EFFECT UNDER MARITIME LAW—WAIVER—PRIORITY OVER MORTGAGE.

This case relates to a class of liens arising on the steamers Harvard and Yale under the statutes of New Jersey, discussed in 166 Fed. 782, affirmed in 173 Fed. 471, and further discussed in 169 Fed. 491. It differs from the prior cases only with reference to a further discussion of the doctrines of laches, waiver, and estoppel, in view of the special circumstances. It also holds that the rules in favor of maintaining the liens of this class apply to merchandise installed in the steamers while lying in the state of New Jersey, notwithstanding the contract therefor was made in New York and the principal work in preparing the merchandise was done in the latter state.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 23, 73, 85; Dec. Dig. §§ 18, 38, 46.*

Waiver and extinguishment, see note to *The Nebraska*, 17 C. C. A. 102.]

In Equity. Consolidated suits by the Berwind-White Coal Mining Company and by the American Trust Company against the Metropolitan Steamship Company. On petition of Charles M. Englis to intervene. Petition allowed.

See, also, 169 Fed. 493.

Robinson, Biddle & Benedict and Verill, Hale & Booth, for interveners.

Alfred H. Strickland, for Berwind-White Coal Mining Co.

William A. Sargent and Avery F. Cushman, for American Trust Co. Libby, Robinson & Ives, for Metropolitan S. S. Co.

PUTNAM, Circuit Judge. This petition was heard on April 9, 1909. At that time the court found nothing in the record which impressed it with any conviction that, so far as the larger portion of the claim was concerned, the result would be in any way different on this petition from what it was with the Fletcher petition, decided on December 26, 1908 (166 Fed. 782), and affirmed by the Circuit Court of Appeals on August 18, 1909, reported in 173 Fed. 471, as modified by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

force of some circumstances in the opinion passed down on the Wanamaker petition, March 10, 1909 (169 Fed. 491). In the Fletcher Case, everything furnished was furnished within the state of New Jersey. In the Wanamaker Case, the contract for all that was furnished was made in the state of New York, but the delivery of the major portion thereof was made in the state of New Jersey. A portion was delivered in the state of New York, where they were contracted for, and as to that we held that there was not enough to bring the case within the statutes of that state. In the present case, the contract was made by correspondence carried on on the part of the petitioner in New York state, and on the part of the Metropolitan Steamship Company at Boston, in the state of Massachusetts. A portion of the work was put aboard the vessels at Chester, in the state of Pennsylvania, where the hulls were constructed. The entire preliminary work was done at the shops of the petitioner at Greenpoint, in the state of New York. Some portion may have been installed while the vessels were in the state of New York, but the great bulk was installed at Hoboken, in New Jersey, where the vessels were being completed, as explained in the Fletcher Case. As the record here fails in the same particular in which the record failed in the Wanamaker Case, with reference to what was installed within the state of New York, the judgment in this case will relate only to what was installed at Hoboken, and, on the principle stated with reference to the Wanamaker petition, it will cover whatever was installed there, wherever else the preliminary work or any part of the work was done. It will be understood, therefore, that the reference to the master, whatever its general terms, will be limited to what was thus installed at Hoboken.

At the hearing in April, the original complainant, namely, the Berwind-White Coal Mining Company, an unsecured creditor, asked leave to file a brief on the question of waiver. All questions of this character were disposed of quite fully both by us and by the Circuit Court of Appeals with reference to the Fletcher petition; but it is now urged that we stated in our opinion in that case that there is no legal evidence that Fletcher knew of the prior mortgage, and that the present record shows that Englis not only knew of the prior mortgage described in our opinion on the Fletcher petition, but also knew that there were to be supplemental mortgages covering the Harvard and Yale specifically, and also that his knowledge did precede his liens. The brief proceeds with much vigor and care to develop this alleged fact of knowledge on the part of Englis, and to press upon the court the essential difference between the two petitions on that account. On the whole, we think we had better review the present propositions carefully, although we think there is an expression in the opinion of the Circuit Court of Appeals which renders the attempt to discriminate of no effect.

We wish, first, to state that no inference is to be drawn, from what we decided with reference to the Fletcher petition, that any amount of knowledge would have affected the conclusion which we then reached. We decided that case on the then existing facts, leaving any case involving different facts to take care of itself. We also observed at the

outset that all the propositions we have received from counsel with reference to either of the petitions before us in regard to the question of waiver, or any cognate question, entirely overlooked the fact that the conclusions of this court, as well as of the Circuit Court of Appeals, rest on the proposition that the lien given by the statutes of New Jersey is akin to the maritime lien, and has the same characteristics, except it cannot be enforced in admiralty. In this respect it is widely distinguished from the ordinary lien given by the common law or by statutes. The pith of the distinction, and the reason therefor, is found in the following expression appearing in the opinion of the Circuit Court of Appeals with reference to the Fletcher petition, namely:

"By the maritime law, on the other hand, a lien existed for the supply and repair of a vessel having an application more extended. It was not possessory. Indeed, the maritime lien was deemed to be given in order that the vessel might go on its way unembarrassed by the lienor's attempt to obtain immediate payment."

Therefore it is that, with reference to expedition in enforcing the lien, there is a wide difference in favor of the maritime lien, and, consequently, of the liens set out by the petitions for the interveners, which it is now decided, so far as we are concerned, are akin to maritime liens, as we have said. Consequently it was that we decided on the Fletcher petition, as pointed out on pages 791 and 792 of 166 Fed., where we fully stated the facts, that there was no basis for a claim of laches with regard thereto. So far as mere laches is concerned, what we have said there applies to the case here. For any one who wishes to read examples of the extent to which the doctrine of laches fails to apply as against maritime liens, we refer them to 2 Parsons on Shipping and Admiralty (1869) 361 et seq.

Another proposition must be considered with reference to the distinguishing features of maritime liens, and, therefore, the liens in this case; and that is that they are not prejudiced by existing incumbrances, although the incumbrances are known to the lienor, unless in an extreme case like that of a tort-feasor. This is on the broad principle that whoever voluntarily takes a lien on a vessel gives the owner of the vessel implied authority to incumber her for supplies and repairs, so far as the maritime law is concerned. At any rate, so far as that law is concerned, the lien cuts through all incumbrances in the way of mortgages, even though known to the lienor. For the reasons stated, the same rule applies here.

For the reasons we have given in our opinion with reference to the Fletcher petition, it is useless to maintain that the original mortgage of 1905, before the steamers Yale and Harvard were constructed, or their construction commenced, raised any equity as against the interveners. That was fully disposed of in that opinion, and no claim of that nature is made now. Therefore the issue, if at all, is between the lienors and the mortgages on the Yale and the Harvard, one of which was made May 25, 1907, and the other one August 14, 1907. In the present case, one contract was made with the petitioner with reference to the construction work for both vessels. This was made in August, 1905, a complete, binding contract, though in the form of letters. The record does not show when the work of preparation was

commenced by the petitioner, but a very considerable installation on both vessels was commenced at Chester in September, 1906; and, during the whole intervening period, the work of preparation was proceeding at Greenpoint; and the installation at Hoboken, which was by far the principal part of what was accomplished, began immediately after the arrivals of the two vessels there, which, on the part of the Yale, was December 15, 1906, and, on the part of the Harvard, February 25 or 26, 1907. Therefore, under the well-settled equitable rules which must apply here, as also would apply in admiralty, this contract, though executory, so far as we are concerned, until the work of installation was commenced at Hoboken in December, 1906, and February, 1907, was effective from that time to fix the equities of the parties; and that time was several months before the mortgages were made on the Yale and the Harvard, so the petitioner's relief for the whole work done must, in view of the fact of the date of the contract and the beginning of the installations in December and February preceding the mortgages, take full effect as of those months. Therefore the expression found in the opinion of the Circuit Court of Appeals in the Fletcher Case, relating to this topic, must be taken to dispose of every new question raised here. That expression is as follows:

"The Trust Company alleged knowledge by the Fletcher Company of the Trust Company's rights; but the knowledge, if there was any, did not precede the lien."

Thus apparently the Circuit Court of Appeals disposes of both aspects; the one bearing on the Fletcher petition, where we found there was no sufficient proof of knowledge of the mortgages, and the other applying to this case, on the hypothesis maintained in the brief which we are considering.

So much for laches. The parties answering these petitions run together the defenses of laches, waiver, and estoppel. Of course, these defenses are in a certain sense akin to each other, and run into each other; yet they are distinct defenses, and should have been distinctly discussed with reference to the particular evidence bearing on each. Laches, it is true, with some supporting circumstances, may run into waiver, and likewise into estoppel; but each has its own individuality, which should be followed out. This has not been done. Laches need not ordinarily be pleaded, but waiver and estoppel should be. The answer in this case pleads laches and estoppel, but not waiver. However, we will consider them all.

The defense of laches we have disposed of. Waiver may run into estoppel, especially when the alleged waiver grows out of matters of record which are inconsistent with each other. There the law refuses to permit the inconsistent positions, independently of the intention of the parties involved; but in this case waiver must be a matter of intention, and can be nothing else. Of course, intention may be inferred from circumstances; but, in view of the fact, which we have shown, that a lien of the character here alleged is not inconsistent with other incumbrances, and may cut through all of them, there is no such proof here as would justify us in finding that Englis intended to waive,

without consideration, so valuable a right as his lien for so large an amount.

Of course, there is no estoppel of record; and, as to estoppel in pais, the rules of law are not at all loose, as the parties respondent to these petitions seem to think. On the other hand, they are very strict. In *Henshaw v. Bissell*, 18 Wall. 255, 271, 21 L. Ed. 835, the opinion rendered in behalf of the court says:

"There is, therefore, no case for the application of the doctrine of equitable estoppel. For its application, there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud."

It is impossible to find in this record any proofs of such a definite character as to meet these conditions. The attempt here to apply the rule of one party lying by and allowing an innocent party to acquire a supposed right to his prejudice fails. To apply that rule it is ordinarily said that the party acquiring the property must be ignorant of the facts, and must rely upon conditions as he supposed them to be, while the party who stands by must ordinarily know the facts, and have reason to believe that the innocent party is misled or mistaken. Neither of these things are proven here. The circumstances and the application of the rule are, of course, very different from a case where one party is purchasing bonds or taking a mortgage, and the other one has no reason to understand that, in the taking of the bonds or the mortgage, he is relying on any particular state of the title. The ordinary illustration relating hereto is that of one purchasing property, who, of course, assumes that he is getting a suitable title. There is not the slightest evidence that the petitioners had not entire faith that the property was ample to pay their liens and the entire amount of the bonds issued on it, or to be issued on it. On the other hand, there is not a particle of evidence to support the proposition that either the mortgagors or the purchasers of bonds had any other view than that which the petitioners might have entertained. The entire evidence is that Englis understood that the vessels would be mortgaged to pay the cost of construction, and dealt in some of the bonds, both receiving them and disposing of them. The only natural conclusion is that, as he was dealing in the bonds both ways, he believed them to be good notwithstanding all the facts known by him; so that, therefore, it is probable that he was not embarrassed with any notion that the interests of other parties required any disclosure from him. Taking the case by and large, all the evidence upon all these branches of defense is too shifty and loose to support either of them.

There must be a master to report the amount to be allowed for whatever was installed at Hoboken, as we have described.

Let there be a decree sustaining the petition to the extent shown by the opinion passed down on September 18, 1909, establishing the liens according to that opinion, on surrender of any promissory notes received by the petitioner, and directing the master accordingly; and let the decree provide that certified copies thereof and of such opinion constitute the master's commission.

THE KÖNIGIN LUISE.

(District Court, S. D. New York. November 10, 1909.)

SHIPPING (§§ 132, 152*)—DAMAGE TO CARGO—NEGLIGENT STOWAGE—FREIGHT PAID IN ADVANCE.

Damage to cargo and loss of freight paid in advance. *Held*, that in view of the addition to the exception of exemption for leakage and breakage, the words "or any other injury resulting from the natural condition of the goods shipped," etc., the burden was upon the carrier to show how the damage was sustained, it not being a case of insufficient packages but of negligence in handling them; also *held* that the freight paid in advance on goods not delivered should be recovered back.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 479, 481, 514; Dec. Dig. §§ 132, 152.*]

Burden of proof as to cause of loss or injury to goods shipped by vessel and diligence or negligence of carrier, see note to *The Patria*, 68 C. C. A. 398.]

(Syllabus by the Judge.)

In Admiralty. Action by the Oil Seeds Company against the steamship *Königin Luise* to recover for injuries to cargo and money paid in advance for freight. Decree for libellant.

Wilcox & Green, for libellant.

Choate & Larocque, for claimant and respondent.

ADAMS, District Judge. This action was brought by the Oil Seeds Company against the steamship *Königin Luise* and the North German Lloyd to recover the damages, said to be \$1,762.04, which amount includes the sum of \$463.21 paid in advance for freight. The libel alleges that on or about the 23rd of August, 1907, Antoine Reggio & Co., shipped at Smyrna, Turkish Asia, on the steamship *Therapia*, in good order and condition, and free from damage, 200 barrels of olive oil to be carried to Genoa, Italy, and to be forwarded from that port by the *Princess Irene*, or other steamship of the respondent, to the port of New York, and there delivered in like good order and condition to the order of C. B. Richard & Co., upon payment of freight and charges; that the said Reggio & Co. received a bill of lading for said merchandise, whereby it was agreed that the same should be carried and delivered as aforesaid, and thereafter said bill of lading was duly endorsed by said C. B. Richard & Co. and delivered to libellant, for value, and the libellant became the holder and owner thereof, and the owner of said merchandise, and was the owner and holder at the time of the subsequent delivery of the merchandise at New York; that the said *Therapia* carried said merchandise from Smyrna to Genoa, and there delivered the same to the respondent and to said steamship *Königin Luise* for transportation to New York, where she delivered it to the libellant, and where the libellant paid the freight and charges before delivery, believing that the merchandise had arrived in good order and condition, but after the delivery, the merchandise was found to be seriously damaged and the libellant alleges that said damage was caused by bad stowage

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and by negligence, carelessness, improper conduct and want of attention of the master, mariners and servants in the employment of the respondent and of the Königin Luise, a large number of the barrels being broken, crushed and otherwise injured and the contents thereof in whole or in part spilled and lost, whereby the damage mentioned above was sustained by the libellant.

The defending parties admit the shipment as alleged in the libel, but claim that the oil was received for carriage in accordance with a bill of lading which had stamped on its face: "Not accountable for leakage or breakage"—also that the barrels were of inferior character and old and weak, also claiming the defence of the perils of the sea as covering the condition of the barrels and ordinary working of cargo.

The bill of lading contained a clause stipulating that the ship owner should not be responsible for leakage or breakage and the claimant and defendant rely upon that provision for their defence, claiming that as no proof has been given to show any negligence on their part, no liability has been established.

The testimony shows that the barrels were the usual class of packages in which oil transported for commercial purposes is shipped. Upon arrival here, it was found that about 26 of the barrels were empty, 29 showed a large percentage of loss, and with a few exceptions, all of the others showed a certain amount of loss. There is always some loss in the transportation of oil, estimated at from $1\frac{1}{2}$ to $5\frac{1}{4}$ or $5\frac{1}{2}$ per cent, but that is entirely insufficient to explain the loss in this case. Here the empty barrels showed broken staves, broken heads, hoops missing, and similar damage. Many of the barrels were squeezed out of shape. All had evidently suffered from some external damaging cause without, however, disturbing their positions in the tiers.

The libellant contends that being a purchaser for value, relying upon the clean bill of lading given by the respondent, it is entitled to recover, and cites: *Compania Naviera Vascongada v. Churchill*, 10 Asp. Mar. Law Cas. 177. I had occasion to consider that case in *New York M. & S. Co. v. Hamburg Am. P. A. Gesellschaft* (D. C.) 171 Fed. 577, and adopted its doctrine of estoppel to sustain a claim made by the indorsee of a bill of lading against a carrier for damage caused to goods receipted for "in good order and condition," being delivered in a damaged condition.

The respondent on the other hand relies upon the doctrine contained in the recent case of *The St. Quentin*, 162 Fed. 883, 89 C. C. A. 573, restated in *The Baralong* (C. C. A.) 172 Fed. 220.

These last mentioned cases, in a general way are in accordance with the authorities, requiring the shipper of goods, damaged in transit, to prove negligence, when the damage is covered by an exception. In the cases cited by libellant the bills of lading, reciting that the goods were received in good order and condition, were incorrect and known to be so by the carrier when they were issued. If the merchandise was not in good order when shipped, it could not be delivered in that condition at the end of the voyage and it was held that the carrier was estopped from denying that the merchandise was in the condition described in the bill of lading and it must respond

for the damages. These were quite different from cases where the merchandise was in the condition described in the bill of lading when shipped and was subsequently damaged, during the course of the voyage. I think there can be no doubt that such was the situation here. The libellant does not contend that the bill of lading was false when issued but, on the contrary, that it correctly showed the condition of the goods and the damage was the result of something happening afterwards. It is said in libellant's brief:

"The testimony taken under the commission to Smyrna shows beyond question that the goods were in perfect order when shipped, and must have been subsequently mishandled or neglected to reach New York in the badly damaged condition they showed upon arrival."

Therefore, the cited cases must be regarded as not in point.

It is further contended by the libellant, however, that the exception does not cover the situation. It reads:

"The owner is not responsible for * * * leakage, breakage, land damage, or any other injury resulting from the natural condition of the goods shipped, or their deficiency of packing not externally recognizable. * * *"

If the exception were leakage and breakage only, it might be that the burden of further proof in the matter, if required, would be upon the libellant, but when such words of exception are qualified as stated above, it becomes questionable if such be the case. For example in *Doherr v. Houston* (D. C.) 123 Fed. 334, affirmed 128 Fed. 594, 64 C. C. A. 102, the exception was "* * * that the carrier should not be liable for any loss or damage occasioned by * * * breakage * * * nor for any loss or damage arising from the nature of the goods or the insufficiency of the packages. * * *" It was held there that the burden was upon the carrier to explain and in the absence of explanation, it was liable.

It is contended by the libellant that broken heads, staves, chimes, etc., did not result from the "natural condition of the goods shipped," nor could the damages be due to deficiency of packing "not externally recognizable." It appears here that the barrels had been tested, were absolutely tight and in perfect ordinary condition, so far as the eye could determine, when they went aboard at Smyrna. They were found in New York, while still in the tier where they had been stowed, in a broken condition, similar to those in *Doherr v. Houston*, supra, where it was held that the carrier was liable, in the absence of explanation of the cause. In *Doherr v. Houston*, stowage was in question and while there is nothing here as there to indicate the cause of the breakage, still the principle seems to be the same and when the facts appear, as they do here, to indicate some negligence must have existed after the shipment and before delivery, I do not think a libellant can be thrown out of court simply because he has not gone into the enemy's camp for testimony.

In *The Folmina*, 212 U. S. 354, 363, 29 Sup. Ct. 363, 365, 53 L. Ed. 546, where damage was found to exist in the cargo of an apparently sea worthy ship, through the unexplained admission of sea water, it was held that the burden of proving the cause of the entrance was upon the carrier. The court, by Mr. Justice White, said in part:

"As the burden of showing that the damage arose from one of the excepted clauses was upon the carrier, and the evidence, though establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance of the sea water must be resolved against the carrier, *The Edwin I. Morrison*, 153 U. S. 199, 212, 14 Sup. Ct. 823, 38 L. Ed. 688. And see further the following cases, applying the principle just stated, and holding that because the damage to cargo was shown to have been occasioned by sea water without any satisfactory proof as to the cause of its presence, in view of the burden resting upon the carrier, conjecture would not be permitted to take the place of proof. * * *

This does not seem to have been a case of insufficiency of packages as in *The Claverburn* (D. C.) 147 Fed. 850, but of breakage of good packages through some improper handling. Mere leakage of the oil would not account for the delivered condition of the barrels and the ship should furnish some explanation of it. In the case just cited, there was testimony to show that the drying quality of the wood oil in the barrels was sufficient to account for the damage, but that it is not so here and to conclude that the nature of this oil was such as to have caused the loss, would, it seems to me, be erroneous.

In the argument here, conjecture has been given a wide scope, but excluding it altogether from consideration, I think the decision may be safely rested upon an entire absence of explanation of the cause of damage from the carrier, which was much more within its knowledge than it was within the shipper's.

The claim for advanced freight is resisted by the carrier under the following provision of the bill of lading, viz:

"XI. Full freight must be paid for goods damaged or diminished through leakage. For liquids, freight must also be paid as for full barrels, whether the same be full, partly full or empty. No freight is to be paid for increase in weight caused by sea damage."

This provision excludes any recovery for freight paid in advance on goods damaged or diminished through "leakage." The word is not qualified as it is in the earlier part of the instrument and the question is shall the carrier be entitled to retain freight paid in advance where it has been held, as here, that the carrier is responsible for the damages to the merchandise. This loss was not through leakage in the ordinary sense, and such part of the amount as was paid as freight on the goods which were not delivered, can be recovered back.

There will be a decree for the libellant, with an order of reference.

NOYES v. MUNSON S. S. LINE.

(District Court, S. D. New York. November 11, 1909.)

SHIPPING (§§ 49, 62*)—CLAIM FOR CHARTER HIRE—DEDUCTIONS.

Held that the charterer was entitled to deduct (1) for quarantine detention, (2) advances to the master, (3) loss of time while awaiting dry

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

docking, and (4) for a compromise with the master with respect to time lost through defective winches.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 195, 258, 259; Dec. Dig. §§ 49, 62.*]

Deductions and offsets from charter hire of vessel, see note to Tweedie Trading Co. v. George D. Emery Co., 84 C. C. A. 254.]

(Syllabus by the Judge.)

In Admiralty. Action by the Munson Steamship Line against Winchester Noyes. Libel dismissed.

Convers & Kirlin, for libellant.

Wheeler, Cortis & Haight, for respondent.

ADAMS, District Judge. Winchester Noyes claims the recovery in this action from the Munson Line of unpaid hire, amounting to \$1,064.84, of the steamer Dorisbrook, under charter dated October 3, 1904. The contract of hiring was covered by the usual form of time charter. The respondent, after sundry denials, alleges:

"Fourteenth: Further answering the libel, the respondent alleges that the charter of the steamship Dorisbrook contained, among others, the following provisions:

'Steamer to be placed at the disposal of the charterers at New York * * * being on her delivery ready to receive cargo, and tight, staunch, strong, and in every way fitted for the service, having water ballast, steam winches and donkey boiler with capacity to run all the steam winches at one and the same time and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage, * * * to be employed in carrying lawful merchandise * * * in such lawful trade as mentioned above, as the charterers or their agents shall direct, on the following conditions:

1. That the owner shall * * * maintain her in a thoroughly efficient state in hull and machinery for and during the service.

2. That the charterers shall provide and pay for all * * * Consular charges (except those pertaining to the captain, officers and crew). * * *

16. That in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, or damage preventing the working of the vessel for more than 24 consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service. * * *

17. * * * The act of God, enemies, fire, restraint of rulers, princes and people * * * throughout this charter party mutually excepted.

22. That as the steamer may be from time to time employed in tropical waters during the term of this Charter, steamer is to be docked, bottom cleaned and painted whenever Charterers and Master think necessary, at least once in every six months, and payment of the hire to be suspended until she is again in proper state for the service.'

Fifteenth: At the port of Mobile the steamship Dorisbrook, during said charter, was delayed by reason of sickness among the crew, rendering them unfit for service, from the 13th day of August, 1905, at 4:30 P. M. to the 16th day of August, 1905, at 1:30 P. M., or 2 days and 21 hours, which, at the charter rate of hire, amounted to \$383.70. Said sickness among the crew was such as to result in a 'deficiency of men' for the proper working of the steamship, and a restraint of princes, rulers and people within the provisions of the charter above quoted.

Sixteenth: While the said steamship Dorisbrook was on the said charter, she consumed for owner's account 18 tons of bunker coal, belonging to the respondent, of the value of \$117.00, for which amount respondent is entitled to make a deduction from charter hire. The respondent also made advances to the master of the said steamship Dorisbrook for the libellant which constituted payment of the charter hire in advance up to the time of the steam-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ship's redelivery at the end of the charter, amounting in all to the sum of \$207.46.

Seventeenth: In accordance with the provisions of clause 22 of said charter, and after the steamship Dorisbrook had been employed in tropical waters for over 6 months, since her last docking, said steamship was duly tendered to the owners by the libellant on the 10th day of August, 1908, at 5 P. M. for the purpose of dry docking and painting. The owners, however, refused to dock said steamer at that time, and pending said refusal, the vessel lay idle up to the time she went off charter on the 13th day of August, 1906, at 9 A. M. and by reason of said owners' refusal to dock, respondent is entitled to reimbursement for said 2 days and 16 hours, which at the charter rate of hire amounted to \$385.92.

Eighteenth: On or about the 12th day of December, 1905, the steamship Dorisbrook arrived at the port of New York with cargo, and the respondent immediately sent her to a berth to discharge. By reason of the fact that upon arrival her winches were broken and out of repair, it was impossible to use the same, except to a very small extent, in the discharge of said cargo, and four of said winches were so far disabled as to be utterly useless during said discharge, which was completed on or about December 16, 1905. Because of the condition of the winches, as aforesaid, the time occupied in said discharge was prolonged by one day, for which the respondent is entitled to compensation in the sum of \$135, which sum is the value of one day at the charter rate. By reason of the condition of the winches aforesaid, the respondent was further necessarily put to extra expense for the hiring of hoisters and derricks to take the place of the said winches, and for extra labor caused by the condition of the winches aforesaid, in the sum of \$102, for which the respondent is entitled to reimbursement. Said sums of \$135 and \$102 make a total of \$237, which was properly deductible by the respondent from the charter hire.

Nineteenth: By reason of the premises the respondent became entitled to deduct from the charter hire otherwise due on said steamship the said sum of \$383.70, \$117, \$207.46, \$385.92 and \$237, and therefore the sum claimed in the libel was properly deducted from said hire as aforesaid."

The cited provisions of the charter party are correctly quoted, in substance.

1. The first deduction claimed is for detention at Mobile, amounting to \$383.70.

It appears that the steamer went into quarantine at Mobile, Alabama, the 13th of August, 1905, at 4:30 p. m., and remained until the 16th at 2 p. m. When she arrived she went to the quarantine hulk and was fumigated, then went to anchor and was detained by the authorities from 4:45 p. m. the 13th until 2 p. m. the 16th on account of the illness of the crew on board. During this time the crew were physically able to move the vessel, but they were held as "suspects" and were thus constructively inefficient. In *Tweedie v. Emery* (D. C.) 146 Fed. 618, affirmed 154 Fed. 472, 84 C. C. A. 253, there was detention owing to sickness of the crew, which was deemed a legal cause for deducting the loss of time. In that case, there was a new crew substituted, and the vessel was then released. There was no substitution here but the vessel in such sense remained helpless. The cases are not distinguishable by reason of the following language of the Court of Appeals, viz.:

"It is to be noted that this is not a case where some of the crew falling sick, enough are left to bring her forward on her voyage."

Here the ship was actually helpless and could not avoid detention during the claimed time. The Circuit Court of Appeals has quite re-

cently again considered and affirmed the doctrine of the *Emery Case* in *Gow v. Gans S. S. Line*, 174 Fed. 215, under similar provisions in the contract. The language just quoted was the basis of a decision by Judge Holt to the effect that there could be no recovery for such detention in quarantine but the decision was reversed and the court said:

"We have held in the case of *Tweedie Trading Co. v. George V. Emery Co.*, 154 Fed. 472, 84 C. C. A. 253, that a deficiency of men may be constructive, e. g., inability to work because of quarantine regulations, and in *Clyde Commercial Steamship Co. v. West India Steamship Co.* (C. C. A.) 169 Fed. 275, that a distinction between the vessel and her crew may be made for quarantine purposes. Such a distinction appears in the regulations under consideration. Under 68 (b), 68 (c), 74 and 104 a vessel may be rendered free from infection by fumigation and released if a new crew be furnished, otherwise she may be detained for five days longer for the purpose of observation of the personnel. The fumigation of this vessel was completed September 11 at 4 P. M. and the subsequent detention of five days was due entirely to the personnel. There was, therefore, a constructive deficiency of men within Art. 16 of the charter, which expressly causes hire to cease for that time. The exception in Art. 17 of the restraint of princes, rulers and people does not apply to the categories mentioned in Art. 16, as we have held in the case of the *Clyde Commercial Steamship Co.*, *supra*."

2. The next deduction claimed, \$207.46, is that made to the master for provisions, etc.

Bills for these disbursements have been approved by the master. There is no real dispute about these items.

3. The next deduction claimed, \$385.92, is for time lost while awaiting dry docking.

On the 11th of August, 1906, the respondent gave the libellant notice that the steamer would be in its hands for dry docking. This was duly acknowledged by the master, who replied as follows:

"In reply to your letter of yesterday I beg to advise you that I cannot accept delivery of my steamer for dry docking purposes as you request.

As per your instructions my owners were notified on August 7th that my steamer would be re-delivered to them in New York on August 13th, in view of which fact, they were aware that you were not going to use my steamer for another trip, and therefore cabled me on August 9th not to dry dock again while under your charter.

As advised you, I had received a cable from owners previously on August 4th, agreeing to dock and paint, but at that time they were no doubt under the impression that I was to go on another voyage.

I, therefore, under the circumstances, must formally decline to accept re-delivery from you for docking purposes, and must ask you to retain my steamer under hire until expiration of charter party on Aug. 13th."

The vessel was actually discharged at 4:30 p. m. on that day. She had been last dry docked December 18, 1905. The libellant refused to dry dock her for the next two days but as soon as she was re-delivered, she was sent to be dry docked.

In this case, therefore, there was an actual necessity for dry docking and it was no answer to a demand for the necessary time to allege that the vessel did not need dry docking. Assuming the correctness of the claimant's contention, still the owner was bound to pay for the time lost, even if it was not actually necessary for the purpose. *Munson S. S. Line v. Miramar S. S. Co.* (D. C.) 150 Fed. 437, affirmed 166 Fed. 722, 92 C. C. A. 412; (C. C. A.) 167 Fed. 960.

4. The next deduction claimed, \$237, was on account of defective winches.

When the steamer arrived in New York December 12, 1905, her winches were badly broken, three of them could not be used at all, and one of them could only be used in part. The engineer testified that on a voyage from Progresso to Staten Island, on December 9th, " * * * everything broke adrift, smashed up." The deck cargo, mahogany logs, "broke adrift and broke the winches, at least the deck winches. * * * On Sunday morning No. 4 winch badly broken by loose logs, 12:30: both frames of No. 4 winch broken. * * * The cargo was discharged. "Some of it was by winches and some of it was by steam hoisting gear that came alongside—using the poop winch and the middle winch and the fore winch. * * * Q. So what winches were there that could not be used? A. No. 2, No. 3, and No. 4. * * * No. 4 was absolutely in pieces. * * * Q. When you arrived in New York on December 12 how many winches were there out of repair? A. Three. Q. Weren't there four? A. Well when we arrived for them to start cargo there were only three. There were four when we arrived, but we fixed No. 1 for them the next morning. Q. When you arrived four were in such condition you could not work them? A. They were broken. Q. How many winches have you in all upon the vessel? A. Six. * * * There were only two winches that were not touched—the bridge deck winch and the poop winch."

Under the circumstances, the master and the charterer entered into an agreement to have a steam hoister assist in the discharge, the charterer agreeing to pay hire and the owner to stand the extra expense of discharging, caused by the defective condition of the winches. The vessel was thus delayed one day longer than usual, the hire for which period would be \$135, and the charterer paid for hoisting and extra labor \$102. This made \$237, for which the master approved a voucher.

The master, it is urged, exceeded his authority in making this agreement, as it was contrary to the charter party. This was perhaps true, unless the master was, under the circumstances, justified in compromising the matter. The ship would have been liable for lost time while she was out of condition for work (*The Munson S. S. Line v. Miramar S. S. Co.*, supra), and it was undoubtedly for her benefit that an adjustment should be reached as soon as practicable. It seems to me that the master adopted a wise course in preventing delay.

In *The Edward H. Blake*, 92 Fed. 202, 34 C. C. A. 297, a dispute as to the meaning of "a small quantity of oak ties" was compromised by the master. It was held, as stated in the syllabus:

"While a master has no power to set aside the contract made by the charter party, yet where, at the time of loading, questions arise between the ship and the charterer as to the proper construction of minor clauses in the contract, in the absence of the owners, the master, as their agent, must necessarily deal with the same, and his construction and agreements in relation thereto are binding on the owners."

I have no doubt that the master, under the circumstances of this case, was justified in making a settlement for the benefit of the vessel, and the wisdom of his action here is apparent when it appears that it

would have been much more expensive if the master had stood strictly on his authority as master, in which event, the vessel would have been liable for a larger amount than she paid here. See *Lake Steam Shipping Co. v. Bacon* (D. C.) 129 Fed. 819, affirmed 145 Fed. 1022, 74 C. C. A. 476.

The respondent has proved more than necessary and the libel is dismissed.

UNITED STATES v. QUONG LEE & CO. et al.

(Circuit Court, N. D. California. August 6, 1909.)

Nos. 13,839-13,846.

CUSTOMS DUTIES (§ 37*)—CLASSIFICATION—EMBROIDERED FANS—"FANS OF ALL KINDS"—"EMBROIDERED WEARING APPAREL OR OTHER ARTICLE OR TEXTILE FABRIC."

Embroidered fans are subject only to the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 427, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675), for "fans of all kinds," not being within the scope of the proviso in Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), imposing the embroidery rate on "embroidered wearing apparel or other article or textile fabric."

[Ed. Note.—For other cases, see Customs Duties, Dec. Dig. § 37.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

Robert T. Devlin, U. S. Atty., and George Clark, Asst. U. S. Atty.
Stanley Jackson, for respondents.

VAN FLEET, District Judge. These cases involve appeals by the government, on the protest of the collector of the port of San Francisco, from the decision of the Board of General Appraisers, reversing the action of the collector in assessing the duty on certain importations of silk embroidered fans entered at that port. The collector held the fans covered by the proviso to Tariff Act July 24, 1897, c. 11, § 2, Schedule J, par. 339, 30 Stat. 181 (U. S. Comp. St. 1901, p. 1662), relating to embroidered articles, rather than under paragraph 427, Schedule N, of the act, relating to fans, and assessed them accordingly at the higher rate provided in the former. The board held that the imported articles should be classified under the latter provision, and the contention of the government is that the classification by the collector is right and should be upheld. The cases all involve but one and the same question, and that one of construction.

The provisions of the act involved in the inquiry are three. Paragraph 390, Schedule L, relating to laces, embroideries, etc., so far as pertinent, reads:

"390. Laces, * * * embroideries and articles embroidered by hand or machinery, * * * made of silk, or of which silk is the component material of chief value, * * * sixty per centum ad valorem."

Paragraph 339, relating to wearing apparel and textile fabrics, is as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"339. Laces, lace window curtains, tidies, pillow shams, bed sets, insertings, flouncings, and other lace articles; handkerchiefs, napkins, wearing apparel, and other articles, made wholly or in part of lace, or in imitation of lace; nets or nettings, veils and veillings, etamines, vitrages, neck ruffings, ruchings, tuckings, flutings, and quillings; embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings, and bands; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram, or otherwise; tamboured or appliquéed articles, fabrics or wearing apparel; hemstitched or tucked flouncings or skirtings, and articles made wholly or in part of ruffings, tuckings, or ruchings; all of the foregoing, composed wholly or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for in this act, whether composed in part of india rubber or otherwise, sixty per centum ad valorem: Provided, that no wearing apparel or other article or textile fabric, when embroidered by hand or machinery, shall pay duty at a less rate than that imposed in any schedule of this act upon any embroideries of the materials of which such embroidery is composed."

Paragraph 427, relating specifically to fans, reads as follows:

"427. Fans of all kinds, except common palm-leaf fans, fifty per centum ad valorem." (*Italics volunteered.*)

The decision of the board in disposing of the cases was expressly based upon the authority of T. D. 24,073, G. A. 5,235, presenting precisely the same question and involving the construction of these provisions of the act, and I cannot do better, in stating the actuating considerations moving the board to its conclusion, than to quote from their opinion in that case. After referring to the pertinent provisions of the act, it is there said:

"A similar proviso to that in paragraph 339 was contained in the tariff act of 1890 (Act Oct. 1, 1890, c. 1244, Schedule J, 26 Stat. 594) in paragraph 373. In that act, however, the language was more precise. It reads as follows: 'Provided, that articles of wearing apparel, and textile fabrics, when embroidered by hand or machinery, and whether specially or otherwise provided for in this act, shall not pay a less rate of duty than that fixed by the respective paragraphs and schedules of this act upon embroideries of the materials of which they are respectively composed.' A comparison of the two provisos discloses that there was contained in the proviso to said paragraph 373 the words 'and whether specially or otherwise provided for in this act.' Congress, in enacting the tariff act of 1897, omitted these words from the corresponding paragraph, but extended the scope of the paragraph by inserting, in lieu of the words 'articles of wearing apparel,' the words 'wearing apparel or other articles.' The proviso to paragraph 373 was construed by the United States Circuit Court in the case of *In re Schefer et al.*, 49 Fed. 826, which decision was affirmed by the United States Circuit Court of Appeals. 53 Fed. 1011, 4 C. C. A. 153. In these cases it seems to have been assumed by both parties to the controversy that the proviso to paragraph 373 of the act of 1890 extended to all the schedules of that act. That was a necessary conclusion, by reason of the phrase contained in that proviso reciting, 'and whether specially or otherwise provided for.' In the case of *Tiffany v. United States* (C. C.) 66 Fed. 736, fans which were highly ornamented by painting in oil or water colors were held to be dutiable under the tariff act of October, 1890, as 'paintings in oil or water colors.' There was no provision for fans *eo nomine* in that act; and, moreover, the court found as a fact in the case that the fans were more suitable for ornaments than for purposes of utility.

"The fans in question here, however, are intended for use as such, and, therefore, come clearly within the category of fans. The sole question for decision in the case is: Are these embraced within the term 'fans of all kinds,' and, as such, dutiable at the rate of 50 per cent. ad valorem, as provided in paragraph 427, or are they subject to the proviso in paragraph 339? In our judgment, the provision for fans is broad enough to, and intended to,

include fans of every description. It would seem to be a matter of common knowledge that a very large class of fans, embracing perhaps the greater amount of merchandise of that character, is embroidered, and that to hold, therefore, that this phrase did not include such, would, in effect, except therefrom the greater number of imported articles of that kind. Moreover, the latter part of paragraph 427 conduces to the same conclusion, for by the paragraph itself is excepted palm-leaf fans. Upon a familiar principle of construction the enumeration of the exceptions from this paragraph includes *ex industria* all the articles which Congress intended should be excepted therefrom. Palm-leaf fans, therefore, being expressly excepted from the provisions of the paragraph, the natural and legal inference is that palm-leaf fans alone are the only fans intended by Congress to be excepted therefrom. This exception does not carry with it embroidered fans, but, by the principle of construction suggested, leaves them included within the very broad term 'fans of all kinds.' Moreover, the phrase 'or other articles,' used in the proviso to said paragraph 339, is associated with 'laces,' 'embroideries,' 'wearing apparel,' and 'textile fabrics,' and under the settled rule of *ejusdem generis* should properly be construed to include only articles of the same general character as those enumerated in these descriptive terms. *Dodge v. United States*, 84 Fed. 449, 28 C. C. A. 152. Fans are not of this character."

Considering the very significant changes made by Congress in the provisions of the act under consideration from that of the tariff act of 1890 as noted in the foregoing opinion, and the very comprehensive language of paragraph 427 relating to fans, not found in the older act, it seems to me that the reasoning of the learned member expressing the views of the Board of General Appraisers is not to be readily answered, and that the contention of the government that the proviso to paragraph 339 was intended to cover articles of every class of which embroidery is a component part, whether of textile fabric or not, is there very satisfactorily, if not conclusively, negated. The whole reliance of the government is upon the words "or other article" found in that proviso. It is said that this language is broad enough to embrace every schedule of the act relating to any article that may be found to be embroidered by hand or machinery, no matter how specifically such article may be covered by other provisions of the act; that the language must be given some meaning, and that this is the only meaning it will bear; and that the construction contended for by the importer simply results in annihilating this feature of the proviso.

I cannot concede the soundness of this reasoning, since, as will be seen, it ignores some of the primary canons of construction applicable to such legislation. Nor do I think it essential to the determination of the present controversy to ascertain precisely what was meant by this language, assuming that it was intended to read as found in the statute. My own view is that it is at least doubtful if it was intended so to read. Considering the subject-matter of the paragraph of which it forms a part and the relation of the particular words to their context, and more especially in view of other provisions of the act, I am strongly persuaded that it was never intended to express the proviso in the form in which it is printed in the statute, but that by some clerical error or misprision the word "or," where found between the words "other article" and "textile fabric," was inadvertently substituted for the preposition "of," and that the proviso was really intended to read, "no wearing apparel or other article of textile fabric," etc. That would have tended to harmony and consistency, rather than the

confusion which has resulted in this and a number of other instances from the effort to harmonize the language as there found with other more or less specific features of the act.

However that may be, I am satisfied that, taking the provision as it stands, it cannot be given the effect contended for, in view of the specific and all-including terms of section 427 relating to the particular class of articles here involved. It is a familiar and fundamental principle of construction to be applied to tariff legislation that where a dutiable article falls within the terms of two enumerations, one of which is the more general and the other the more specific, the specific, and not the general, controls and prescribes the duty. *Koechl v. United States*, 91 Fed. 110, 33 C. C. A. 363. It will be conceded that the enumeration to be found in the language of the proviso to paragraph 339 is by class, while that of paragraph 427 is by species, and that the latter is therefore the more definite and specific. Where Congress has designated an article by a specific name, and imposed a duty upon it as such, general terms in the same act, though sufficiently broad to comprehend such article, are not to control, but must give way to the more specific provision. *American Net Twine Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. 55, 35 L. Ed. 821; *Robertson v. Glendinning*, 132 U. S. 158, 10 Sup. Ct. 44, 33 L. Ed. 298; *Homer v. Collector*, 1 Wall. 486, 17 L. Ed. 688.

It is claimed that the ruling of the Board of General Appraisers in these cases has been materially modified, if not overthrown, by the cases of *Carter v. United States*, 143 Fed. 256, 74 C. C. A. 394, and *Lichtenstein v. United States (C. C.)* 154 Fed. 736. But I do not regard either of those cases as affecting the integrity of that ruling. The former involved the assessment of duty on wearing apparel, hosiery made of cotton in open-work or lace effect, with certain embroidered figures thereon; and it was properly held that the proviso to paragraph 339 governed the classification, rather than paragraph 318 Schedule I, applicable to cotton hosiery, but which says nothing about embroidery. There is nothing said in that case, necessary to the conclusion reached, which militates against the ruling here in question. The *Lichtenstein Case* related to the classification of an imported screen, consisting partly of wood and partly of embroidered silk, with certain other ornamental features. It was contended that the article was dutiable under Schedule D, par. 208, of the act, as one composed in chief value of wood. The evidence, however, left it in doubt as to the material of chief value entering into its construction, and both the collector and the Board of General Appraisers held it to be an embroidered article. The ruling was affirmed by the Circuit Court, and properly so, under the facts therein presented. The view there expressed by the learned judge of the Circuit Court, that the doctrine of *noscitur a sociis* does not apply to limit the effect of the proviso to paragraph 339, I regard as not only unnecessary to the conclusion reached, but as being opposed to the strong current of authority. *United States v. Nichols*, 186 U. S. 298, 22 Sup. Ct. 918, 46 L. Ed. 1173; *Hollender v. Magone*, 149 U. S. 586, 13 Sup. Ct. 932, 37 L. Ed. 860; *Lithograph Co. v. Worthington*, 132 U. S. 655, 10 Sup. Ct. 180, 33 L. Ed. 453; *Reiche v. Smythe*, 13 Wall. 162, 20 L. Ed. 566; *Dodge v.*

United States, 84 Fed. 449, 28 C. C. A. 152; Wiebusch v. United States, 84 Fed. 451, 28 C. C. A. 154.

There are some other considerations urged by the government in favor of its contention; but the most that can be said of them is that they would tend to disclose an ambiguity in the act as to the construction to be put upon it. That of itself is fatal to the government's claim; for it must be borne in mind that one of the cardinal rules for construing a statute imposing a burden in the nature of a tax or duty is that every ambiguity or uncertainty is to be resolved against the taxing power, and in favor of the one upon whom the burden is sought to be laid. *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240, 30 L. Ed. 1012, and cases there cited.

The ruling of the Board of General Appraisers is affirmed, and a separate judgment to that effect will be entered in each case.

UNITED STATES v. KISSEL et al.

(Circuit Court, S. D. New York. October 26, 1909.)

1. MONOPOLIES (§ 29*)—ELEMENTS OF OFFENSE—ANTI-TRUST STATUTE.

To constitute the offense of conspiracy in restraint of interstate or foreign commerce, or to monopolize such commerce, under the Sherman anti-trust act (Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) unlike a conspiracy to commit an offense against or to defraud the United States, under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), no overt act is necessary; the conspiracy itself being the offense.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. § 29.*]

2. MONOPOLIES (§ 12*)—ANTI-TRUST ACT—"CONSPIRACY."

The word "conspiracy," as used in the Sherman anti-trust act (Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), has substantially the same meaning as the word "contract."

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

3. CRIMINAL LAW (§ 149*)—CONSPIRACY IN VIOLATION OF ANTI-TRUST LAW—LIMITATION OF CRIMINAL PROSECUTION.

A conspiracy in restraint of interstate commerce, or to monopolize the same, in violation of the Sherman anti-trust act (Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), by causing a manufacturing corporation to suspend business in the interest of a competing concern, by obtaining control of its stock through a contract, was complete at latest when its object was fully accomplished by the making of the contract and the election of a board of directors who voted to cease business; and a prosecution therefor is barred in three years from that time, under Rev. St. § 1044 (U. S. Comp. St. 1901, p. 725).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 273-275; Dec. Dig. § 149.*]

4. CRIMINAL LAW (§ 150*)—CRIMINAL PROSECUTION—LIMITATION.

If a conspiracy to commit a crime has been carried out, and the crime committed, those who committed it are subject to whatever penalties the law imposes, and entitled to whatever protection the law affords; and if

*For other cases see same topic & § NUMBER in Dec. & Am. Digs, 1907 to date, & Rep'r Indexes

the statute of limitations is a bar to a prosecution for the crime, that bar cannot be lifted by a prosecution for a conspiracy to commit that crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 275; Dec. Dig. § 150.*]

5. CRIMINAL LAW (§ 288*)—SPECIAL PLEA OF LIMITATION.

The defense of, the statute of limitations may be raised in a criminal case by a special plea before trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 660, 661; Dec. Dig. § 288.*]

Gustav E. Kissel and Thomas B. Harned, indicted with the American Sugar Refining Company and others, filed pleas in bar to the indictment, to which the government demurred. Demurrers overruled, and pleas sustained.

Henry A. Wise, U. S. Atty. (Charles F. Brown, John W. H. Crim, and James R. Knapp, of counsel), for the United States.

William D. Guthrie and William Church Osborn, for defendant Kissel.

George Whitefield Betts, Jr., and Francis H. Kinnicutt, for defendant Harned.

HOLT, District Judge. These are demurrers filed by the government to pleas in bar interposed by the defendants Kissel and Harned to the indictment. The indictment charges the defendants with a conspiracy in restraint of interstate commerce, in violation of Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), commonly called the "Sherman Act." The defendants are the American Sugar Refining Company and its directors, and certain other persons. The indictment alleges, in substance, that the defendants conspired to prevent the Pennsylvania Sugar Refining Company from doing business. It is alleged that this result was accomplished; that the defendant Kissel, acting secretly as agent of the American Sugar Refining Company, made a contract to loan to Adolph Segal \$1,250,000, upon a note of Segal secured by certain collateral, among which collateral were 26,000 shares, being a majority, of the stock of the Pennsylvania Sugar Refining Company; that, having thus obtained such majority of the stock, a new board of directors, in the interest of the American Sugar Refining Company, was elected; that said board immediately voted to close the refinery of the Pennsylvania Sugar Refining Company; and that it has since done no business. The defendants Kissel and Harned have pleaded, in bar of the prosecution, the statute of limitations; and the defendant Kissel has also pleaded in bar that, having produced on the trial of a civil action certain documents tending to prove certain facts necessary to be proved in this case, he is entitled to immunity from prosecution under this indictment.

Admittedly, the general three-year statute of limitations for crimes not capital contained in section 1044 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 725), applies in this case. It is also conceded that the execution of the contract between Kissel and Segal, by which the loan was made and the control of a majority of the stock of the Pennsylvania Company obtained, the consent of the Champion

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Construction Company to the pledge of the stock, the power of attorney by that company to Kissel, the election of the new directors, the meeting of the new board, at which the vote was passed that the Pennsylvania Sugar Refining Company should thereafter refrain from carrying on business until the further order of said board, the advance of \$1,250,000 by the American Sugar Refining Company to Kissel, and the loan of that amount by Kissel to Segal, were all done and the entire transaction closed in all respects on or before January 4, 1903. Therefore the offense alleged in this indictment was complete, and this indictment might have been brought, on January 5, 1904. The indictment was not filed until July 1, 1909, more than five years after the time when the alleged conspiracy was entered into and its object entirely accomplished. Obviously, therefore, the statute of limitations is a bar to this prosecution, unless the crime charged in the indictment is a continuing offense, or acts have occurred which have renewed the offense and started again the running of the statute.

A conspiracy, in its legal sense, is a misdemeanor at common law. It has been defined as an agreement by two or more persons to do an illegal act, or to do a legal act by illegal methods. Such a conspiracy, if entered into, could be criminally punished at common law, whether any act in furtherance of it was done or not. Section 5440 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 3676) provides that if two or more persons conspire either to commit any offense against the United States, or to defraud the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to criminal punishment. Under this statute, a mere conspiracy is not an offense; but, in addition to the conspiracy, one or more of the parties to it must do some act to effect its object before a criminal prosecution can be maintained. The first section of the Sherman act provides that:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor."

The second section of the act provides that:

"Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor."

This indictment is necessarily brought under these provisions of the Sherman act. No indictment can be brought in the United States courts for the offense of conspiracy at common law, because it has not been made an offense by any United States statute. Nor could this indictment have been brought under section 5440 of the United States Revised Statutes, because there is no law of the United States making a conspiracy in restraint of trade or to monopolize trade an offense against the United States except the Sherman act, and there cannot be a conspiracy to engage in a conspiracy. Under the Sherman act no overt act is necessary to the commission of the offense. That provides

that every person who engages in a conspiracy in restraint of trade or commerce, or to monopolize trade, is guilty of the offense. The question in this case, therefore, is when the statute of limitations begins to run in an indictment for conspiracy under the Sherman act.

The law of conspiracy has been the subject of a great deal of over-refined discussion, and the authorities upon the subject are quite conflicting. Some hold a conspiracy to be an offense complete when entered into, and upon which the statute of limitations immediately begins to run. Others hold it to be a continuing offense, from which it is argued that the statute of limitations never begins to run against a conspiracy until it is abandoned and whatever result has been accomplished by it annulled. The government's counsel, upon the argument, claimed that the defendants, having once entered upon the conspiracy and closed the refinery of the Pennsylvania Company, continued to be engaged in the conspiracy every day so long as the refinery was closed. It would follow, from this position, that the only way in which the defendants could start the statute of limitations running would be to rescind the vote to close the refinery, have the directors friendly to the American Sugar Company resign, and deliver back to the original holders the stock taken as collateral. No authorities have been cited sustaining such a position. Most of the cases cited have arisen in prosecutions based upon section 5440, under which the indictment must not only charge the conspiracy, but one or more overt acts.

Some authorities hold that the statute of limitations begins to run in such prosecutions as soon as one overt act has been committed, and that, if more acts in furtherance of the conspiracy are performed, that does not stop the running of the statute. *United States v. Owen* (D. C.) 32 Fed. 534; *United States v. McCord* (D. C.) 72 Fed. 159; *Ex parte Black* (D. C.) 147 Fed. 832; *United States v. Biggs* (D. C.) 157 Fed. 264. Other cases hold, in substance, that each additional overt act starts the statute running anew. *United States v. Bradford* (C. C.) 148 Fed. 413; *Ware v. United States*, 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053; *United States v. Brace* (D. C.) 149 Fed. 874. In *Ware v. United States*, 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, it is held that there cannot be a conviction upon the original conspiracy and overt acts which have taken place more than three years before the finding of the indictment; that there must be proved a conspiracy within the three years, as well as an overt act; and that, although the original conspiracy is competent evidence upon the question whether a new or continuing conspiracy has been entered into within the three years, it alone is insufficient to prove such new conspiracy. See, also, *United States v. Black*, 160 Fed. 431, 87 C. C. A. 383.

These decisions were all made in other districts. With entire respect for the judges making them, it is impossible to harmonize them. In my opinion, the cases which hold that the statute begins to run after the first overt act, and is not stopped by subsequent overt acts in pursuance of the same conspiracy take the correct view. But in any event the decisions under section 5440 of the United States Revised Statutes are not strictly applicable to this prosecution.

The word "conspiracy" is usually employed with a sinister meaning; but, in my opinion, as used in the Sherman act, it has substantially the same meaning as the word "contract." A conspiracy in restraint of trade is nothing but a contract or agreement between two or more persons in restraint of trade. If this indictment had charged, in the language of the act, that the defendants had made a contract in restraint of trade, I suppose no one would claim that the statute of limitations did not begin to run upon the execution of the contract. How can the government impose a different liability on the defendants by calling the same thing a conspiracy? I think that the offense was complete in this case when the contract between Kissel and Segal was made. It was unquestionably complete before January 5, 1904, before which date the contract was carried out in all respects and the object of the alleged conspiracy accomplished. If, however, the doctrine of that class of cases which hold that each new overt act constitutes a new offense, in prosecutions under section 5440, were to be followed in this case, the overt acts alleged to have occurred within three years, necessary to constitute a new offense, must be acts which have a tendency to carry out the object of the conspiracy, or in some way tend to make it effectual (*United States v. McLaughlin* [D. C.] 169 Fed. 307; *United States v. Black*, 160 Fed. 431, 87 C. C. A. 383); and each defendant must have participated intentionally in an overt act done within the three years prior to the indictment (*Ware v. United States*, 154 Fed. 579, 84 C. C. A. 503, 12 L. R. A. [N. S.] 1053).

So far as the defendant Harned is concerned, he had nothing to do with any overt act alleged in the indictment after December 30, 1903. As to the defendant Kissel, the overt acts alleged in the indictment as occurring within three years before it was filed, in my opinion, are not acts which had any tendency to carry out the object of the conspiracy, or to make it effectual. The overt acts so alleged are certain resolutions adopted by the directors of the American Sugar Refining Company, agreeing to indemnify the president and counsel for any liability in the Segal matter, certain letters written by one of the defendants to the secretary of the American Sugar Refining Company, and a bill for disbursements rendered by the defendant Kissel to the American Sugar Refining Company, all in the year 1907. In my opinion, these alleged overt acts had no tendency to accomplish the object of the conspiracy. The object was completely accomplished before January 5, 1904. One of the letters, dated February 15, 1907, alleged in the indictment as an overt act, shows that the question whether criminal proceedings should be brought had been under consideration by the Department of Justice before that time, but it took no action until this indictment was filed.

The case of *United States v. Irvine*, 98 U. S. 450, 25 L. Ed. 193, although that was not a prosecution for a conspiracy, seems to me to state the principle applicable to such a case better than any other authority that has been cited. In that case an indictment was found for a violation of the act making it a misdemeanor for a pension agent to wrongfully withhold from a pensioner the whole or any part of the pension due to him. The indictment was brought more than three

years after the pension money had been received by the pension agent and demanded from him by the pensioner. The trial court held that the offense prohibited by the statute was a continuing offense, and that so long as the defendant continued to withhold the pension money the offense was not barred by the statute of limitations. The Supreme Court overruled that decision. Mr. Justice Miller, in the opinion, says:

"There is in this but one offense. When it is committed, the party is guilty, and is subject to criminal prosecution; and from that time, also, the statute of limitations applicable to the offense begins to run. It is unreasonable to hold that 20 years after this he can be indicted for wrongfully withholding the money, and be put to prove his innocence after his receipt is lost, and when perhaps the pensioner is dead. * * * He pleads the statute, * * * which was made for such a case as this; but the reply is: 'You received the money. You have continued to withhold it these 20 years. Every year, every month, every day, was a withholding within the meaning of the statute.' We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that day the statute of limitations begins to run against the prosecution."

There seems to be an increasing tendency in recent years for public prosecutors to indict for conspiracies when crimes have been committed. A conspiracy to commit a crime may be a sufficiently serious offense to be properly punished; but, when a crime has been actually committed by two or more persons, there is usually no proper reason why they should be indicted for the agreement to commit the crime, instead of for the crime itself. A large class of federal prosecutions for commercial offenses, such, for instance, as violations of the interstate commerce act, the Sherman act, the bankrupt act, the acts relating to public lands, and many others, now habitually take the form of indictments for conspiracies to commit crimes, the actual commission of which is also usually alleged in the indictment. Prosecutors seem to think that by this practice all statutes of limitations and many of the rules of evidence established for the protection of persons charged with crime can be disregarded. But there is no mysterious potency in the word "conspiracy." If a conspiracy to commit a crime has been carried out, and the crime committed, the crime, in my opinion, cannot be made something else by being called a conspiracy. The men who have committed the crime are liable to whatever penalties the law imposes and to whatever protection the law affords. If the statute of limitations is a bar to a prosecution for the crime, that bar, in my opinion, cannot be lifted by a prosecution for a conspiracy to commit that crime.

Statutes of limitations are beneficial statutes. The interests of the community and justice to persons charged with crime require that offenses be promptly prosecuted. Statutes of limitations should be given a plain and sensible construction. Their effect should not be frittered away by a strained interpretation, based on subtle and refined reasoning. The government has waited before bringing this prosecution for 5½ years after the alleged offense was complete, and, in my opinion, the statute of limitations is a bar to this indictment.

This conclusion makes it unnecessary to consider the doubtful question raised by the plea of immunity interposed by the defendant Kissel.

The ground of demurrer that the plea in bar of the statute of limitations will not lie, because the plea is in substance a plea of not guilty, seems to me, if I correctly understand it, wholly untenable. The defense of the statute of limitations could be raised on the trial under the general plea of not guilty; but it can also be raised by a special plea before the trial.

The demurrers to the pleas in bar interposed by the defendants Kissel and Harned are overruled, and judgment dismissing the indictment as to said defendants may be entered.

THE RAPPAHANNOCK.

(District Court, W. D. New York. September 1, 1909.)

1. SHIPPING (§ 132*)—DAMAGE TO CARGO—GROUNDS OF VESSEL'S LIABILITY—BURDEN OF PROOF.

Where cargo receives damage in transit, the carrier has the burden of showing affirmatively that the loss was within an exception of perils of the sea in the bills of lading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 479, 481; Dec. Dig. § 132.*]

2. SHIPPING (§ 121*)—CARRIAGE OF GOODS—CONTRACTS OF AFFREIGHTMENT.

In contracts for carriage by sea, there is an implied warranty that the vessel is in all respects seaworthy and reasonably fit to carry the particular goods specified in the bill of lading.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 449-451; Dec. Dig. § 121.*]

Implied warranty of seaworthiness, see notes to *The Carib Prince*, 15 C. C. A. 388; *Nelson v. Coal, Cement & Supply Co.*, 60 C. C. A. 177.]

3. SHIPPING (§ 141*)—DAMAGE TO CARGO—LIABILITY OF VESSEL.

On a voyage from a Canadian port on Lake Superior to Buffalo, a steamer's cargo of wheat was damaged by water escaping from a feed pipe connecting the engine and boiler rooms, which was broken at a joint. The use of such feed pipe and the manner in which it was constructed and cased were not unusual on such steamers, and an inspection a month earlier, and a further examination by the officers and shipper's agent before loading, showed it to be in good condition. *Held*, that it did not render the vessel unseaworthy at the beginning of the voyage, but that under the evidence the breaking was due to perils of navigation, which strained the vessel during the voyage, and which were within the exceptions in the bill of lading; it being shown that she encountered unusually rough weather and was otherwise strained.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 498; Dec. Dig. § 141.*]

Loss by perils of the sea, see notes to *The Dunbritton*, 19 C. C. A. 465; *Southerland-Innes Co. v. Thynas*, 64 C. C. A. 118.]

In Admiralty. Suit by the Northern Elevator Company, Limited, against the steamer Rappahannock for damage to cargo. Libel dismissed.

Wallace, Butler & Brown, Howard S. Harrington, Ulysses S. Thomas, and Archibald G. Thacher, for libellant.

Clinton & Clinton, for respondent.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HAZEL, District Judge. The libel in this case was filed to recover damages to a cargo of grain shipped by the Northern Elevator Company, Limited, on the wooden steamer Rappahannock, owned by the respondent, the Davidson Steamship Company. There were transported by the Rappahannock, from Ft. William and Port Arthur, Ontario, Canada, to the port of Buffalo, on October 9, 1905, in the aggregate 125,000 bushels of No. 2 Northern Manitoba wheat. The shipment arrived at its destination on October 14th, and on unloading the vessel it was discovered that 11,713 bushels of the wheat were wet, moist, and heated, owing to a leak in the main feed pipe, which pipe extended about 9 feet athwartships through the cargo space between the engine and boiler rooms. This pipe was $2\frac{1}{2}$ inches in diameter, was incased in a covering of asbestos, and this was inclosed in a wooden box, which was about 2 inches thick. The bills of lading provided for delivering the grain in like good order and condition as when shipped, and that if it became heated in transit the carrier was bound to pay all deficiencies, excepting 5 bushels for each 1,000 bushels, the dangers of navigation, or its equivalent term, the perils of the sea, excepted.

There is no controversy over the shipment of the wheat, its delivery in a damaged condition, or that its deterioration was due to the dripping of water through a crack in the feed pipe three-quarters of an inch long at the coupling of two lengths of the pipe. It is contended by libelant, and testimony has been introduced to establish the fact, that the locality of the pipe was improper and dangerous, that the threading of the pipe to make a joint weakened it, and that it was improperly supported and incased. Upon this contention I find, from the evidence, that it was not unusual in vessels constructed like the Rappahannock, and there were a dozen or more in the carrying trade on the Great Lakes, to have a feed pipe running from the engine to the boiler, which was stationed in another part of the vessel; nor was the manner in which the feed pipe was incased out of the ordinary. The *Titania* (D. C.) 19 Fed. 101. It is not proven that the use of a threaded coupling in a feed pipe of wrought iron materially weakened the joint or pipe, or that this was an unusual construction in the year 1895, when the Rappahannock was built. Indeed, the expert testimony of the respondent indicates that such methods of construction in lake-carrying wooden vessels were common and were not thought defective. The Rappahannock was constructed of oak and her deck of pine 11 years before the mishap. She was 300 feet over all, 42.5 feet beam, 28 feet deep, and had been repaired in 1904. Although engaged since her construction in carrying all sorts of merchandise on the Great Lakes, coal, iron ore, and grain, she was without mishap or accident, and at no time was there any leakage from the feed pipe. By the Inland Lloyds' register for 1905 it appears that the Rappahannock was rated in class AI* and Ⓢ, signifying a high grade and approved system of water pipes. Subsequently, however, in the year 1906, after this controversy arose, her rating was reduced. It is probably true that at the present time her general construction would not be approved for carrying grain; but it is clear that in 1895, to the close of the sea-

son in 1905, her construction as to piping, etc., was not criticised, and she was not regarded as unseaworthy or unfit to carry grain.

I think the principal questions in issue are whether the feed pipe was insufficient to such an extent as to render the steamer unseaworthy at the inception of the voyage, and whether the break or crack in the pipe was attributable to the dangers of navigation. It is now well settled that, under a bill of lading such as here, the carrying vessel must be held responsible for the damaged merchandise, unless it is affirmatively shown by her that the loss was sustained because of the perils of the sea, an act of God, or of the public enemy. *Jahn v. The Folmina*, 212 U. S. 354, 29 Sup. Ct. 363, 53 L. Ed. 546. Under the bills of lading and proof, the Rappahannock was a common carrier; and if she was unseaworthy, or unfitted to carry the grain without injuring it en route, she must be held liable. *Pope v. Nickerson*, 3 Story, 465, Fed. Cas. No. 11,274; *The Exe*, 57 Fed. 399, 6 C. C. A. 410. In transactions of this character the contract for the carriage of the merchandise not only impliedly assures the shipper that safe and proper means of transportation will be used, but also that the vessel in all respects will be seaworthy and reasonably fit to carry the particular goods specified in the bill of lading. Assuming, therefore, the correctness of the conclusion already stated, namely, that the vessel was not unseaworthy from faulty construction of the feed pipe at the beginning of the voyage, the vital question arises whether the leak in the pipe was caused by unusual storms or violence of the seas. If such was the fact, the vessel is exonerated.

The evidence shows that the Rappahannock, which had in tow the barge *Granada*, was proceeding at the rate of 9 miles per hour through the water, and when approximately about 43 miles from her port of departure she encountered windstorms. It is claimed by her owner, and her master so testified, that the direction of the wind and storm on Lake Superior was such as to give the vessel an unusual strain or twist; that the storm lasted about twelve hours, and that the velocity of the wind was 60 miles an hour. The engineer testified that the sea was high over the steamer's quarter, that she rolled considerably, and that a portion of the time her wheel was out of the water. The assistant engineer testified that he had seen and experienced worse weather. The first mate said that between Passage Island and Whitefish Point the wind breezed up, blowing hard, and raised a heavy sea. The wheelsman testified that the wind was from 50 to 55 miles an hour, causing the steamer to roll some. It is further shown that on Lake Huron there was more bad weather, the wind blowing for about two hours from the west across the land. The master of the Rappahannock testified that the wind blew at the rate of 60 miles an hour. The engineer testified that the vessel labored some, but not heavily. The wheelsman, interrogated on the second storm, testified: "There was quite a little lump of a sea running." There was also a gale from the south on Lake Erie, and the steamer hauled up for the south shore of the lake to gain the lee of the land. The master of the Rappahannock, describing the duration of the storm, testified that the wind blew from 8:30 o'clock p. m. to 1:28 a. m. None of the witnesses claim or pretend that the gales were extraordinarily terrific, or that there was ex-

ceedingly heavy pitching and plunging of the vessel on the swells of the sea, although storms of the character described by the witnesses were unusual in the forepart of October. It was not supposed by any of the officers or crew of the steamer that her seaworthiness was extraordinarily tried, yet that she labored and strained in the gales which she encountered is unquestionable, although her barge was securely kept in tow throughout the entire voyage. There was no thought of the vessel foundering or going ashore, and there were no leaks in her decks or seams, though it is shown that the waves were high enough to wash her deck and break a few doors, aside from sweeping from the deck a pair of fenders which had been lashed down with rope. Her butts started on the port and starboard sides of the boiler house. The survey held after the vessel reached Buffalo shows that she had been severely strained, and because of such straining the feed pipe to the main boilers had parted at the coupling. The witness Green, one of the surveyors, testified that the oakum was spewed out of the vessel's butts, which indicated straining. The witness Gaskin, the other surveyor, states that he felt reasonably certain that the leak in the pipe arose from the straining of the vessel; that in his judgment the pipe would not have broken if the vessel had not been strained.

To refute the claim of the straining of the Rappahannock by reason of the violence of the gales, the libellant introduced in evidence, without objection, the official weather reports, tending to show that on October 9th the average hourly wind velocity at Duluth, the port at the extreme westerly end of Lake Superior, was 12.7, and the maximum 34, miles an hour. On October 10th the maximum velocity at Duluth was 27 miles an hour. The reports taken at other stations on Lake Superior, Lake Huron, and Lake Erie show the maximum velocity of the wind on different days during the voyage to have been appreciably less than estimated by the master of the Rappahannock. I am not satisfied, however, in view of the circumstances, that the weather reports should be accorded great weight. They were observations taken on land, and, at least in one instance, many miles removed from the point where the Rappahannock claims to have experienced severe weather. Mr. Cuthbertson, an experienced official in charge of the Weather Bureau at Buffalo, N. Y., testifying for the respondent, says that observations to ascertain the velocity of the wind, taken on land, would not enable a determination of its velocity on the open lake, and in his opinion heavy winds might be blowing on the lake, and not be shown by the observation on land. Corroboratory of the claim of the respondent, he testified that the weather maps of October 9, 10, and 11, 1905, show a well-defined storm area moving from British Northwest through Lake Superior, and thence easterly over Lake Huron to Lake Ontario. Hence it is clearly apparent that the Rappahannock encountered severe gales on her voyage through Lakes Superior, Huron, and Erie. Such gales and windstorms probably were not extraordinarily violent, yet they were sufficiently severe and lasting to have produced the unusual straining of the steamer, and consequent break in her feed pipe, from which water leaked on the cargo.

There is other evidence to indicate that the stress of weather caused the leakage. It is shown that in September, one month prior to the

shipment, a United States inspection of the Rappahannock and of the feed pipe was had. It appears that a hydrostatic pressure of 240 pounds was applied to the pipes and boilers, as against 160 pounds the normal pressure, with no evidence of weakness resulting from such test. Witness Kennedy testified that it is customary for the United States inspectors, when applying the hydrostatic pressure, to also test the boilers and pipes by tapping. That this was actually done, in the absence of direct testimony, may, I think, be fairly presumed. Subsequently visual inspections were made, before the loading and departure of the vessel, by the master and inspector representing the shippers and at different times by the engineer and mate, and no leaks or deterioration in the pipe casing were observed. Inspections without tapping the pipe are probably not free from criticism, although it is not clear that tapping the pipe would prove helpful to discover its actual strength. When it is considered, however, that the engines were working at the time of the inspection, and that for some time prior thereto there was a continuous water pressure on the feed pipe, the presumption is thought warranted that, had there been a leak in the pipe, it would have been discovered, even though the casing was not removed. Furthermore, it is reasonable to suppose that the hydrostatic pressure test and tapping would have disclosed any leaks or defects in the pipe, or such wear and tear as would be anticipatory of leakage.

The warranty of reasonable fitness to carry the particular class of merchandise depends upon the existence of the defect at the commencement of the voyage, and which was not discoverable by the exercise of such ordinary care as would have been disclosed by prior examination. The risk of such defect, under the warranty of absolute seaworthiness, is undoubtedly on the vessel and her owner. *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644. In the present case, however, the defect was a method of coupling and threading at a joint; but, as has been indicated, such joints were not unusual in freight-carrying vessels on the Great Lakes. Therefore, at the beginning of the voyage, in my judgment, there was no reason to believe that the strength of such pipe was weakened. It is shown by an expert witness that the soundness of the feed pipe in all reasonable expectation would not fall short of 15 years. The facts of the case at bar are quite distinguishable from those in *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688, upon which libellant lays stress. There the cap had never been severed or unscrewed from the pump hole. It had never been tested, and the court held that the vessel was bound, before going on the trip, to secure the cap against ordinary accidents. In this case there was an examination, and the pipe, in spite of its 11 years' use was reasonably fit for the voyage.

Basing my views upon the evidence, I incline to the belief that the damage to the cargo was caused by the danger of navigation, and that it would not have happened if the steamer had not encountered unusually bad weather. She was in a reasonably fit condition to resist the ordinary elements and the usual strains. The feed pipe was strong enough at the commencement of the voyage to resist the ordinary weather conditions in that season of the year. There was no rust upon the fracture, and the inferences are warranted that the leak oc-

curred during the voyage. Taking into consideration the fact that the pipe developed no leak on previous trips, the hydrostatic test by the United States inspectors and the engineer of the vessel, the inspection of the pipe and coupling by Mr. Davidson during the summer, the examinations by the master and mate, and later the engineer, just before the vessel was loaded, to discover leaks and defects, lead to the conclusion that the steamer was seaworthy at the beginning of the voyage, and, furthermore, that she was in a reasonably fit condition for the transportation in question. I am satisfied that the feed pipe, in one or the other of the gales which the vessel encountered, was so severely strained or wrenched as to cause the leak, and, unless such was the fact, the crack in the pipe is unexplained. All the probabilities are thought to indicate that the principal cause of the damage to the cargo may be assigned to the violence of the weather, and under her contract of carriage this was a peril of the sea, and she was not responsible for the injury to the cargo.

It follows that the libel must be dismissed, with costs.

THE VENEZUELA.

(District Court, W. D. New York. September 11, 1909.)

1. ADMIRALTY (§ 36*)—REMEDIES—COUNTERCLAIMS.

In a suit against a steamer to recover for machinery supplied her, a counterclaim for damages for breach of the contract under which it was supplied is maintainable.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 327; Dec. Dig. § 36.*]

2. MARITIME LIENS (§ 5*)—REPAIRS FURNISHED TO OWNER—IMPLIED AGREEMENT FOR LIEN.

A tacit understanding by both parties that one furnishing repairs to a vessel in a foreign port, although they were ordered by the owner, looked to the vessel for payment, is sufficient to establish an implied agreement for a lien.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 7; Dec. Dig. § 5.*]

For supplies and services, presumption as to credit to vessel, see note to The George Dumois, 15 C. C. A. 679.]

3. SALES (§ 267*)—CONTRACT FOR FURNISHING MACHINERY—IMPLIED WARRANTY.

A provision, in a contract to furnish and install furnaces, that they should pass government inspection, did not relieve the contractor from the implied warranty that the work should be properly performed and the furnaces reasonably fit and free from such defects as would be only discoverable after use and trial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 760, 761; Dec. Dig. § 267.*]

4. CUSTOMS AND USAGES (§ 13*)—CONSTRUCTION—IMPLIED TERMS.

A common and well-known custom or usage in respect to the subject-matter of a contract may be read into it as an implied term.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 26; Dec. Dig. § 13.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. SALES (§ 288*)—PERFORMANCE—WAIVER OF BREACH OF WARRANTY.

Where furnaces installed by libelants in respondent's lake steamer proved defective as soon as used, and were repaired by libelants, their continued use thereafter for four months without complaint, and after being again repaired to the close of the season, was a waiver of the right to insist that they failed to comply with the implied warranty of their fitness.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 817-823; Dec. Dig. § 288.*]

6. SALES (§ 418*)—BREACH OF CONTRACT—REPAIR OF VESSEL.

Where furnaces installed in a steamer under contract failed to work properly, and the vessel was detained while they were being repaired, but there was no claim that the contractor knew of the defect, the owner of the vessel is not entitled to recover from the contractor as damages for breach of the contract the earnings which she lost by reason of the delay for repairs.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.*]

In Admiralty. Action by William M. Tashenberg and Fred Tashenberg against the steamer Venezuela. Decree for libelants.

Norton Bros. and John B. Richards, for libelants.

Clinton & Clinton and George Clinton, for claimant and cross-libelant.

HAZEL, District Judge. This is a libel in rem to recover a balance due for work and labor performed upon the steamer Venezuela, and furnishing said steamer, pursuant to written contract, two furnaces with cast-iron fronts, together with breeching and smokestack, at the agreed price of \$2,963; also for supplying a new blowpipe for the boiler, amounting to \$90; and for extra work performed and money expended in subsequently repairing furnaces at the ports of Cleveland and Bay City. The Davidson Steamship Company, claimant, has filed a cross-libel in personam, alleging a breach of contract, in that the work of fitting the steamer with new furnaces was not performed in a proper and workmanlike manner; that the furnaces constantly leaked, causing a loss of time and delay in the steamer's navigation and trips. Such a counterclaim, when it is shown to relate to matters contained in the original libel, and where the claims of the libelant and cross-libelant arise out of the same transaction, is unquestionably maintainable under admiralty rule 53. *The Highland Light* (D. C.) 88 Fed. 296; *The Electron* (D. C.) 48 Fed. 689.

It is claimed by the cross-libelant that credit was not given the vessel, and therefore no lien was created for the services performed or the materials furnished. The facts and circumstances, however, sufficiently show that the manufacturers of the furnaces looked to the vessel, and not to the owner, for compensation for their entire services. There certainly existed a tacit understanding that the Venezuela should be bound, and that libelants should have a lien for their labor performed and materials furnished. *The Newport* (D. C.) 107 Fed. 744; *The Gracie May*, 72 Fed. 283, 18 C. C. A. 559. We may now consider the case on its merits.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The particular fault with the work performed on the furnaces is claimed to have arisen from defective riveting of the inner end to the flange of the flue sheet. The furnaces were 8 feet long and 42 inches in diameter, and of the pattern or style known as the "straight end furnace." It was necessary, to properly and securely fit them in place, not only to join their ends to the flue sheets, but to caulk the joints to enable resisting the heat of the fire and withstand the pressure from water. The proofs show that after the furnaces were installed in the boiler of the steamer in the spring of 1906, and before the steamer departed for her trip, the work was examined by government inspectors, who tested their capacity and found them to be free from leakage or defects. The contracts contained a postscript requiring the work to pass government inspection. Such inspection or test, however, cannot be considered to relieve the libelants from liability on their implied warranty that the work under the contract would be properly performed and free from such defects as were only discoverable after use and trial. *Osgood Carleton et al. v. Lombard, Ayres & Co.*, 149 N. Y. 137, 43 N. E. 422. The libelants were certainly called upon to perform their work of riveting in such a way as to make the furnaces reasonably fit for the purposes intended, and they cannot be permitted to claim that, merely because the hydrostatic test did not disclose latent defects or leakage, the work was properly and practicably done.

The proofs are that within 6 hours after the departure of the vessel from the port of Buffalo on her voyage up the Lakes on April 25, 1906, the furnaces leaked badly at the joint where the flue sheets were connected to the ends of the furnaces, and in consequence thereof the steamer was obliged to put in at Cleveland for repairs. There she was partially repaired by Mr. Maher, a boiler maker, who was subsequently relieved by the libelants with the sanction of claimant. Libelants completed the repairs, which delayed the *Venezuela* for about 10 days, when she again started and completed her trip. No complaints of faulty workmanship or leakage were thereafter made to libelants until August 30th, when they were notified by claimant that the furnaces again leaked. Between the time of re-riveting and alterations in parts of the furnaces at Cleveland and the last-mentioned date, a period of 4 months, the *Venezuela* was constantly engaged in her business of transporting merchandise, and libelants had no reason to suppose that the work continued unsatisfactory, or that the furnaces did not adequately perform their functions. On September 1, 1906, the libelants, at the request of the owner of the *Venezuela*, went to Bay City to inspect the furnaces, and, if necessary, to make further alterations and repairs. In a conversation with Mr. Davidson, the president of the claimant, the witness Tashenberg, one of the libelants, stated that, as the steamer used a Howden apparatus to induce a draft in the furnace, it would not be possible to keep the riveted joints at the end of the furnaces absolutely secure from leaks without the use in the furnaces of a fire-brick arch. Mr. Davidson, however, insisted that under the contract the libelants were required to perform their work without leakage and without the necessity of using fire brick.

Testimony has been introduced tending to show that it was common experience for leaks to develop at such joints in straight end furnaces using the so-called Howden draft, soon after firing the furnaces, in the absence of a fire-brick protection. Upon this subject there is much conflict of testimony; the cross-libelant claiming that a fire-brick arch was not essential to the efficient use of the furnaces. If there was a common understanding at the time of making the contract relative to the use of a fire-brick lining or arch in connection with the furnaces and induced draft of the type used by the Venezuela, such usage, custom, or common understanding may be read into the contract as accompanying it by implication. *Peterson v. Cedar Logs* (D. C.) 127 Fed. 869; *The Mary N. Bourke* (D. C.) 135 Fed. 895. But, whatever probative force such testimony tending to establish a customary usage might ordinarily be entitled to receive, it has, I think, been negatived by the action of libelants in proceeding to Cleveland and Bay City for the express purpose of alterations or repairs, without a clear understanding that they would regard such work as extra or additional to that originally done. The evidence convincingly shows that the original leakage was due to failure to use proper rivets, or such as would have the required bearing on the plate. There is evidence to show that the joined sheets were not up, and that in a few instances the rivet holes were not opposite or fair. The original work was not such as to prevent leaking without the use of fire brick at the joints.

Libelants claim that from the beginning of the work they repeatedly stated to the engineer of the Venezuela and to Mr. Davidson that the Howden draft, which was used by the steamer, induced draft which would furnish heat of such intensity that, to protect the joints, a fire-brick arch in the furnaces would be required. Nothing, however, was stated at the time of making the contract to indicate that fire brick for the interior of the furnaces was necessary to protect the joints, and, moreover, libelants knew that the owner of the Venezuela objected to its use. In this connection I may state that claimant's reason for declining to use fire brick, on the ground that it would result in diminishing the draft area of the furnaces, with consequent loss of efficiency, is not thought of conspicuous consequence. It is probably true that the draft would be somewhat reduced, but the extent thereof would be negligible. However that may be, it appears by the evidence that the vessel has continuously used the furnaces with and without the use of a fire-brick arch from the time the repairs were made at Cleveland until the vessel was dry docked in September at Bay City. Subsequently she continued the use of the furnaces until the month of December, 1906, when the season of navigation ended. In these circumstances I am of opinion that there was an acceptance of the furnaces and the workmanship which is the subject of this controversy by the claimant, and it became liable for the contract price.

It is well settled that the purchaser of a manufactured article may have a reasonable opportunity for inspection and examination before rejecting the article bought; but, as I understand the law, he is not permitted to use and retain the article known by him to be defective,

and not to be within the terms of the contract, without paying therefor. He cannot use the article until such time as he has no further use for it, and then reject it, even though his complaints that the article was unsatisfactory were not infrequent. That fault was found in September, four months after repairs were made on the furnaces at Cleveland, and again in November and December, toward the close of navigation, is unavailing, and claimant by its conduct has waived any failure on the part of the libelants to more completely comply with the implied warranty of fitness. *Brown v. Foster*, 108 N. Y. 387, 15 N. E. 608; *Ellison v. Creed*, 34 App. Div. 15, 53 N. Y. Supp. 1054; *Bates v. Fish Bros. Wagon Co.*, 50 App. Div. 38, 63 N. Y. Supp. 649.

I have examined the cases cited by counsel for cross-libelant. They uphold the view that where a contract to furnish a stated quantity of goods at a specified time is broken, and the quantity delivered is less than that required by the agreement, there is a bar to an action for the price of the goods delivered; and where a contract, for instance, was to complete a building before payment, and there was a failure to complete, the builder could not recover for his work and materials, even though the owner occupied the building. In these cases performance was a condition precedent to delivery of the property; but such conditions did not exist with reference to the furnaces here in question, which the claimants could legally have rejected immediately on ascertaining their imperfections.

The claimant maintains that it is entitled to recoup its loss of earnings for detention at Cleveland while repairs were being made there; but I do not think that the gains and profits that the Venezuela might have made during this period are recoverable as damages. *Blanchard v. Ely*, 21 Wend. (N. Y.) 342, 34 Am. Dec. 250; *Cassidy v. Le Fevre*, 45 N. Y. 562; *Horne v. Wood*, 16 Barb. 386; *Brauer v. Oceanica Steam Nav. Co.*, 34 Misc. Rep. 127, 69 N. Y. Supp. 465. In such a situation as here, the damages that the injured party may recover are the difference between the actual value of the furnaces and work performed in installing them and what such value would have been if the furnaces and work were in complete accord with the implied warranties of performance and fitness; or the injured party, if he so elects, may recover the cost and expenses for making the furnaces fit and proper for the purposes intended. It is not contended that libelants willfully refused to install proper furnaces, or failed to finish the work within a stipulated time, or abandoned, or left it partially performed, necessitating completion by some other person. On the contrary, the proofs are that on several occasions they, at cross-libelant's request, endeavored to remedy the defects and leakages.

Reliance is placed by counsel for claimant on *The Nimrod* (D. C.) 141 Fed. 215, to substantiate recovery of probable earnings of the vessel during her detention while being repaired. In that case the defects in the boiler were known to the manufacturer and not known to the boat, and in the estimation of the court this was a circumstance entitling the cross-libelant to special damages by reason of the breach. In the other cases cited the detention for repairs arose from collisions or other maritime torts, and such cases are not applicable to facts

which, as in the present case, indicate a fair supposition that the only damages that were in contemplation by the parties at the time of making the contract were such as would naturally flow from a breach thereof. *Howard v. Stilwell & Bierce Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; *Fleming v. Beck*, 48 Pa. 309.

It follows, from the foregoing, that the libelants are entitled to recover the balance due them under the contract dated January 12, 1906, with the additional sum of \$90 for smokestack on pony boiler, and the sum of \$132.96 for extra work not disputed, deducting therefrom, however, the counterclaim of cross-libelant for meals furnished to workmen at Cleveland, amounting to \$20.25, and the amount paid or incurred for repairs to the furnaces at Cleveland and Bay City, aggregating \$465.55. Libelants' claims for extra work, amounting to \$747.25, and expenses in going to Bay City, are disallowed. The claims of cross-libelant for loss of use of the vessel, amounting to \$1,496.39, and for wages of seamen while the vessel was delayed pending repairs, amounting to \$264.27, are disallowed.

Decree may be entered accordingly, without costs to either party.

In the above I have assumed that the vessel became liable for the repairs at Bay City, though the proofs show an independent contract between maker and libelants. If the vessel did not become liable, the item of \$250 for such repairs is disallowed. The liability of the vessel for this item may be shown on settlement of decree.

RYLEY et al. v. PHILADELPHIA & R. RY. CO.

(District Court, S. D. New York. November 12, 1909.)

ADMIRALTY (§ 22*)—JURISDICTION—TORTS.

Injury to a person caused by a collision in the Delaware River, resulted in his death on shore. *Held*, that there was no jurisdiction in admiralty to award damages.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 223; Dec. Dig. § 22.*

Jurisdiction of torts, see note to *Campbell v. H. Hackfeld & Co.*, 62 C. C. A. 279.]

(Syllabus by the Judge.)

In Admiralty. Action by Jennie M. Ryley and others against the Philadelphia & Reading Railway Company. Exceptions sustained.

Carpenter & Park, for libellants.

Armstrong, Brown & Boland and James F. Campbell, for respondent.

ADAMS, District Judge. This action was brought by Jennie M. Ryley, widow of the late James Ryley, by Thomas W. Ryley, son of the same, Frances E. Trevena and Lucy J. Taylor, daughters of the same, against the Philadelphia & Reading Railway Company to recover damages, claimed to amount to \$10,000, for the death of the said James Ryley, on January 26, 1909.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

It is alleged in the libel that the said James Ryley, on the said date, was master of the barge Bethayres, bound from Philadelphia to an eastern port, in tow of the tug Catawissa, both tug and barge being employed by the respondent in transporting coal from Philadelphia to other ports on the Atlantic coast; that the other libellants were a son and daughters of the said James Ryley; that the tow left Philadelphia, the Bethayres being the second of three barges and proceeded down the Delaware River; that Ryley, together with three members of the crew, went forward in order to pay out the hawser of the barge to obey the orders of the master of the tug; that after paying out considerable hawser a signal was given to the tug to slacken her speed in order that those on the barge could make the hawser fast to the bits of the barge; that the tug at the time was proceeding at a rapid speed and no response being received from the tug another signal by whistle was given to the tug and immediately thereafter a third signal was given by whistle; that no response was given by the tug to the signals and she continued on without any reduction of speed; that the mate and crew of the barge were unable to take the necessary turns around the bits and when all of the hawser had been pulled out, it parted within a few feet from the end where it was made fast on the barge, the loose end sweeping around the barge, cutting off the hand of one of the deck hands and striking Ryley in the abdomen, producing a fatal wound from which he died on the following morning at the Episcopal Hospital, Philadelphia. The libel then proceeds to allege the faults of the tug, and that the said Ryley left the said libellants surviving him, and further that the injuries were received while the barge was at Marcus Hook, Delaware River, within the waters of the State of Pennsylvania and within the jurisdiction of said state; that by reason of the premises the libellants have suffered the alleged damage which they claim to recover by virtue of the statute of the State of Pennsylvania (Act April 15, 1851 [P. L. 674], §§ 18, 19, as amended by Act April 26, 1855 [P. L. 309], § 1), and the acts amendatory thereof and supplemental thereto.

The respondent filed exceptions to the libel, as follows:

"That the said libel is informal and insufficient as follows:

First: That the said action is prosecuted by the widow and next of kin of the said deceased, whereas the action should be brought in the name of the widow alone.

Second: That said action is brought to recover for the alleged negligence of the master of the tug 'Catawissa,' a fellow servant of the deceased.

Third: That the death of said deceased occurred upon land within the State of Pennsylvania, and that this Court has not jurisdiction of the subject of the action."

The important exceptions seem to be the first and third.

The statute law of Pennsylvania (Act April 15, 1851 [P. L. 674]) is as follows:

"Sec. 18. That no action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction.

Sec. 19. That whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during

his or her life, the widow of any such deceased, or if there be no widow the personal representatives, may maintain an action for and recover damages for the death thus occasioned."

¶ The Act of 1855 (P. L. 309) is as follows:

"That the persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors.

Sec. 2. That the declaration shall state who are the parties entitled in such action; the actions shall be brought within one year after the death, and not thereafter."

It seems that the right of action was with one of the parties, i. e., in this case the widow. *The Huntingdon & Broad Top Co. v. Decker*, 84 Pa. 419, 425. Therefore the exception seems good but I prefer to depend upon the third exception, which raises the question whether an injury happening upon a vessel but the result from it occurring upon land, in this case the Episcopal Hospital, Philadelphia, is within the jurisdiction.

It was said in *Mann v. Weiland*, *81 Pa. 243, 256:

"This action is not by or against an executor, administrator, or guardian; nor is the assignor of the thing in action dead. There is no assignment, either actually or constructively. If an action had been brought by Weiland to recover damages for injuries he had sustained, it would have survived to his personal representatives under the eighteenth section of the act of April, 1851, supra; and after his death the plaintiff in error would not have been competent to testify to matters which occurred during the life of Weiland. This action, however, was not brought by him, nor is it for the recovery of damages for injuries he sustained; but it is for the injuries his wife sustained by his death. It is for a cause of action her husband never had. It arose on and after his death, and accrued to his widow. In case of injury causing death, the first section of the act of April 26, 1855 (*Purdon's Dig.* p. 1004, pl. 3), withholds the right of action from the personal representatives of the decedent, and gives it only to the husband, widow, children, or parents of the deceased."

And in *Hoodmacher v. Lehigh Valley R. Co.*, 218 Pa. 21, 23, 66 Atl. 975, 976, it was said:

"As soon as the decedent was injured he had a common-law right of action, which was transitory and enforceable in any common-law jurisdiction where defendant could be served. But when he died without having brought suit, his right died with him; there was no survivorship to any one. By statute a new right arose, derivative in its nature and not maintainable, when, if he had lived he could not have recovered, yet, nevertheless, a new right, resting entirely on statute, and vested in the party to whom it is given by the statute of the jurisdiction in which it arose."

In the admiralty, it has become well settled that where damages or death occur, it is not sufficient that the wrong originated upon the water. If it was not consummated upon the water, jurisdiction does not exist.

It was said by Mr. Justice Nelson in *The Plymouth*, 3 Wall. 20, 34, 18 L. Ed. 125:

"This class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of marine torts, namely, that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same

must have taken place upon these waters to be within the admiralty jurisdiction. In other words the cause of damage, in technical language, whatever else attended it, must have been there complete."

This has been followed in numerous cases and may be regarded as settled law. It is not necessary to consider the second exception as the others are sustained.

IN re STEVENS et al.

(District Court, D. Oregon. November 11, 1909.)

No. 1,344.

BANKRUPTCY (§ 267*)—LIENS—RIGHT OF MORTGAGEE TO INTEREST.

A valid mortgage upon property of a bankrupt, by the express terms of Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), is not affected by the act; and, where the property is sold by the trustee free from the lien of the mortgage, the holder is entitled to payment from the proceeds of the full amount of his debt, with interest to the time of sale, whether or not he has proved his debt in the bankruptcy proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 267.*]

In the matter of A. J. Stevens, bankrupt. On certificate of referee. Order of referee modified.

Mahlon Purdin, for mortgage claimant.

WOLVERTON, District Judge. The referee has certified certain facts, upon which are desired the judgment and advice of the court touching what interest a secured creditor is entitled to receive upon his demand or claim against the estate.

A. W. Sturgis filed and proved his claim against the estate, being evidenced by a promissory note secured by a mortgage on certain realty of the bankrupt. The claim as proven, with interest to the date of the adjudication in bankruptcy, was the sum of \$520.78. The realty was sold by the trustee, with the consent of the claimant, and the sum of \$900 realized thereupon. At the final hearing it was found that there were sufficient funds to pay the expenses of the administration and the mortgage debt; but the labor claims, having priority, could not be paid in full, and the general creditors received nothing. Under this state of facts, it was held by the referee that the mortgage claimant was entitled to interest upon his demand to the date of the adjudication in bankruptcy, while the claimant insists that he is entitled to interest up to the date of its payment by the trustee. Thus is presented the question for determination here.

The bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) contemplates that secured claims shall be proved. This is deducible from section 57a, which prescribes of what the proof of claims shall consist. A claim may be allowed for the purpose of enabling the claimant to participate in the meetings of creditors. For this purpose the value is ascertained in a summary way; the

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

amount to be allowed being the residue of the claim above the value of the security. Section 57e. Subsequently, but for another purpose, it is provided (subdivision "h") how the value of the security shall be determined, which is by converting the same into money in pursuance of the agreement by which the lien was created, or by agreement, arbitration, compromise, or litigation, as the court may direct. Thereupon it is declared that the value thus ascertained shall be credited upon the claim, "and a dividend shall be paid only on the unpaid balance." The balance thus found due upon the secured claim, which, in that event, would be only partially secured, constitutes the amount of the creditor's claim against the estate of the bankrupt, and is made the basis for striking dividends as it respects the demand.

The rule governing general claims against the estate, bearing interest, is that they will continue to draw interest to the date of the filing of the petition in bankruptcy, but not subsequent thereto. Such is the manifest intentment of the bankruptcy act itself. Section 63a. This section prescribes that debts may be proven and allowed against the estate, which are a fixed liability as evidenced by a judgment, or an instrument of writing absolutely owing at the time of the filing of the petition, whether then payable or not, "with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest." Thus is evinced a purpose of fixing the date of the filing of the petition as a time with reference to which all claims shall be computed with a view to ascertaining their amounts, and thus is a basis established for striking and paying dividends. The estate pays no accruing interest thereafter. *In re Haake*, 11 Fed. Cas. 134, No. 5,883.

The rule is convenient, fair, and equitable to all concerned, and affords a ready and indubitable basis for distribution of the assets under the provisions of the act among the creditors of the estate. By section 67d it is declared that liens given and accepted in good faith shall not be affected by the act. A lien in the usual course of business is given to secure interest accruing, as well as the principal of a demand, and it needs no argument to demonstrate the fact that, if the act should declare that interest shall cease upon secured demands at a given date, whether the demands are paid or not, it would affect the lien constituting such security. Another proposition is true also—that, while the bankruptcy act contemplates that a secured creditor shall prove his claim, he may, notwithstanding, decline to make proof, and he does not thereby waive or lose his lien upon the property pledged. *In re Goldsmith* (D. C.) 118 Fed. 763. His lien is yet simply unaffected by the bankruptcy act. Putting the two propositions together, the lien claimant is afforded a legal means whereby he is enabled to procure the interest on his demand, if fully secured.

Furthermore, if the property be worth more than the claim for which it is pledged, the trustee is bound to administer it; for the surplus value or proceeds above the amount of the lien should go to the creditors. He must sell either subject to or disincumbered of the lien. If disincumbered of the lien, the lien would follow the proceeds into the hands of the trustee and attach to them. In such case the trustee, in order to free them of the lien, must pay the claim, with interest, as

that is the measure of the claimant's demand against such proceeds. The balance, therefore, to which the estate would be entitled for distribution, would be such as remained after deducting the claimant's demand, with interest to the time when the money was realized from the property charged with such demand. There seems to be no provision for the allowance of any claim fully secured. The allowance can go only to any balance that may remain of the claimant's demand after applying the value of the property incumbered by the claim. Perhaps an allowance should not be entered, even as to that; but the unpaid balance is constituted the basis upon which dividends shall be paid from the assets of the estate. This, however, is tantamount to an allowance, because the claim is ascertained upon which the claimant will be entitled to his dividends.

Now, if the secured claimant is entitled to his interest when he omits to make proof of his claim, it would not seem that it was the purpose of the act to cut off the running of his interest at the time of the filing of the petition in bankruptcy when his claim is proved. Indeed, section 67d is indicative of the opposite intentment, in declaring that good-faith liens shall not be affected by the act. The act, otherwise construed, would result in the impairment of the lienor's contract, and could not stand under the federal Constitution. Of course, the lienor may waive his security, and, if that is done, he comes in as one of the general creditors, and will share their rights and none other. But, if there be no waiver of the security, the estate is incumbered with the entire demand, including principal and interest.

The next inquiry is, then, when does the interest cease to run upon a secured claim? The manifest answer to this is, when the money is realized from the property pledged. That is the end of the proceeding, we might say, for foreclosing the lien, and the duty then devolves upon the trustee to pay the claimant his debt. The estate ought not to be burdened with the payment of interest subsequent to that time. Sturgis was, therefore, entitled to interest on his demand to the time the realty covered by his mortgage was sold and the money realized therefor with which to pay such demand.

The findings and decree of the referee will be modified accordingly.

UNITED STATES v. SHING SHUN & CO. et al.

(Circuit Court, N. D. California. August 13, 1909.)

No. 13,786.

1. CUSTOMS DUTIES (§ 30*)—CLASSIFICATION—OLIVES—"IN BOTTLES, JARS, OR SIMILAR PACKAGES."

Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 264, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), relates to olives "in bottles, jars, or similar packages," and "in casks or otherwise than in bottles, jars, or similar packages." *Held*, that this language does not import an intention to make a division between olives in retail packages and those in wholesale pack-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ages, and that olives in jars holding 10 gallons are therefore within the first of these provisions.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 72-77; Dec. Dig. § 30.*]

2. STATUTES (§ 190*)—CONSTRUCTION—UNEQUIVOCAL LANGUAGE.

Unless the terms of a statute are equivocal or uncertain, there is no room for construction; and where Congress has employed terms, not only well understood in trade, but in common, everyday use in domestic and household affairs, and about which no question can arise as to their definition, it must be presumed that such terms were employed with full knowledge of their signification, and no exception or qualification thereof may be interpolated into the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 266; Dec. Dig. § 190.*]

On Application for Review of a Decision by the Board of United States General Appraisers.

Robert T. Devlin, U. S. Atty., and George Clark, Asst. U. S. Atty. Stanley Jackson, for respondents.

VAN FLEET, District Judge. The question presented in this case is as to the proper classification for duty under Tariff Act July 24, 1897, c. 11, 30 Stat. 151 (U. S. Comp. St. 1901, p. 1626), of certain importations of olives entered at the port of San Francisco. The pertinent provision of the act is paragraph 264, Schedule G, which, so far as it relates to olives, reads:

"Olives, green or prepared, in bottles, jars, or similar packages, twenty-five cents per gallon; in casks or otherwise than in bottles, jars, or similar packages, fifteen cents per gallon."

The olives involved were contained in earthen jars of a capacity of about 10 gallons each. They were returned by the appraiser as olives "in jars"; and the collector, under the foregoing provision of the act, assessed them at the rate of 25 cents per gallon. The importers contended that the olives were dutiable at the lesser rate of 15 cents per gallon, and protested to the Board of General Appraisers. The latter sustained this contention, and reversed the action of the collector; and the government has appealed.

It appears that the construction put upon the provision in question by the Board of General Appraisers has not been uniform. In G. A. 4,207 (T. D. 19,625), rendered June 30, 1898, the board had the same question presented for consideration, and in that case it was said:

"The merchandise consists of green olives in earthenware jars containing from 4 to 10 gallons each. They were assessed for duty at 25 cents per gallon under paragraph 264 of the act of July, 1897, and are claimed to be dutiable at 15 cents per gallon under the same paragraph. The pertinent portion of paragraph 264 reads: * * * The appellants contend that the usual capacity of bottles and jars containing olives is about one quart, and that these large jars more closely resemble casks and similar packages. Paragraph 264, however, makes no restriction nor limitation as to size. We find that the goods are olives in jars, and upon this finding the decision of the collector must be affirmed."

In a later case (T. D. 25,805, Abstract 3,908), where the same commodity was involved, and the question was presented upon precisely

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

similar facts and a like ruling of the collector, the board, without referring to its previous ruling, in effect overruled it. It is there said:

"Since it is not disputed that the jars each contained 10 gallons, we are of the opinion that the question involved falls within the ruling in G. A. 5,448 (T. D. 24,733), wherein the board, in passing upon the question of the rate of duty assessable on olives packed in tin cans containing from 5 to 15 gallons said: 'A reading of paragraph 264 leads to the conclusion that Congress had in mind two styles of packing for olives, one for retail trade in small packages for table or family use, and the other for wholesale trade in large packages. We are of opinion that a proper construction of the paragraph is that the provision for "bottles, jars and similar packages" means packages handled and used by people who deal in or use olives in packages in the form in which they are sold in glass bottles or jars.' We accord with this view, and it is of no consequence whether the covering be tin or earthenware, so long as the quantity is large enough to justify the presumption that it is such as is handled by the wholesale trade. We sustain the protest, and overrule the decision of the collector."

The ruling in the present case (T. D. 26,559, Abstract 7,138) is expressly put upon the authority of the case last referred to, the reasoning of which is adopted. The government contends that the ruling in G. A. 4,207 (T. D. 19,625) was a correct construction and application of the statute, and should be adhered to; and from a consideration of the very plain and unambiguous language of the statute I am constrained to the view that this contention must be sustained.

It will be seen that the board, in the case last quoted from, has ignored the plain terms of the act, and adopted a construction based upon an assumption of what Congress "had in mind." If there were anything equivocal or uncertain in the terms of the statute, there might be room for some such construction; but there is not. The statute says nothing about the wholesale trade or retail trade, nor about the capacity of the different classes of containers designated as falling within the one rate or the other; but in specifying the different classes of packages it employs terms not only well understood in trade, but in common, everyday use in domestic and household affairs, and about which no question can arise as to their definition. It must be presumed that in using those terms Congress did so with full knowledge of the customs and usages of the trade, and the popular and common understanding as to their signification; and the evidence in the record discloses that the particular class of earthen containers in which the olives in controversy were packed were commonly known and understood in the trade, and by the customs authorities and the importers alike, as jars, equally with those of smaller capacity of the same material, and that olives in such larger jars were sold both to the retail and wholesale trade.

It is apparent, I think, that no such exception or qualification as that sought to be interpolated into the act is to be gathered from its language, although it would have been a very simple thing for Congress to have expressed, if such was its purpose; but this it has not done, and, when no exception or qualification is found in the act itself, the courts are not at liberty to create one. By its terms the rate of duty is made to depend upon whether the article is imported in a certain designated character of receptacle, without regard to its capacity; and this requirement the customs authorities and the courts are

alike bound to observe. Where the language employed in an act is clear and certain, they have nothing to do with the reasonableness or justice of the results flowing from according it its natural, usual, and obvious meaning, nor with any supposed policy actuating its framers. *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 15 Sup. Ct. 508, 39 L. Ed. 601. As aptly said in *Scott v. Reid*, 10 Pet. 524, 527, 9 L. Ed. 519:

"Where the language of the act is explicit, there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the Legislature. * * * It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

And again, in *Hadden v. Collector*, 5 Wall. 107, 111, 18 L. Ed. 518:

"What is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."

These considerations lead me to the conclusion that the ruling complained of is erroneous, and should be reversed; and a judgment will be entered to that effect.

FROST v. BARBER.

(Circuit Court, S. D. New York. October 6, 1909.)

COURTS (§ 350*)—FEDERAL COURTS—ADOPTION OF PRACTICE OF STATE COURTS.

The federal statutes and practice do not authorize the examination of an opposing party before trial, although provided for by a state statute; but under Rev. St. § 863 (U. S. Comp. St. 1901, p. 661), which authorizes a party to take the testimony of any witness who resides at a greater distance than 100 miles, etc., by deposition, where he desires the testimony of the opposing party, the court may require the latter to appear at the trial, or postpone the trial when reached, to enable his deposition to be then taken.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 923, 924; Dec. Dig. § 350.*]

Action by Meshech Frost against Ohio C. Barber. On application for examination of plaintiff. Denied.

See, also, 173 Fed. 848.

William A. Ulman, for plaintiff.

Wollman & Wollman, for defendant.

LACOMBE, Circuit Judge. The federal practice does not permit examination of a party before trial. *Hanks Dental Ass'n v. International Tooth Crown Co.*, 194 U. S. 303, 24 Sup. Ct. 700, 48 L. Ed. 989. The object of section 863, Rev. St. (U. S. Comp. St. 1901, p. 661), is not to enable a party to ascertain, in advance of the trial, what will be the testimony of some particular witness, but solely to secure him against

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

going to trial without the testimony of every witness whom he believes he should call or examine.

This object will be attained in the present case by denying this application, with the proviso that, when the cause is called for trial, the witness, who is the plaintiff, shall be present in court and within the reach of a subpoena, and that if he should not be so present the trial be postponed long enough to enable the defendant to take his testimony, wherever he may then be.

FROST v. BARBER.

(Circuit Court, S. D. New York. October 13, 1909.)

COURTS (§ 350*)—FEDERAL COURTS—DEPOSITIONS—NONRESIDENCE OF WITNESS.

A party is not entitled to take the deposition of a witness in a federal court, under Rev. St. § 863 (U. S. Comp. St. 1901, p. 661), where the witness actually lives at the place of trial and expects to remain there, although his legal domicile may be elsewhere.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 923; Dec. Dig. § 350.*]

Action by Meshech Frost against Ohio C. Barber. On application to take deposition of plaintiff. Application denied.

See, also, 173 Fed. 847.

Wm. A. Ulman, for plaintiff.

Wollman & Wollman, for defendant.

LACOMBE, Circuit Judge. The frequent use of the words "residence" and "domicile" in the long line of authorities cited is not persuasive, because the facts differed so much from those in the suit at bar. In those cases the witness was actually living at the place of his residence or domicile. In the case at bar (assuming, for the sake of argument, that the efforts to secure technical residence in New Jersey were futile) the plaintiff is a citizen of Ohio, where his domicile was from the time he was seven years old, and where he had voted for many years; but, after the death of his wife and the marriage of his children, his presence in Ohio has been infrequent and for short intervals, and he has actually lived for the past year and a half in this city, except for a visit to Europe, lasting 28 days, and various short trips elsewhere, aggregating not more than 3 weeks, and he expects to continue living here until the trial.

Under the circumstances, the application to compel him to testify under section 863, Rev. St. (U. S. Comp. St. 1901, p. 661), should be denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

THOMPSON CO. v. PENNEBAKER.

(Circuit Court of Appeals, Ninth Circuit. November 8, 1909.)

No. 1,700.

1. WATERS AND WATER COURSES (§ 153*)—REQUISITES OF CONTRACT—OPTION—DESCRIPTION OF PROPERTY.

A contract giving an option for the purchase of certain lands and water rights sufficiently described the same for identification, where it gave the section on which they were located, recited that the water rights had been appropriated by the seller under the law of Washington and recorded as required by such law in the county records, and further described the lands as sufficient lands "in and about said water rights" for the construction of a power house, etc.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 153.*]

2. WATERS AND WATER COURSES (§ 10*)—APPROPRIATION OF WATER FROM STREAM—"BENEFICIAL USE."

The development and maintenance of an electric power plant to be operated by water power is a "beneficial use" of the water, within the meaning of Ballinger's Ann. Codes & St. Wash. § 4099 (Pierce's Code, § 5139), and water previously appropriated from a stream under the statute may lawfully be applied to such purpose.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 10.*]

For other definitions, see *Words and Phrases*, vol. 1, p. 749.]

3. WATERS AND WATER COURSES (§ 31*)—TRANSFER OF OPTION TO PURCHASE—CONSTRUCTION.

Plaintiff assigned to defendant a contract giving an option to purchase certain water rights and land connected therewith, under an agreement that, if defendant should "dispose of or use the said option to its benefit, directly or indirectly," it should pay plaintiff therefor the sum of \$10,000. Defendant organized another corporation, of which it owned all the stock, to which it assigned the option, and which took steps to acquire the property and went into possession. *Held*, that such action was a beneficial use of the option, which entitled plaintiff to recover the stipulated price therefor.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 31.*]

4. WATERS AND WATER COURSES (§ 31*)—SALE OF OPTION TO BUY PROPERTY—ACTION TO RECOVER PRICE.

Water rights acquired by appropriation of public waters and possessory rights in public lands are valuable rights, capable of being transferred, and may be a lawful subject of contracts of sale, and a defendant, which purchased an option to buy such rights, which it exercised by paying in part therefor and going into possession and expending money in developing the property, cannot defend against an action to recover the stipulated price for the option on the ground that the vendor did not have the legal title to the property.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 31.*]

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

Action by Edwin P. Pennebaker against the Thompson Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error, as plaintiff in the court below, brought an action at law against the plaintiff in error, defendant below, to recover the sum of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

\$10,000 upon an alleged breach of contract. It was alleged in the complaint that on April 24, 1905, plaintiff was the owner of a certain option and right to purchase certain lands and water rights in the state of Washington from one John L. McMurray, who was then the owner of said lands and water rights. In the agreement between the plaintiff and McMurray, dated December 12, 1904, the water rights were described as two water rights of 1,500 cubic feet each per second of time, appropriated by McMurray under the laws of the state of Washington in such case provided. One of these water rights was further described as located in section 4, township 15 N., of range 4 E. of the Willamette meridian, and recorded in the public records of water claims of Pierce and Thurston counties. The other water right was described as located in section 32, township 16 N., of range 4 E. of the Willamette meridian, and was also recorded in the public records of water rights of Pierce and Thurston counties. Among other conditions of this agreement was a provision that upon demand by the plaintiff, and upon payment to McMurray within six months of the sum of \$75,000, or at any time within three months upon the payment of \$60,000, or upon the payment of \$10,000 within three months, then the term for the purchase price should be extended to six months, and the purchase price of said lands should be \$60,000. It was further provided that in case said option, or either of them, should be consummated, McMurray would execute and deliver to plaintiff a relinquishment to the government of the United States of sufficient lands in and about said water rights for the construction of a power house and a right of way for a flume and transmission line purposes and for the development and maintenance of an electric power plant.

It was further alleged in the complaint that upon said April 24, 1905, the plaintiff entered into an agreement in writing with the defendant, whereby plaintiff for a valuable consideration sold, assigned, and transferred to the defendant all his right, title, and interest in and to the said contract and option which plaintiff had with McMurray. In this agreement the plaintiff sold, assigned, transferred, and conveyed unto the defendant all his right, title, and interest in and to the agreement and option with McMurray; and for and in consideration of this assignment the defendant agreed, for itself, its successors and assigns, that in case defendant, by itself, its agents, attorneys, or servants, should make or cause to be made any sale whatsoever under said contract, or should itself, or by its agents, attorneys, or servants, purchase said property under and by virtue of said contract, or otherwise, or in case said defendant, its successors or assigns, by itself, its agents, attorneys, or servants, should assign or cause said contract to be assigned, the defendant would pay plaintiff the sum of \$10,000. It was further provided in the agreement that it was the intention of the parties thereto that in case the defendant should in any manner exercise any of the provisions of the option, or in any manner dispose of or use the said option to its benefit directly or indirectly, in such event there should immediately become due and owing from the defendant to the plaintiff the sum of \$10,000.

It was alleged in the complaint that the defendant had used said option for its benefit, and had paid to McMurray, the grantor of said option, the sum of \$2,000 as part of the purchase price for the lands and water rights therein described, and by virtue of said option had procured from said McMurray a certain agreement concerning the said lands and water rights. It was further alleged that defendant had sold, assigned, and transferred said contract of option and used the same to its benefit. It was alleged that this assignment by the defendant was made to the Cascade Public Service Corporation, a corporation organized and existing under and by virtue of the laws of the state of Washington. It was alleged that the defendant had never paid the sum of \$10,000 provided in said agreement between plaintiff and defendant, wherefore plaintiff demanded judgment for the said amount of \$10,000. Copies of the agreement between McMurray and the plaintiff, and between the plaintiff and the defendant, and between the defendant and McMurray, were attached to the complaint and made parts thereof.

In its answer defendant denied that it ever used the options or contracts mentioned in the complaint, or assigned the same, or any part thereof, except as in the answer admitted. The admissions were the entering into the mutual

agreements between the plaintiff and defendant, and between the defendant and McMurray, as set forth in the complaint. It was alleged that at the time the defendant entered into its agreement with McMurray the plaintiff was, and for a long time thereafter continued to be, an employ  of the defendant, as its engineer in charge of the properties and works proposed by the defendant to be erected in or about the water rights and land therein mentioned, and had been and was well aware and had full knowledge of and consented to the substitution of said last-mentioned agreement in place of the terms of said option from McMurray to plaintiff. It was alleged that by mutual agreement between the said McMurray and defendant, and in pursuance of the terms and conditions of the said written agreement between them, the defendant went into joint possession with said McMurray of said lands, and thereafter diligently prosecuted the work of developing the said water rights and lands for the purpose of erecting and operating an electric generating plant, and ever since had continued so to do, until the defendant had expended upwards of \$20,000 for said properties; that for the purpose of acquiring, by condemnation or otherwise, the lands and properties necessary for the purposes aforesaid, and of constructing and operating thereon an electric generating plant, the defendant had caused to be organized and incorporated, under and by virtue of the laws of the state of Washington a corporation, the Cascade Public Service Corporation; that ever since its incorporation the defendant had been by itself and through its agents and employ s sole owner of the entire capital stock of the said Cascade Public Service Corporation; that the defendant was authorized by its charter and the laws of the state of Washington to own and hold stock in other corporations, and, having so organized and incorporated the said Cascade Public Service Corporation for the purpose of further continuing the prosecution of its design to construct and operate an electric generating plant on the land mentioned, the defendant formally assigned its agreement with McMurray to said Cascade Public Service Corporation, and thereupon continued the development work begun by the defendant on said water power and plant; that the defendant and the Cascade Public Service Corporation had fully carried out and performed all the terms and conditions under its agreement with McMurray, and had paid McMurray sums of money aggregating in all \$2,000; and that McMurray had attempted to, in bad faith, violate all terms and conditions thereof, and was then attempting to avoid and annul and cause the same to be broken, to the loss and damage of the defendant.

The answer then proceeds to state certain transactions wherein McMurray is charged with having conspired with one Warren to fraudulently abandon his claim to said lands as a homestead and fraudulently relinquish the same to the United States, for the purpose of violating his agreement with the defendant; that for the purpose of further protecting their rights in said lands the defendant and the Cascade Public Service Corporation had been compelled to pay and did pay to McMurray and Warren the sum of \$800 for the purpose of obtaining from said persons a reconveyance of a portion of said lands; that the Cascade Public Service Corporation notified McMurray that it was ready and willing to pay all money due under the agreement between defendant and McMurray, and thereupon demanded title to said property, whereupon the said McMurray agreed thereto, and agreed to furnish said Cascade Public Service Corporation with the necessary abstract of title to said lands, showing good title in him, the said McMurray; that McMurray had continuously refused to furnish said Cascade Public Service Corporation with the abstract of title, or to convey said lands in accordance with the terms of his said contract; but in violation of his agreement between the plaintiff and defendant, and for the purpose of fraudulently depriving said Cascade Public Service Corporation of its right therein, and further conspiring with said Warren to defeat and prevent any conveyance, had caused to be incorporated under the laws of the state of Washington a corporation under the name of the Aztec Power Company, and caused all the properties described in the agreement between defendant and McMurray to be conveyed to it. The answer further alleged that it believes that the Aztec Power Company paid no consideration for said properties, had no assets except said properties, had no stockholders except said Warren and McMurray, and that

said corporation was organized and incorporated by said McMurray and Warren for the sole purpose of making said transfer of lands, for the purpose of hindering, delaying, and defrauding said Cascade Public Service Corporation.

The answer alleged certain proceedings in court by a corporation named the Nisqually Power Company against McMurray and others for the condemnation of said lands; that neither the defendant nor the Cascade Public Service Corporation were made parties thereto; and it is alleged that McMurray and Warren and the Aztec Power Company had agreed with the said Nisqually Power Company on the terms of sale, and had sold and conveyed, or had agreed to sell and convey, the same to the said Nisqually Power Company; that the said McMurray and Warren had caused the said Aztec Power Company to commence an action in the superior court of the state of Washington against the defendant and the Cascade Public Service Corporation to eject them therefrom; and for the reasons stated there was and had been a total failure of any and all consideration for the promises and agreement on the part of the defendant to pay plaintiff any sum whatever, and that the action was premature and should abate.

The plaintiff in his reply denied that he was ever the engineer of the defendant, in charge of any properties or any works proposed by defendant to be erected in or about the water rights, or any water rights, or the lands, or any lands, named in the agreement between defendant and McMurray. He admitted that he was well aware, had full knowledge of, and consented to the substitution of the agreement between the defendant and McMurray for the option to himself from McMurray; and he alleged that he agreed to such substitution for the sum of \$10,000, the sum sued for in the complaint, no part of which had even been paid; admitted that the defendant, in pursuance of the terms and conditions of the agreement between McMurray and the defendant, went into possession of all the lands described in said agreement, and that the defendant prosecuted the work of developing the water rights on said lands; admitted that the defendant had expended \$20,000 for said property; admitted that the defendant and the Cascade Public Service Corporation had fully carried out and performed all the terms and conditions to be by them performed under the agreement between the defendant and McMurray, and had paid McMurray the sum of \$2,000; admitted that the Cascade Public Service Corporation had duly notified McMurray that it was ready and willing to pay all money due under the agreement between the defendant and McMurray.

Upon these pleadings the case was brought to trial before a court and a jury, and upon evidence being introduced on the part of the plaintiff, including the allegations of defendant's affirmative defense as set forth in its answer, the plaintiff rested; and defendant thereupon moved for a nonsuit, and the plaintiff moved the court to direct the jury to render a verdict for the plaintiff on the ground, first, that the defendant had made the assignment contemplated under the option; second, that defendant had used the option for its benefit; and, third, that the defendant had purchased the land. The jury was thereupon discharged, and the court entered a judgment in favor of the plaintiff for the sum of \$10,000.

George M. Sinclair and Ellis, Fletcher & Evans, for plaintiff in error.

George P. Fishburne and Maury & Templeman, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and HUNT, District Judge.

MORROW, Circuit Judge (after stating the facts as above). The defendant contends that the option contained in the original agreement between McMurray and the plaintiff, and assigned by the plaintiff to the defendant, was void, for the reason that the description of

the property intended to be conveyed is too uncertain to be ascertained, and the option furnishes no means or method for its ascertainment. The water rights were described by the location in certain sections of the public land, and were recorded in the public records of water rights in the counties where located, and the lands to be relinquished to the government of the United States were described as:

"Sufficient lands in and about said water rights for the construction of a power house and right of way for flume and transmission line purposes and for the development and maintenance of an electric power plant."

The objection to this identification is that it is alleged in defendant's answer that McMurray's possession of land was that of a homestead, and that at the time the agreement between plaintiff and defendant was executed, on April 25, 1905, the land was unsurveyed public land of the United States; but it also appears from defendant's answer that, in pursuance of the terms of the agreement between it and McMurray, entered into on June 15, 1905, defendant "went into joint possession with said McMurray of said lands, and thereafter diligently prosecuted the work of developing the said water rights and lands for the purpose of erecting and operating an electric generating plant, and ever since has continued so to do until," at the time defendant filed its answer on February 25, 1908, "defendant had expended upwards of \$20,000 for said properties."

Aside from any question as to the right of the defendant, in face of such an allegation, to deny that there was a sufficient description of the property, we think the description in the agreement was sufficient for all practical and legal purposes to identify the lands and water rights conveyed. The laws of the state of Washington provide for the appropriation of water flowing in any river, stream, or ravine, and require that notice of such appropriation in writing must be posted in a conspicuous place at the point of intended storage or diversion, and that a copy of such notice must, within 10 days after it is posted, be filed for record in the office of the auditor of the county in which it is posted. See sections 4091 and 4092, Ballinger's Ann. Codes & St. Wash. (Pierce's Code, §§ 5131, 5132). It was recited in the agreement between plaintiff and McMurray that the water was appropriated by McMurray under the laws of the state of Washington, and this is not denied by the defendant. It will be presumed, therefore, that a notice identifying the appropriation was posted and recorded, and, being referred to in the agreement, such notice was sufficient identification of the water rights, and the description in the agreement of the land "in and about said water rights" was a sufficient identification of the land.

The next objection is that the option contained in the agreement between plaintiff and McMurray is void for the reason that the statute of the state of Washington authorizes the appropriation of water flowing in any river, stream, or ravine for irrigation, mining, or manufacturing purposes, but not for the "development and maintenance of an electric power plant," mentioned in the agreement. As far as appears from the record, the original appropriation by McMurray was for a purpose strictly provided by statute. After such appropriation had

been made, the water could be applied to any beneficial use. Section 4099, Ballinger's Ann. Codes & St. (Pierce's Code, § 5139). The development and maintenance of an electric power plant is clearly a beneficial use. The option is, therefore, not open to the objection that the appropriation is not within the statute.

It is contended on the part of the defendant that the assignment of the McMurray contract made by it to the Cascade Public Service Corporation was not such an assignment as entitled plaintiff to recover, for the reason that it was not an assignment whereby defendant sold or otherwise disposed of the option. The explanation is made that, defendant not being strictly a public service corporation, it was not authorized under the laws of the state of Washington to exercise the power of eminent domain. It therefore organized the Cascade Public Service Corporation, and retained the ownership of its stock and the control of the corporation, as it might do under the law of the state, in order that it might carry out its purpose with respect to the property. But this was the exercise of a right under the agreement, and the beneficial use of the option on the part of the defendant, and it was under this provision of the agreement that plaintiff charges in his complaint that it became entitled to recover in this action.

It is next objected that McMurray had no title to the lands and water rights described in the agreement, and there was, therefore, no consideration for the promise of the defendant to pay for the assignment of the option held by plaintiff. Plaintiff had an option on McMurray's appropriation and possession under the statute. This was a valuable right, capable of being assigned and transferred. Possessory rights on the public domain have always been recognized as transferable, and water rights can be transferred like other property. *Weil on Water Rights*, § 221. The option on the property held by the plaintiff was the right to purchase the right of possession to these water rights held by McMurray and the further right of possession of sufficient lands in and about said water rights for the construction of a power house, etc. These rights were assigned and transferred to defendant by plaintiff, and thereupon defendant purchased McMurray's right of possession and paid him \$2,000 therefor, and at the same time entered upon its joint possession with McMurray and expended upwards of \$20,000 for the property. Defendant thereupon became obligated under the agreement to pay to plaintiff the sum of \$10,000 for the option. It may be that the defendant did not acquire a complete and perfect title to the property from McMurray; but that was defendant's affair. He acquired from plaintiff all the latter agreed to convey. Plaintiff conveyed his right to purchase McMurray's rights, whatever they might be; and, defendant having purchased under the agreement, it cannot now defend on the ground that there was a failure of consideration.

The judgment of the Circuit Court is affirmed.

A. LESCHEN & SONS ROPE CO. V. MAYFLOWER GOLD MINING & REDUCTION CO.

(Circuit Court of Appeals, Eighth Circuit, November 1, 1909.)

No. 3,026.

1. PAYMENT (§ 17*)—BY NOTE—ACCEPTANCE OF DEBTOR'S NOTE IS NOT PAYMENT OF HIS DEBT.

The acceptance by a creditor of a promissory note of his debtor for his antecedent debt does not extinguish it, unless the note is paid. It is a conditional, and not an absolute, payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 70-77; Dec. Dig. § 17.*]

2. PAYMENT (§ 17*) — BY NOTE — AGREEMENT OR INDUBITABLE INTENTION OF CREDITOR TO TAKE RISK OF THE NOTE'S PAYMENT REQUISITE TO EXTINGUISH DEBT.

A clear agreement by the creditor that he will take the risk of the payment of the note, and that the debt is discharged thereby, or an indubitable intention so to do, is requisite to extinguish a debt by the taking of the debtor's note.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 70-77; Dec. Dig. § 17.*]

3. PAYMENT (§ 17*)—AGREEMENT THAT DEBT IS TO BE PAID OR HAS BEEN PAID BY NOTE MEANS CONDITIONALLY, AND NOT ABSOLUTELY, PAID.

An agreement that a debt shall be paid, or that it has been paid, by the note of the debtor, is a contract for an extension of time, and that the debt shall be paid, or has been paid, by the note on condition that the note is paid.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 70-77; Dec. Dig. § 17.*]

4. PAYMENT (§ 67*)—BY NOTE—ACCEPTANCE OF SECURITY STRENGTHENS PRESUMPTION THAT PAYMENT IS CONDITIONAL.

A lien, a title, or other security held for the payment of a debt strengthens the presumption that an agreement that a debt is to be paid, or has been paid, by the note of a debtor, is subject to the condition that the note is subsequently paid.

[Ed. Note.—For other cases, see Payment, Dec. Dig. § 67.*]

5. CONTRACTS (§ 147*)—CONSTRUCTION—COURTS TO ASCERTAIN INTENTIONS OF PARTIES FROM THEIR SITUATION WHEN MAKING AGREEMENT.

The court, so far as possible, should put itself in the place of the parties to the contract when their minds met upon the terms of the agreement; and then from a consideration of the writing itself, of its purpose, and of the circumstances which conditioned its making, endeavor to ascertain what they intended to agree to do, upon what sense and meaning of the terms they used their minds actually met.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

6. CONTRACTS (§ 154*) — CONSTRUCTION — COMMON RATIONAL MEANING PREFERRED TO UNUSUAL OR SUTLE ONE.

Where the language of the agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

agreement must be preferred to that which makes it an unusual, unfair, or improbable contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 735; Dec. Dig. § 154.*]

7. CONTRACTS (§ 147*) — INTENTION DEDUCED FROM WRITING PREVAILS OVER INAPT EXPRESSIONS.

The intention of the parties, when manifest, or when ascertained from the written agreement, must control and be enforced, without regard to inapt expressions or the dry words of the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. § 147.*]

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

Action by the Mayflower Gold Mining & Reduction Company against the A. Leschen & Sons Rope Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Charles C. Butler, for plaintiff in error.

H. M. Hogg and C. L. Watson, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. This writ of error was sued out to reverse a judgment in favor of the defendant in error, the Mayflower Gold Mining & Reduction Company, a corporation, upon the pleadings which disclosed these facts: The mining company agreed to buy certain materials for a tramway from the plaintiff in error, A. Leschen & Sons Rope Company, a corporation, and to pay it therefor \$1,000 on the execution of the contract, \$2,500 upon a sight draft with bill of lading attached upon the delivery of a specific part of the goods f. o. b. the cars at St. Louis, in the state of Missouri, \$2,500 30 days from the date of that bill of lading, \$6,600 on a sight draft with bill of lading attached upon the delivery f. o. b. the cars at St. Louis of another specified part of the materials, and \$4,200 "to be paid by your [the mining company's] note at sixty (60) days, * * * not later than sixty (60) days from arrival of last shipment," and the rope company agreed to sell these materials upon condition that the title and ownership thereof should remain in it, and that it might take possession thereof "in default of the last payment being made." The rope company delivered all the materials, the mining company made all the payments, except the last, and gave its note for that, but never paid the note. After the note was dishonored, the rope company replevied the materials, and the court below dismissed its action, on the ground that the mining company had made the last payment in accordance with the terms of the agreement by giving the note, which it had refused to pay.

The argument in support of this conclusion is that by the terms of the contract the parties expressly agreed that the \$4,200 was "to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be paid by your [the mining company's] note at sixty (60) days," that the note was given, and that thereby the \$4,200 was paid in the way the parties agreed that it should be paid, so that there was never any default in the last payment, and the title to the property vested in the purchaser. But was this the meaning of the contract? Does this agreement evidence the intention of the parties to it that the title to this property should pass to the vendee when the latter gave its 60-day note? The purpose of all interpretation is to ascertain and to give effect to the intentions of the parties expressed by their writings. The basic rule for the discovery of those intentions is that the court, so far as possible, should put itself in the place of the parties to the contract when their minds met upon the terms of the agreement, and then, from a consideration of the writing itself, of its purpose, and of the circumstances which conditioned its making, endeavor to ascertain what they intended to agree to, upon what sense and meaning of the terms they used their minds actually met. *American Bonding Co. v. Pueblo Investment Co.*, 150 Fed. 17, 27, 80 C. C. A. 97, 107, 9 L. R. A. (N. S.) 557; *Accumulator Co. v. Dubuque St. Ry. Co.*, 64 Fed. 70, 74, 12 C. C. A. 37, 41, 42; *Salt Lake City v. Smith*, 104 Fed. 457, 462, 43 C. C. A. 637, 643; *Fitzgerald v. First National Bank*, 114 Fed. 474, 482, 52 C. C. A. 276, 284.

Where the language of an agreement is contradictory, obscure, or ambiguous, or where its meaning is doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair, or improbable contract. *Pressed Steel Car Co. v. Eastern Ry. Co.*, 121 Fed. 609, 611, 57 C. C. A. 635, 637; *Coghlan v. Stetson* (C. C.) 19 Fed. 727, 729; *Jacobs v. Spalding*, 71 Wis. 177, 186, 36 N. W. 608; *Russell v. Allerton*, 108 N. Y. 288, 292, 15 N. E. 391.

The intention of the parties, when manifest, or when ascertained from the written agreement, must control and be enforced, without regard to inapt expressions or the dry words of the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement. *American Bonding Co. v. Pueblo Investment Co.*, 150 Fed. 17, 28, 80 C. C. A. 97, 108; *Prentice v. Duluth, etc., Forwarding Co.*, 58 Fed. 437, 443, 7 C. C. A. 293, 298; *Westervelt v. Mohrenstecher*, 76 Fed. 118, 121, 22 C. C. A. 93, 95, 34 L. R. A. 477; *Tillitt v. Mann*, 104 Fed. 421, 424, 43 C. C. A. 617, 619; *Salt Lake City v. Smith*, 104 Fed. 457, 462, 43 C. C. A. 637, 643, 644; *Uinta Tunnel, etc., Co. v. Ajax Gold Mining Co.*, 141 Fed. 563, 567, 73 C. C. A. 35; *U. S. Fidelity & G. Co. v. Board of Com'rs*, 145 Fed. 144, 148, 76 C. C. A. 114; *Witt v. Railway Company*, 38 Minn. 122, 127, 35 N. W. 862; *Driscoll v. Green*, 59 N. H. 101; *Johnson v. Simpson*, 36 N. H. 91; *Walsh v. Hill*, 38 Cal. 481, 486, 487.

The acceptance by a creditor of the promissory note of his debtor for his antecedent debt does not extinguish it, unless the note is paid. It is not an absolute, but a conditional, payment of the debt. *Downey*

v. Hicks, 14 How. 240, 243, 14 L. Ed. 404; The Kimball, 3 Wall. 37, 45, 18 L. Ed. 50; The Emily Souder, 17 Wall. 666, 670, 21 L. Ed. 683; Peter v. Beverly, 10 Pet. 532, 568, 9 L. Ed. 522; Lyman v. The Bank of the United States, 12 How. 225, 243, 13 L. Ed. 965; In re Worcester County, 102 Fed. 808, 814, 42 C. C. A. 637, 643; Atlas S. S. Ltd. v. Colombian Land Company, 102 Fed. 358, 359, 42 C. C. A. 398, 399; Cheltenham Stone & Gravel Co. v. Gates Iron Works, 23 Ill. App. 635, 637; Id. 124 Ill. 623, 626, 16 N. E. 923; Hine v. Roberts, 48 Conn. 267, 271, 40 Am. Rep. 170; First National Bank of Pueblo v. Newton, 10 Colo. 161, 171, 14 Pac. 428.

A clear agreement by the creditor that he will take the risk of the payment of the note and that the debt is discharged thereby, or the indubitable intention of both the parties to that effect, is requisite to extinguish a debt by the taking of the debtor's note. An agreement that a debt shall be paid, or shall be payable, or that it has been paid by the note of the debtor, is a contract for an extension of the time of payment, and that the debt shall be paid, or that it has been paid, by the note of the debtor on condition that the note is paid, but not otherwise. Combination Steel & Iron Co. v. St. Paul City Railway, 47 Minn. 207, 209, 49 N. W. 744; 2 Benjamin on Sales (7th Ed.) § 729; Story on Promissory Notes, par. 404; Tobey v. Barber, 5 Johns. (N. Y.) 68, 72, 4 Am. Dec. 326; Eastman v. Porter, 14 Wis. 39, 42, 46, 47; Johnson v. Weed, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279; Comptoir D'Escompte v. Dresbach, 78 Cal. 15, 20, 21, 20 Pac. 28; Putnam v. Lewis, 8 Johns. (N. Y.) 389; Owenson v. Morse, 7 Term Reports, 64, 66; Sayer v. Wagstaff, 5 Beavan's Reports, 415, 423, 49 English Rep. Full Reprint, 639, 642; Maillard v. Duke of Argyle, 6 Manning & Granger's Rep. (46 English Common Law) 40, 46; Port Darlington Harbour Co. v. Squair, 18 U. C. Q. B. 533. Where the extinguishment of a debt has the effect to strike down a lien or a title securing its payment, the presumption that it is not discharged by the acceptance of the note of the debtor in payment of it is strengthened, because in such a case the discharge of a lien is more unusual and unreasonable. The Kimball, 3 Wall. 37, 45, 18 L. Ed. 50; Sweet & Carpenter v. James, 2 R. I. 270, 294, 297; The Bird of Paradise, 5 Wall. 545, 18 L. Ed. 662.

The application of these rules of law to the facts of the case in hand leaves little doubt of the sense and meaning of the provision of the contract that the \$4,200 should be paid by the note of the mining company upon which the minds of the parties to this contract must have met. The ordinary meaning of that term was that the debt should be paid by the note on condition that the note was paid, but should not be extinguished otherwise, and the common and customary meaning of an expression is to be preferred to an unusual and ingenious interpretation of it. The payment of that part of the purchase price of the property was secured by the retention of the title in the vendor, and this fact raises a strong presumption that the parties did not intend that the security should be released until the note was paid. The vendor was of St. Louis, the vendee of Colorado, the goods were to be shipped in two specified parcels at two different times from the former to the latter place, the vendee agreed to pay \$16,800 for them in five

installments, the first four in cash before the vendee could get possession of the second shipment, and the last installment, the \$4,200, by the vendee's note at 60 days. The payment of the first four installments was secured by the retention by the vendor of the bill of lading of the last shipment until those installments were paid in cash, so that the only purpose and the only effect of the retention of the title to the property by the vendor thereafter was to secure the payment of the last installment, and this purpose and effect would be defeated by a construction that the debt for this installment was to be extinguished, and the security for it released, by the giving of the debtor's note, which was unpaid, an obligation of no higher character than its obligation to pay the installment without the note.

The futility and unreasonableness of a stipulation thus interpreted, the strong presumption that the parties did not intend to agree that the security should be released until the debt of the obligor was absolutely paid, and the facts that the giving and acceptance of a note for a debt does not extinguish it, that the common and customary meaning of agreements that a debt has been paid, or that it shall be paid, by note, is that it has been paid, or that it will be paid, on condition that the note is paid, that it is only when there is a clear agreement by the creditor that the note of the debtor shall discharge the debt and that the creditor will take the risk of the payment of the note, or an indubitable intention of the parties to that effect, that a creditor's acceptance of such a note extinguishes the debt or releases its security, and the further fact that there was no such agreement in this case, compel the conclusion that the parties to this controversy never intended to agree, and never did agree, that the \$4,200 should be absolutely paid, or that the security for its payment should be released, by the acceptance of the debtor's note. It remained unpaid, and will remain unpaid, until that note is paid.

The judgment must be reversed, therefore, and the case must be remanded to the Circuit Court for further proceedings in accordance with the views expressed in this opinion; and it is so ordered.

MINE & SMELTER SUPPLY CO. V. STOCKGROWERS' BANK.

(Circuit Court of Appeals, Eighth Circuit* October 28, 1909.)

No. 3,015.

1. FRAUDS. STATUTE OF (§§ 17, 33*)—PROMISE TO ANSWER FOR DEBT OF ANOTHER—WRITING INDISPENSABLE UNLESS MAIN PURPOSE AND EFFECT ARE TO BENEFIT PROMISOR.

(a) An agreement in writing, or some note or memorandum thereof, subscribed by the party to be charged, is indispensable to the validity of a promise to answer for the debt, default, or miscarriage of another, where the chief object of the promisor is to guarantee the obligation of another, and the promisor derives no direct and substantial benefit therefrom.

(b) But where the main purpose of the promisor is to serve his own interest and in consideration of his promise to answer for the debt, default, or miscarriage of another he secures for himself a direct and substantial benefit, his promise becomes his original obligation, which carries with it

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and sustains his incidental undertaking to answer for another's debt, and it is valid without writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 16, 53; Dec. Dig. §§ 17, 33.*]

2. FRAUDS, STATUTE OF (§ 16*)—WRITING UNNECESSARY TO SUSTAIN CONTRACT TO PAY PROMISOR'S DEBT BY PAYING HIS CREDITOR'S DEBT.

A promise to pay the debt of the promisor by paying his creditor's debt to another is an original undertaking of the promisor, and no writing is requisite to support it.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 22-26; Dec. Dig. § 16.*]

3. FRAUDS, STATUTE OF (§ 33*)—CONSIDERATION NECESSARY TO SUSTAIN PROMISE TO PAY ANOTHER'S DEBT.

Loss to the promisee is a sufficient consideration for a promise in writing to answer for another's debt.

But a direct and substantial benefit to the promisor is indispensable to sustain such a promise, in the absence of writing.

[Ed. Note.—for other cases, see Frauds, Statute of, Cent. Dig. §§ 50-53, 56; Dec. Dig. § 33.*]

4. FRAUDS, STATUTE OF (§§ 33, 106*)—PROMISE TO PAY ANOTHER'S DEBTS—FACTS—CONCLUSION.

A bank had agreed to loan H. & S. \$20,000, to be drawn on their checks. H. & S. owed the S. Co. \$10,078.50 for goods bought, part of which had not been shipped and part of which were in transit. The bank made a parol contract with H. & S. and the S. Co. to pay the debt of H. & S. by cash, or its cashier's check, to the amount of \$5,870.74, by its note payable in about three months for \$3,813.21 and by paying \$394.55 when certain goods were shipped to H. & S., in consideration that the S. Co. would ship these goods to H. & S., would release to them the goods in transit, and would dismiss a baseless action against the bank. The S. Co. shipped the goods and dismissed the action. The bank delivered its cashier's check, but refused to pay the check, and refused to further perform its parol agreement. *Held:*

(a) The main purpose of the parol agreement was to guarantee the payment of the debt of H. & S. to the S. Co. The bank did not derive sufficient consideration from the shipment of the goods, the release of those in transit, and the dismissal of the action against it to transform the contract from one of guaranty to an original undertaking on its part, and the parol agreement was void under the statute of frauds.

(b) But the cashier's check was an agreement in writing, subscribed by the party to be charged, to pay \$5,870.74 of the debt of H. & S. to the S. Co. The loss incurred by the S. Co. by the shipment of the goods was a sufficient consideration to sustain it, and it was a valid contract under the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 51, 210; Dec. Dig. §§ 33, 106.*]

5. BANKS AND BANKING (§ 99*)—ULTRA VIRES—CASHIER'S CHECK TO PAY ANOTHER'S DEBT IS PRESUMPTIVELY WITHIN THE POWERS OF A BANK.

The guaranty by a bank without benefit to itself of the debt of another in which it has no interest is beyond its powers.

But a cashier's check issued by a bank to pay the debt of another is presumptively within its powers, because it has lawful authority to obtain money, commercial paper, or other lawful security as consideration for the issue of the check before it emits it, and the legal presumption is that it and its officers have discharged their duty and acted within their powers.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 236; Dec. Dig. § 99.*]

6. CORPORATIONS (§ 389*)—CONTRACTS PRESUMPTIVELY VALID WHERE UNDER ANY CIRCUMSTANCES THEY MAY BE SO.

Until the contrary is proved, contracts and promises of corporations are presumed to be within their powers, and to be valid, where under any circumstances they may be so.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1568; Dec. Dig. § 389.*]

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Wyoming.

George S. Redd (George Stidger and Horace G. Benson, on the brief), for plaintiff in error.

William A. Riner (Gibson Clark and John D. Clark, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. The Mine & Smelter Supply Company complains because the court below sustained a demurrer to and dismissed its complaint, which set forth the following facts: The defendant, the Stockgrowers' Bank, had agreed to loan L. A. Holdredge & Son \$20,000 to be paid out upon their checks and to be used in the construction of the Thermopolis waterworks. L. A. Holdredge & Son owed the supply company \$10,078.50 for goods which they had purchased of the supply company, and which were to be wrought into the construction of the waterworks. Part of these goods had been received by them, part were in transit, and hydrants of the value of \$394.55 had not yet been shipped. The bank had agreed, partially by parol and partially in writing, to accept certain drafts drawn by the supply company upon the account of Holdredge & Son with the bank. Two drafts, each for \$500 had been drawn, the bank had refused to pay them, they had been protested at an expense to the supply company of \$5, and the supply company had brought an action against the bank upon them, which was then pending. In this conditions of affairs the bank, on November 9, 1906, agreed with the supply company and with Holdredge & Son to pay the debt of the latter to the supply company by delivering to it cash or its cashier's check for \$5,870.74 and its promissory note for \$3,813.21, payable on February 1, 1907, and by paying it \$394.55 when certain hydrants, the bill for which was included in said debt, were delivered to Holdredge & Son, to charge the amount of this debt against the loan which the bank had agreed to make to Holdredge & Son, and to do this in consideration that the supply company would release to Holdredge & Son the goods in transit, that it would dismiss its suit against the bank, and that it would ship to Holdredge & Son the hydrants. Thereupon the supply company released the goods, dismissed its suit, and shipped the hydrants, and the bank issued and delivered to the supply company its cashier's check for \$5,870.74 and agreed to give the supply company its note for \$3,813.21, payable February 1, 1907. The bank afterwards

*For other cases see same topic & § NUMBERS in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

refused to pay its check, and refused to pay any part of the indebtedness of Holdredge & Son to the supply company.

All the agreements of the bank were by parol, except its check for \$5,870.74, and the court below held that they were void under the statute of frauds, and dismissed the complaint for that reason.

The statutes of the state of Wyoming, where this contract was made, declare that "every special promise to answer for the debt, default, or miscarriage of another person" shall be void unless the promise, or some note or memorandum thereof be in writing and subscribed by the party to be charged therewith. Rev. St. Wyo. 1899, § 2953.

Counsel for the plaintiff contend that the agreement of the bank to pay the debt of Holdredge & Son to the supply company out of the loan it had agreed to make to Holdredge & Son did not fall under the ban of this statute, because it was a promise of the bank to discharge its own obligation to make the loan to Holdredge & Son, and its promise to pay the supply company was a mere incident to its main undertaking. The decisions which relate to the argument presented in support of this position are innumerable and inharmonious, but the rules of law by which it must be tried are these:

A legal consideration and a writing subscribed by the party to be charged are both indispensable to sustain a special promise to answer for the debt, default, or miscarriage of another under the statute of frauds. *Mallory v. Gillett*, 21 N. Y. 412, 414, 416; *Loomis v. Newhall*, 15 Pick. (Mass.) 159, 166, 167; *Stone v. Symmes*, 18 Pick. (Mass.) 467; *Berkshire v. Young*, 45 Ind. 461, 467; *Langford v. Freeman*, 60 Ind. 46, 50; *Hassinger v. Newman*, 83 Ind. 124, 126, 43 Am. Rep. 64.

Where there is such a writing, the relinquishment of a right, lien, or advantage, or any substantial loss by the creditor to be paid, although no direct benefit or advantage accrues to the promisor, constitutes a sufficient consideration to sustain the promise. *Corkins v. Collins*, 16 Mich. 477, 481, 482; *Mallory v. Gillett*, 21 N. Y. 412, 414.

Where the promisor agrees to discharge his own debt by paying the debt of his creditor at the latter's request, as in a case where a bank undertakes, at the request of one who has money or property deposited with it, to pay the creditor of the depositor out of this money or in consideration of this property, the contract is not a special promise to pay the debt of another, within the meaning of the statute, and no writing is necessary to sustain it. The main undertaking in such a case is to pay the promisor's own debt in the manner requested by his creditor, and the promise to pay the latter's debt to another is a mere incident of the chief undertaking, which is valid without a writing, and which carries with it and sustains the incidental promise to pay the debt of the creditor's creditor. *Griffin v. Cunningham*, 183 Mass. 505, 67 N. E. 660; *Hoile v. Bailey*, 58 Wis. 434, 17 N. W. 322; *Putney v. Farnham*, 27 Wis. 187, 189, 9 Am. Rep. 459; *Fosha v. Prosser*, 120 Wis. 336, 97 N. W. 924, 926; *Morgan v. S. M. L. V. Co.*, 97 Wis. 275, 72 N. W. 872; *De Walt v. Hartzell*, 7 Colo. 601, 4 Pac. 1201; *Hughes v. Fisher*, 10 Colo. 383, 386, 15 Pac. 702.

Where the promise to pay the debt of another is not the chief purpose of the transaction in which it inheres, and a substantial and

valuable consideration therefor inures directly to the benefit of the promisor, as in a case in which he obtains a conveyance of property in consideration of his promise to pay the debt of the grantor, or to pay an incumbrance upon the property, the promise does not fall within the statute, and no writing is necessary to support it. In cases of this character, the fact that the object of the promisors is not to answer for the debts, defaults, or miscarriages of others, but is to obtain substantial benefits or advantages to themselves, which they actually secure as the consideration for their agreements, distinguishes these promises from those within the statute, and makes them original agreements of the promisors, which are valid without writings. *Davis v. Patrick*, 141 U. S. 479, 487, 488, 489, 12 Sup. Ct. 58, 35 L. Ed. 826; *Emerson v. Slater*, 22 How. 28, 37, 38, 43, 44, 16 L. Ed. 360; *Mallory v. Gillett*, 21 N. Y. 412, 423, 433; *Stewart v. Jerome*, 71 Mich. 201, 38 N. W. 895, 898, 15 Am. St. Rep. 252; *Johnson v. Knapp*, 36 Iowa, 616, 618; *Pratt v. Fishwild & Williams*, 121 Iowa, 642, 96 N. W. 1089, 1092; *Cox v. Halloran*, 82 App. Div. 639, 81 N. Y. Supp. 803; *Roy & Titcomb v. Flin*, 10 Ariz. 80, 85 Pac. 725; *Justice v. Tallman*, 86 Pa. 147; *Harrison v. Simpson*, 17 Kan. 508; *Stariha, Executor, v. Greenwood*, 28 Minn. 521, 11 N. W. 76; *Hoile v. Bailey*, 58 Wis. 434, 17 N. W. 322; *Fosha v. Prosser*, 120 Wis. 336, 97 N. W. 924, 926; *Morgan v. S. M. L. V. Co.*, 97 Wis. 275, 72 N. W. 872.

But where the main purpose of the transaction is the promise to pay the debt of another, and no substantial benefit or advantage inures directly to the promisor in consideration thereof, the agreement falls under the ban of the statute, and it cannot be sustained, in the absence of a writing subscribed by the party to be charged. *Mallory v. Gillett*, 21 N. Y. 412, 420; *Gray v. Herman*, 75 Wis. 453, 44 N. W. 248, 249, 6 L. R. A. 691; *Weisel v. Spence*, 59 Wis. 301, 18 N. W. 165; *Stewart v. Jerome*, 71 Mich. 201, 38 N. W. 895, 898, 899, 15 Am. St. Rep. 252.

Laying out of view the cashier's check for \$5,870.74, which will be considered later, there was a sufficient consideration in the loss inflicted upon the supply company by its delivery to Holdredge & Son of the hydrants and the goods in transit to sustain the bank's promise to pay the latter's debt, if that promise had been in writing. This consideration, however, was insufficient to support that promise without writing, because the goods were delivered to Holdredge & Son, and the bank derived no benefit from that delivery. It was only in case the chief purpose of the bank in making this promise was to obtain some substantial benefit to itself, to which the payment of the debt of Holdredge & Son was incidental, and in case it obtained such an advantage, that its promise became its original contract, and was valid without writing.

Counsel insist that the main object of the promisor was to benefit itself, and that it secured a substantial advantage because it succeeded, by means of its promise, in securing an opportunity to loan its money to Holdredge & Son, and because the promise was in reality its undertaking to pay its own debt. But the bank and Holdredge & Son had agreed before this transaction that the bank would loan that concern, whenever they drew their checks upon it, the \$20,000, of which the \$10,078.50 to be paid to the supply company was a part, so that

its promise to pay the latter amount out of that loan gave it no additional interest, discount, or advantage, nor was this contract an agreement by the bank to pay its own debt. A promise to make a loan is not a loan. It does not make the promisor the debtor of the promisee to the amount of the proposed loan. Such an agreement is not susceptible of specific enforcement. The only remedy for its breach is an action at law for damages, and where, as in this case, there is no pleading or proof of special damages, nothing but nominal damages may be recovered, because the measure of the damages is legal interest, and the promisee is chargeable with the same rate as the promisor. If the bank had made the loan, or taken the commercial paper or other obligation of Holdredge & Son for the \$20,000, the bank would have become their debtor, and its promise at their request to pay its debt to them by paying their debt to the supply company would have been valid and binding without writing, because it would have constituted an original undertaking of the bank for its own benefit upon adequate consideration inuring directly to it. But a mere unenforceable agreement to make a loan creates no substantial debt, and this promise cannot be sustained on the theory that it was an agreement of the bank to discharge its own obligation.

Counsel argue that the bank derived such a benefit from the dismissal of the action against it upon the two drafts, each for \$500, as will sustain its promise without writing. But the complaint discloses no cause of action against the bank upon either of these drafts. It contains averments that they were drawn upon the bank by the supply company, that the bank refused to pay them, that they were protested at the expense of the supply company, and that the latter company brought an action upon them; but it contains nothing more material to the question of the liability of the bank thereon. A bank is not liable upon a draft upon it, which it has neither accepted, nor agreed to accept; and the dismissal of an action, which clearly appears by the pleading of the plaintiff to be without foundation, is no substantial benefit to the defendant, and it does not constitute a sufficient consideration to transform a guaranty into an original undertaking. *Kidder v. Blake*, 45 N. H. 530, 532, and cases there cited; *Long v. Towl*, 42 Mo. 545, 549, 97 Am. Dec. 355; *Parsons on Contracts* (9th Ed.) p. 481; *Wade v. Simeon*, 52 English Common Law Reports, 546, 566; *Cline & Co. v. Templeton*, 78 Ky. 550, 552.

Finally, upon this subject, the facts pleaded are convincing, while we keep out of view the cashier's check, that the main purpose of the bank in making this promise to pay the \$10,078.50, which Holdredge & Son owed to the supply company, was not to obtain an advantage for itself, that it derived no substantial benefit as a consideration therefor, and that the chief object of its promise was to insure the payment of the debt of Holdredge & Son. Its promise, therefore, fell under the statute of frauds, and in the absence of a writing subscribed by the bank it was not enforceable.

But on the same day that this promise was made the bank issued and delivered to the supply company its cashier's check for \$5,870.74 in part payment of the debt of Holdredge & Son to the supply company. That check was the negotiable commercial paper of the bank. The pre-

sumption of validity and of a legal consideration for it arose from its face. What was there in the complaint to overcome this presumption? Counsel answer, the void parol agreement of guaranty in part performance of which the check was issued. But the agreement of guaranty and its performance were not forbidden by the moral or the civil law. That contract was unenforceable, because there was no legal evidence of its existence; but it was not evil in itself. And when the bank issued and subscribed its cashier's check, whereby it agreed to pay to the supply company \$5,870.74 of that debt, it made a written contract, which was valid and enforceable under the statute of frauds to the amount there specified. *Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 81, 52 C. C. A. 25, 29, 57 L. R. A. 696.

But counsel contend that the execution and delivery of this check was ultra vires of the bank, because it was the guaranty of the debt of another. In the absence of an express grant of authority, and there is none in the charter of this bank (Rev. St. Wyo. 1899, § 3092), a guaranty, from which the bank derives no substantial benefit, of the performance of the obligation of another, in which it has no interest, is beyond the powers of such a corporation. *Bowen v. Needles National Bank*, 94 Fed. 925, 36 C. C. A. 553; *Merchants' Bank of Val-dosta v. Baird*, 160 Fed. 642, 645, 90 C. C. A. 338, 341, 17 L. R. A. (N. S.) 526. Thus the mere guaranty, without benefit to the bank, of the payment of the debt of Holdredge & Son, was unquestionably beyond the authority of that corporation. But under the averments of the complaint the bank cashier's check is evidence of more than a guaranty.

The bank had unquestioned power to loan \$5,870.74 to Holdredge & Son, and to take their promissory note or other like security for its repayment, and in consideration of such security to pay or to agree to pay the proceeds of that loan, or an equivalent amount, at the request of Holdredge & Son, to the supply company, in part payment of their debt to it. It is a practice of banks, too general to be ignored by the courts, to take such notes or security from borrowers before they credit them with the moneys so borrowed or assume obligations on account of them. There is nothing in the complaint in this case inconsistent with the presumption that this bank followed this practice in the case at bar, and obtained the commercial paper of Holdredge & Son, or other lawful security, for the repayment of the \$5,870.74 and interest, before it made and delivered its check to the supply company. The check is prima facie valid. Concede that it was the duty of the bank and of its officers to obtain commercial paper or like security for the repayment of the \$5,870.74 before it agreed to pay that amount to the supply company. Until the contrary is proved, the bank must be presumed to have done so; for the legal presumption is that corporations, officers, and men faithfully discharge the duties imposed upon them and act within their powers. *Hughes County v. Livingston*, 104 Fed. 306, 317, 43 C. C. A. 541, 552; *Speer v. Board of County Commissioners*, 32 C. C. A. 101, 109, 88 Fed. 749, 757.

Again, the bank had authority to issue the check in consideration of commercial paper or other adequate security taken by it, and where,

under any circumstances, the execution of a promise or contract of a corporation may have been within its lawful powers, the presumption that it was so prevails until the contrary is established. *City of Lincoln v. Sun Vapor S. L. Co.*, 59 Fed. 756, 760, 8 C. C. A. 253, 261; *Grattan Township v. Chilton*, 97 Fed. 145, 148, 38 C. C. A. 84, 87; *City of Pierre v. Dunscomb*, 106 Fed. 611, 616, 617, 45 C. C. A. 499, 504, 505; *Hughes County v. Livingston*, 104 Fed. 306, 311, 43 C. C. A. 541, 546; *Independent School District v. Rew*, 111 Fed. 1, 7, 49 C. C. A. 198, 204, 55 L. R. A. 364.

"Corporations are presumed to contract within their powers; and when a corporate contract is not on its face beyond the powers of the corporation making it, it will, in the absence of evidence to the contrary, be presumed to be valid." *Choctaw, O. & G. R. Co. v. Bond*, 87 C. C. A. 355, 360, 160 Fed. 403, 408; *Railway Company v. McCarthy*, 96 U. S. 258, 267, 24 L. Ed. 693.

The cases of *Bowen v. Needles National Bank*, 94 Fed. 925, 36 C. C. A. 553 and *Merchants' Bank of Valdosta v. Baird*, 160 Fed. 642, 90 C. C. A. 338, 17 L. R. A. (N. S.) 526, differ from the case of this check, in that the defendants in those cases had not obtained money or taken commercial paper or other lawful security for the obligations sued, and the plaintiffs had received constructive notice of that fact, and of the fact that the obligations evidenced mere guaranties of others' debts, while in the case in hand the legal presumption is that the defendant bank had obtained funds or taken adequate security for the repayment of the \$5,870.74 before it issued its check. Hence its cashier's check evidenced, not a guaranty of another's debt, but an original contract of the bank made to serve its own interest in consideration of its receipt of the commercial paper of Holdredge & Son or other adequate security for the repayment of that amount and interest.

The conclusion is that the complaint stated a good cause of action upon the check of the bank, and that the judgment must be reversed, and the case must be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

It is so ordered.

UNION DEVELOPMENT & CONSTRUCTION CO., Limited, et al. v.
GLOBE ASPHALT CO.

(Circuit Court of Appeals, Fifth Circuit. October 4, 1909.)

No. 1,774.

SALES (§ 77*)—CONTRACT—CONSTRUCTION—COMPENSATION—CONTRACT TO FURNISH ASPHALT REQUIRED BY PAVING CONTRACTS.

By a contract made by an extended correspondence an asphalt company agreed to furnish to a paving company crude asphalt from its mine and liquid flux necessary to make an asphaltic paving cement, sufficient in quantity to complete certain contracts of the paving company with the city of New Orleans, at the price of \$37 per ton, with a guaranty that each ton of the cement would lay 90 square yards of pavement specified. The cement was to be made in New Orleans by means of a portable plant furnished by the asphalt company, which was also to furnish a man to have full charge of the making and laying of the same, his salary to be paid by the paving company. *Held* that, construing the contract in the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

light of all the correspondence, it required the paving company to pay for the asphalt at the rate of \$37 for each 90 square yards of pavement laid, and not for each ton of the crude material shipped.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 77.*

Contracts for sale of things to be produced or manufactured, see note to *Star Brewery Co. v. Horst*, 58 C. C. A. 363.]

Appeal from Circuit Court of the United States for the Eastern District of Louisiana.

Suit in equity by the Globe Asphalt Company against the Union Development & Construction Company, Limited, and others. Decree for complainant, and defendants appeal. Reversed in part.

J. D. Rouse, Wm. Grant, Wm. B. Grant, Harry H. Hall, J. Blanc Monroe, Emile Godchaux, Samuel L. Gilmore, and H. G. Dupre, for appellants.

John Clogg, Lamar C. Quintero, and Edgar H. Farrar, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The Union Development & Construction Company, Limited, one of the appellants, which we will call the Union Company, is a corporation engaged in the paving business in the city of New Orleans. The appellee, the Globe Asphalt Company, which we will call the Globe Company, was the lessee, for a long term, of extensive and rich natural deposits of asphalt on Moore's Ranch, Goleta, Cal., the Goleta mines, and refined the product of these mines at a refinery which it installed and operated at a point in California which it called Obispo, and from which it marketed these products throughout the United States under the name of "Obispo asphalt." On November 14, 1901, the appellee granted to the Globe Asphalt & Paving Company, of South Dakota, the exclusive right to use Obispo asphalt in the states of Florida, Louisiana, Mississippi, and Texas. This Paving Company agreed to take certain minimum amounts for each state every year during the life of the contract, which was to run 25 years. Shipments under the contract had to begin in January, 1903, and continue at the rate of 50 tons a month. The failure of the Paving Company to take the minimum amount authorized cancellation. The Paving Company agreed to use no other asphalt, and was to pay \$30 per ton of 2,000 pounds, gross weight, f. o. b. cars or boat at Obispo, Cal. On October 20, 1902, this contract, with all rights and benefits thereunder, was transferred to Harold W. Newman, of New Orleans, and on October 27th, of the same year the transfer was duly ratified in writing by the Globe Company, and the price reduced to \$25 per ton. Newman subsequently associated himself with other parties, forming the Union Company, which company, with the consent of the appellee did, on November 29, 1902, take over his contract. This contract expired on June 1, 1903, but was renewed by the Globe Company on June 12, 1903, and its privileges and benefits extended to the Union Company, and to any reorganization thereof or formation of a new company as successor.

In April and May, 1903, the city of New Orleans advertised for bids on several large paving contracts. After correspondence and per-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sonal conferences with the appellee, and obtaining full information from its president and certain satisfactory concessions, the Union Company prepared estimates based on Obispo asphalt to be furnished by the Globe Company, and on June 1, 1903, submitted bids on three pieces of paving on which bids were solicited, namely, on Canal street, on Polymnia street, and on Pelican avenue. There were bids by other parties. The bids of the Union Company were the lowest. To these bids objection was made by a member of the council because of suggestions from certain owners of abutting property on Canal street to the effect that the Globe Company was manufacturing a portion of its asphalt from the residuum of petroleum or other oils, instead of exclusively refining asphalt mined from natural deposits. One of the specifications in the city's proposals for bids was that asphalt shall be mined from some natural deposit; that asphalt manufactured solely from petroleum or other oil residuums, shall not be employed. Ultimate action on the Union Company's bid was postponed, and the city council took steps to have the city chemist, who was then in California, visit the appellee's Goleta mines and its Obispo refinery and make report thereon. The result of this proceeding sufficiently appears from the following extracts from letters of the appellee, addressed to the Union Company from Los Angeles, Cal.; the first bearing date of July 21, 1903, in which it was said:

"For reasons not necessary to be explained here, we were compelled to deny Prof. Metz the privilege of officially visiting the Goleta asphalt mine, and, as that was part of his investigation, he deemed it best to stop all investigations. It is doubtful that, even though he had finished up his work, the report that he would have made, though of the most favorable character, would have relieved us of any suspicion that the material to be furnished your company at a later day would not be all, or in part, asphalt made from crude oil. In order that all suspicion may be eliminated, we hereby propose to furnish your company with all the asphalt you may want for use in street paving in New Orleans, La., direct from the Goleta asphalt mine, and to furnish with each shipment thereof the Goleta wharfmaster's shipping receipt and weight sheets, so there may be no question as to where the asphalt comes from, and this asphalt can then be refined at your New Orleans asphalt paving plant, immediately under the eye of such city official as may be appointed for that purpose. This Goleta asphalt, as it comes from the mine, is much richer in bitumen than the refined Trinidad, and contains no water; hence you can refine and then flux it with the liquid asphalt we would furnish you from our Obispo works, and have exactly the same results and product as we obtain at our works in the shape of our finished refined Obispo asphalt. By handling the matter in this way, the question of crude oil asphalt cannot be used in any manner. * * * As this Goleta asphalt will average 60 per cent. or better of bitumen, as against 95 to 97 per cent. that is contained in our refined Obispo, we will make something like a corresponding difference in price. In other words, we will make the price for the Goleta asphalt at \$15 on board steamer at the mine, or \$18 per ton f. o. b. cars East San Pedro Harbor. We trust that the proposition will remove all objections to awarding your company the paving contracts, and should suggest that this proposal as to the shipment of your supply of asphalt direct from the Goleta mine, and the refining thereof in New Orleans, be written out and formally presented to the finance committee for their consideration."

And again the next day it wrote:

"If the question of the awarding of the contracts to the Union Development & Construction Company is not dependent upon strictly political grounds, we cannot see how the city authorities can do otherwise than give this company

the work, since we have made a proposition by which the city is sure of their supply of asphalt direct from the mine, and such evidence connected therewith as to make it absolutely sure that their assignments can be traced from the Goleta mine direct to New Orleans. Upon arrival in New Orleans, this asphalt can be refined just as well at the ground, wherever your asphalt plant is located, and a refined product obtained that would be of the same high grade and quality as though it was refined in the modern asphalt refinery of this coast. If this programme is carried out, the writer [the president of the Globe Company] will personally look after the proper appliances that will have to be erected for this refining process."

And on July 27, 1903, its president wired the Union Company:

"We will guarantee cost and freight will not be more than \$42 per ton for finished refined asphalt on final and true delivery your works at New Orleans; that is, according to contract, regardless of cost to us. I will pay for refining plant and cost for refining, and will guarantee delivery to you asphalt equal in quality and purity as though refined here."

This proposition was refused by wire. By letter of the same date the Globe Company expressed itself thus:

"It is intended that the refined Obispo asphalt shall be delivered to you at a cost price fixed by the contract existing between the Globe Asphalt Company and the Union Development & Construction Company; the only difference being that the refining will be done in your city, instead of California. The whole object of this plan has been given in a former letter; that is, to eliminate the crude oil asphalt question, and, as the finished material will not cost your company any more per ton than as provided for in the contract between us, we cannot see why you would have any serious objections, and surely the city officials will agree that the refining can be done in your city just as well as though done in California."

Upon receipt of this letter, the Union Company replied by wire:

"Your telegram to hand of July 27th. The proposal is accepted. Erect refinery and refine crude here. Expense to be paid by you. Only on condition that you guarantee price of \$25 and freight, \$12, total \$37, per ton of refined asphalt, in accordance with contract dated Los Angeles, October 27th last, since renewed."

To this the Globe Company replied by telegram, dated Los Angeles, July 28th, "We agree to \$37 as per your telegram of to-day," which it confirmed by letter of same date, in which it said:

"Your company is not expected to participate in any expense necessary for refining in New Orleans. We stand ready to supply you with refined Obispo asphalt made from Goleta crude asphalt, either from New Orleans plant or Obispo, at your option, and which will comply with all terms of your contract. This proposition is made to eliminate the crude oil asphalt question."

The next day the Globe Company wrote:

"In answer to your telegram of the 28th we wired you as follows: 'We agree to \$37 as per your telegram of to-day'—meaning by this that the price of the refined Obispo asphalt which we expect to refine in New Orleans and will be turned over to your company at the price of \$37 per ton for the refined material."

This agreement to refine the asphalt in New Orleans was satisfactory to the city authorities, and on October 1, 1903, the necessary ordinances accepting the bids of the Union Company were passed by the city council. By this time a panic had so far congested the money markets that the Union Company found itself unable to finance the large

paving contracts which it had undertaken. Its duly authorized representatives brought this phase of the situation to the notice of the Globe Company. That company at once displayed active anxiety to get its asphalt introduced into New Orleans, and its president undertook personally to interest Northern capitalists in the matter and have them take over the paving contracts held by the Union Company. He sent the Union Company this dispatch:

"Pittsburg, Pa., Oct. 3, '03.

"Flinn will decide 6th day of October. The prospects are encouraging. If Flinn decides favorably, a special agent will be sent immediately to New Orleans, if the city can extend the time that it is necessary to take so an agent can send copy of report. Have received a telegram announcing Guild quite impossible at present."

And on the same day he wrote the Union Company as follows:

"I submitted the telegram to Booth & Flinn to-day, and, after explaining matters fully, Mr. Geo. Flinn expressed himself in a way that left no doubt that he was deeply interested, and that their firm was at liberty to take over the contracts. He requested that I leave the papers with him to look over, and that I call at his office next Tuesday at 9:30 a. m. Mr. Flinn expressed himself in a very frank manner, stating that he looked upon the matter in a very favorable light; that the only difficulty that might arise would be to arrange for such a large sum of money under the present conditions of the money market. If this firm comes to a favorable conclusion, it will be necessary to at once send a representative to New Orleans to corroborate all that I have said, and at the same time close the deal; but, before sending this agent, assurance of a reasonable time extension must be guaranteed by the New Orleans city officials. You can arrange this time extension business, advise me of the fact, and I can inform B. & F., and no doubt I will go to your city with their agent. The inclosed telegram from Guild & Co. was received late this afternoon: 'We have taken up the matter with T. B. Redmond. Information of any kind will be promptly forwarded as fast as obtained.'"

On October 6, 1903, the Union Company telegraphed Mr. Dubbs:

"We have obtained extension until 19th day of October only on condition that if you guarantee Flinn is serious and will arrive not later than 12th day of October."

To which Dubbs replied:

"Pittsburg, Pa., Oct. 8, '03.

"Your telegram to hand during my absence. Under favorable conditions at present existing, I am satisfied we can accomplish desired result within ten days. We have written full particulars."

On October 8, 1903, the Union Company wrote to Mr. Dubbs:

"Your favor of the 6th inst., confirming your telegram of same date, to hand. We understand that thereby Mr. Flinn intends to leave Pittsburg for this city on Saturday, and if not able to leave on that date he will do so on a later day, provided necessary time is given by the city. As wired you, we are granted time by the city notary to sign up the contracts until October 19th; but, should we be forced to ask for further delay, we must do so through the council, and thereby expose our weakness to the public and injure our credit. It is therefore important that you use every endeavor to get Mr. Flinn on the way by Saturday. This would give him a full week to decide. After he has declared his decision to take hold of these contracts, we can then easily obtain further extension from the council in his behalf without injury to ourselves. * * * Please wire us Saturday as to Mr. Flinn's positive movements, as our friends here want to know that we are serious in our representations to them. We, on our part, will wire you on Saturday morning that the extension granted us still holds good until October 19th."

Mr. A. Ledoux, president of the Union Company, invested with plenary power to represent it with reference to these paving contracts, and Judge John Clegg, a member of its executive committee and acting as such, and in part, also, as its legal adviser, visited Mr. Dubbs at Pittsburg. He (Mr. Dubbs) was president of the Globe Company and invested with plenary power to represent it in all matters touching these contracts. Referring to this visit, Judge Clegg in his testimony says:

"We went from here [New Orleans] to Pittsburg, and Mr. Dubbs thought he had parties there who would take the contract, and, not succeeding there, he joined Mr. Ledoux and myself in the visit to New York, seeking to interest people there. Being well informed of the situation, he went there, and was very much in earnest in seeking to get the Brooklyn people to take it up."

On October 10, 1903, Mr. Dubbs wired the Union Company from Brooklyn, N. Y.:

"I have finally made a deal, and will be in New Orleans Thursday."

On October 12th, he wired from Brooklyn:

"Have made deal with New York parties, and will arrive in New Orleans next Thursday with party. Wire me, care Astor House, if satisfactory."

On October 13th, from Pittsburg, Pa., Mr. Dubbs wrote the Union Company:

"Have just returned from New York City, where I went first to see Mr. Kelly, of the Brooklyn Alcatraz Asphalt Paving Co., who had suggested to Mr. Williams that he would like to take over the New Orleans contracts, but, after going over the matter, decided that it would take more money than he commanded. I then took it up with Mr. Firmen, a contractor of New York, who stated on Sunday positively that he would take over the business, and on Monday we were to draw up a preliminary contract, and then start for your city on Tuesday night. On the strength of this I wired you that I would close the deal. On Monday, when we got together, Mr. Firmen stated that he would be unable to finance the business unless the temporary certificates could be used as collateral in your New Orleans banks; hence my message from New York on this subject, and my telegram of to-day from this city on the same question. If your answer is in the affirmative, I am to wire Mr. F., and he will at once start for New Orleans to close up the deal. He expressed himself as only being able to raise \$100,000 at the present time, and he would have to depend on the use of the certificates for raising the balance of the money needed to carry out the work. We are awaiting your reply, and, if favorable, you can expect us in your city, not later than Friday morning. H. H. Flinn dropped the matter at the last moment, owing to the fact that he could not leave the city, and would not trust the matter to any one else. Firmen has arranged for two portable asphalt plants, steam rollers, etc., and claims that he can finish up the work in less than six months."

On October 15, 1903, Mr. Dubbs wired the Union Company from Pittsburg, Pa.:

"George Firmen requests us to telegraph you as follows: 'I cannot contract immediately for New Orleans work. Agnew will leave for your place to-night.'"

To which the Union Company replied:

"Your telegram to hand. Under the circumstances, have no occasion for Agnew's coming, unless expenses to be paid by you."

On October 16, 1903, Mr. Dubbs wrote the Union Company from Pittsburg, Pa.:

"As wired you, Mr. Agnew started last night for your city. He will explain more fully as to the tight condition of the money market, and for that reason, more than anything else, it is impossible to handle the New Orleans contracts just at this time. If you can by any means get the city officials to grant you more time, and if the money market should ease up within a reasonable time, there will be no trouble in floating the business on the lines as desired by you. Mr. Agnew will have some suggestions to make which might be of interest to you, and if you should decide to act on any of them you can count on every assistance that this company can give. We will be at all the expense of Agnew's trip, and, should he need any funds before he gets through in your city, kindly advance same, and draw on us at this office, and we will honor same. We trust that something will result from Agnew's visit."

Touching this letter the counsel for the appellee says in his printed brief:

"The Union Company was informed by a letter of date October 16th that all attempts to get somebody to take over these contracts with the city had failed. Thereupon a syndicate was formed, composed of Samuel Hyman, who had been a member of the executive committee of the Union Company, Alfred Hiller, and Charles Godchaux."

Samuel Hyman, above referred to, who was a shareholder in the Union Company and fully conversant with all the correspondence by letter and wire which that company had had with the Globe Company or with its president, Mr. Dubbs, on the subject of Obispo asphalt and the Union Company's contracts with the city of New Orleans, testifies that the Union Company could not go on with these contracts; that he had tried to raise money for them in every shape and form; that Judge Clegg had done so, and Mr. Ledoux, and he thinks that between them they had tried every contractor in the United States, to get them to take over the contracts, but did not succeed.

Alfred Hiller, above named, is a brother-in-law of Samuel Hyman, and became much interested in the difficulty in which Hyman was involved with the Union Company, and made diligent inquiry into the condition of its affairs, and took into consideration the proposition which Hyman made to him in regard to forming a syndicate in which he and Hyman and others who might be induced to take part would unite and take over the contracts which the Union Company had obtained from the city. It was expected that F. B. Hull, a stockholder in the Union Company, and Charles Godchaux, and perhaps others, would unite with Hyman and Hiller in forming the syndicate; but Hull concluded to confine his operations entirely to the building department of the Union Company, and Mr. Charles Godchaux alone united with the other two. But, before he consented to come in, he pressed the question upon the others, "How much is that asphalt going to cost?" Being told, he asked, further, "Are you sure of it?" And, being assured, he pressed the further question, "How much will it lay?"

Mr. Hyman, examined as a witness, testifies:

"Then Mr. Dubbs came down, and he and his man, Agnew, and Mr. Ledoux and myself (Hyman) were all up in the Union Development & Construction Company's office one night, and Mr. Dubbs gave us figures on the whole thing, and Mr. Ledoux put them down, and it was understood just as plain as a man

can talk that they figured out how much asphalt it was going to take and the prices."

Mr. Hiller testifies that, when Mr. Hyman requested him to go into the syndicate, he stated the cost of the asphalt from which a large portion of the profit on the work was to come, and requested that Hiller, in order to familiarize himself with the statements, should go over the figures which were in the hands of Mr. Ledoux and could be seen at the office of the Union Company. They (Hyman and Hiller) went to the office of the Union Company, and there met Mr. Ledoux and Mr. Dubbs, and Mr. Ledoux, in the presence of Mr. Dubbs, gave Hiller certain papers (shown witness while he was testifying) which showed the cost of the asphalt, touching which the witness says:

"I went over these papers and calculations with Mr. Dubbs and Mr. Ledoux. These figures are in the handwriting of Mr. Ledoux. They were called out by Mr. Dubbs, and Mr. Ledoux wrote them down. They were being gone over with Mr. Ledoux and Mr. Dubbs when I stepped into the office. They were then already written. Upon the basis of these figures, which practically verified the statements made by Mr. Hyman, I proceeded to form the syndicate."

At the request of Mr. Godchaux that Mr. Dubbs should confirm the price made to the Union Company for asphalt to the syndicate, Mr. Hiller requested Mr. Dubbs to address the parties a letter to that effect, in compliance with which request Mr. Dubbs thereafter handed Mr. Hiller the following typewritten letter (with some carbon copies thereof):

"The Globe Asphalt Company hereby agrees to furnish the Union Development & Construction Company, Limited, and their guarantors, all the Obispo asphalt, in the shape and form of Goleta crude asphalt and refined liquid Obispo flux, both in such proportions as may be necessary to make an acceptable asphaltic cement and in sufficient quantity to complete and finish all of the asphalt paving work that your company now has to do in the city of New Orleans, amounting approximately to 130,000 to 140,000 square yards of asphalt surface street work, the price for same to be \$37 per ton of 2,000 pounds gross weight, all f. o. b. cars in New Orleans. This price of \$37 per gross ton to be the basic price on our guarantee that each net ton of 2,000 pounds of the refined Goleta and Obispo asphaltic cement will lay an average of 90 square yards of finished asphalt pavement, consisting of a 1-inch binder course and a 1½-inch top or wearing surface; it being understood that in pavements consisting of a 2-inch top coat and 1½-inch binder course the asphalt cement is to lay a proportionate number of square yards of pavement, or 67.5 yards to the net ton of asphaltic cement. The Globe Asphalt Company further agrees to ship forward to New Orleans the asphalt and asphaltic flux as rapidly as the same may be needed for use in the work under consideration. Your company or guarantors to advance and pay all freight and switching charges on same. The Globe Company also hereby agrees to ship upon your order, and same is to arrive in time for use, a complete portable asphalt paving plant and one or two asphalt rollers, for which your company or guarantors is to pay the Globe Asphalt Company for use of same as follows: Five cents per square yard of finished asphalt street surface for the asphalt plant and \$5 per working day for each roller. Your company is also to pay the freight charges both coming and going on the asphalt paving plant and on the one or two rollers. The terms of payment and guaranty on said payment to Globe Asphalt Company for all the asphalt furnished and the 5 cents per yard for use of the asphalt plant and the \$5 per day each, as rental for the steam roller or rollers, to be as follows: A written guaranty satisfactory to the Globe Asphalt Company is to be given to the Globe Asphalt Company, properly signed by acceptable parties that all money due for said asphalt, asphalt plant, and asphalt roller or rollers shall and will be paid in cash, or equiva-

lent, to the Globe Asphalt Company when the asphalt street work has been finished, the said money to be paid to said Globe Asphalt Company by your company or by the parties signing the guaranty contract referred to, said payment to be paid within 10 days after the said asphalt work is completed and accepted by the city of New Orleans. It is understood that the asphalt furnished by the Globe Asphalt Company and that the asphalt street work done shall be (per se) acceptable and satisfactory to the city of New Orleans. It being understood that all the manipulations of the asphalt, both at the asphalt plant and in laying of same on the street or streets, shall be under the immediate supervision and control of the Globe Asphalt Company, through an agent or representative that said Globe Asphalt Company shall furnish. The salary and expenses of said Globe Asphalt Company agent, manager, or representative shall be at the rate of \$2,500 per year, payable by your company as guarantors monthly, and your company to also pay said agent necessary traveling expenses in coming to New Orleans and returning. The asphalt paving plant is to have an engineer accompanying same, and who is to be the responsible agent for the proper care of same; his wages and necessary traveling expenses to be also paid monthly by your company or guarantors. It is further understood and agreed that the Globe Asphalt Company is to attach to each bill of lading on every asphalt shipment a certificate giving the amount of asphalt and the value thereof of such shipment, and said certificate is to be signed by a proper person, acting as agent of the Union Development & Construction Company, Limited, or their guarantors. All asphalt is to be consigned to the Globe Asphalt Company with the B/L properly indorsed for delivery of the asphalt to the Union Development & Construction Company, Limited, or their guarantors, said B/L to be sent through a New Orleans bank and surrendered by said bank upon receiving the signature to the attached certificate above mentioned of the authorized agent of the Union Development & Construction Company, Limited, or their guarantors. This proposition is made with the understanding that all work on the concrete and other parts of the contract will be pushed with all the due diligence necessary to avoid unnecessary delay in the prosecution of the asphalt street work. Acceptance or rejection of this proposition to be made in writing by the Union Development & Construction Company, Limited, and their guarantors within 20 days from date hereof."

The board of directors of the Union Company passed certain resolutions, which were approved at a stockholders' meeting held on November 12, 1903, to the effect that the Union Company transfers, sets over, and assigns, with full substitution, to the syndicate, all of its right, title, interest, claim, and demands, of any nature whatsoever in and to the three paving contracts or bids hereinbefore referred to; the syndicate agreeing to provide all funds for labor, material, superintendence, etc., that may be necessary for the full carrying out of the said contracts, etc. Thereafter the following letters were delivered by the Union Company and its guarantors to the Globe Company:

"Alfred Hiller Company, Limited.

"New Orleans, November 19, 1903.

"Mr. L. A. Dubbs, President Globe Asphalt Company, No. 405 Blakewell Building, Pittsburg, Pa.—Dear Sir: As you have been advised through telegrams from Mr. A. Ledoux, president of the Union Development & Construction Company, Limited, that all matters pertaining to the three contracts with the city of New Orleans which were awarded to the Union Development & Construction Company, Limited, have been arranged, we now beg to advise that your agreement of date October 31, 1903, addressed to the Union Development & Construction Company, Limited, and their guarantors, is accepted, with the exception as follows: It is to be understood that the rental of two rollers is \$5 per day for the two, not \$5 each. The payment of the crude asphalt and flux is to be made when the work is completed and accepted by the city of New Orleans, and, further, that you are to furnish as-

phalt and flux at the same price for such a quantity as may be necessary during the maintenance feature of the contract. By this is meant what asphalt and flux may be needed to maintain the street for a period of five years. Whilst this last feature may be practically covered by your agreement to the Union Development & Construction Company, Limited, the guarantors or syndicate desire this to be a special understanding with you, your company, as to its supplies for maintenance. We shall advise you in due course concerning the shipments of asphalt, also plant and rollers, and we now beg to inclose to you herewith agreement as was understood would be sent to you.

"Yours truly, [Signed] Union Development & Construction Co., Ltd.,

"A. Ledoux, Pres.

"Alfred Hiller.

"Sam. Hyman.

"Charles Godchaux."

"Alfred Hiller Company, Limited.

"New Orleans, November 19, 1903.

"Mr. J. A. Dubbs, Pres. Globe Asphalt Co., No. 405 Blakewell Building, Pittsburg, Pa.: Referring to your proposal and agreement of date October 31, 1903, we hereby guarantee the payment of all crude asphalt and refined liquid Obispo flux as may be shipped to the Union Development & Construction Company, Limited, for asphaltting the following streets in New Orleans, namely: Canal street, from Liberty to Metairie Road; Polymnia, Coliseum to Carondelet; and Pelican avenue, from Bouny street to Elmira street. Also, for rental of asphalt plant and two rollers for said above-described streets. Payments to be made in accordance with terms expressed in said agreement of October 31st, as amended by letter of acceptance of November 19, 1903.

"Union Development & Construction Company, Limited,

"Guarantors:

"Sam. Hyman.

"Alfred Hiller.

"Charles Godchaux."

In the resolution of transfer from the Union Company to the syndicate, it was provided that during the operation of the paving contracts with the city this company (the Union Company) shall open and keep a separate set of books, wherein shall be entered exclusively all transactions pertaining to said paving contracts, which books shall be at all times open to the reasonable inspection of the syndicate, the members thereof, or their assigns. It was also provided that in consideration of the Union Company's furnishing, during the operation of the contracts, the use free to the syndicate of its office, office force, office material, officers, and employes, the syndicate shall pay to the company \$—— per month, payable monthly, to be continued until said paving contracts have been completed. Books were opened and proper accounts of the proceedings were kept in the office of the Union Company, by or under the direction of Mr. Ledoux, the president of the Union Company, who acted also as the agent or representative of the paving syndicate. Mr. Ledoux died —— day of ——, 190—. Up to the time of his death he had full control in the office of the operations of the Union Company and of the work of the syndicate, except as to the refining of the asphalt and laying of pavements, which was entirely subject to the direction of Mr. Agnew, who was an employe of the Union Company and its guarantors, and whose salary was paid by them, but who was also agent of the Globe Company especially and completely charged with the refining of the asphalt and the construction

of the pavement so as to make it meet the requirements of the city's contracts. Mr. Dubbs testifies that:

"Mr. Agnew was the general manager of the asphalt department for the guarantors of the Union Development & Construction Company. He was employed on my recommendation. I guaranteed the asphalt would be used in a proper manner, and a pavement laid that would be acceptable to the city; and, so far as the manipulating and handling of the asphalt was concerned, Mr. Agnew was under my instructions. In other words, if I should want to, I could change the form, or I could change the percentage in the pavement. Beyond that, he was not under my control in any way."

The witness Mendlesohn, whose duty it was to follow up the work, write up the books of the syndicate, and add up these books for Mr. Ledoux, testifies that:

"Mr. Agnew had absolute control of the plant. We did not interfere with him. Whatever he did he was responsible for. Mr. Ledoux, the president of the Union Company, was recognized as the head of the whole business. I would not attempt to do anything without consulting with Mr. Ledoux; but there was one party there with whom he (Mr. Ledoux) would not interfere, or to whom he would not give any instructions. That was Mr. Agnew. Mr. Ledoux gave him no instructions as to the refining of the asphalt, or as to laying it, because the Globe Company undertook to furnish asphalt that would make a good pavement, and that it should be properly laid, and that was what Mr. Agnew's business was."

When the shipments of the Goleta crude asphalt and the refined liquid Obispo flux began to arrive, the Union Company and its guarantors noted a material discrepancy between the weight sheets attached to the Goleta wharfmaster's shipping receipt and the weight sheets attached to the carrier's bill of lading, on which the carrier's charges were demanded; and by letter dated January 6, 1904, this matter was brought to the attention of the Globe Company, to which the president of that company replied, on January 9, 1904, as follows:

"Yours of the 6th inst., inclosing paid freight bills, received. We note that the railroad weights differ from the wharfinger's weights; but, as the final settlement between your company and ours is to be based on the number of square yards of finished pavement laid per ton, we need pay no attention to this difference, except to call the wharfinger's attention to the matter, which we have already done."

On July 16, 1904, the paving to be done on Polymnia street had been completed, and the Union Company reported the same by letter of that date, addressed to the president of the Globe Company at its home office in Pittsburg, in which it says, in the first paragraph of the letter:

"We herewith inclose you credit mem. for \$1,634.29, for proceeds of asphalt used on Polymnia street, as per your guaranty of 90 yards of finished pavement to the ton."

The body of the memorandum inclosed was in these words and figures:

"N. O., July 1/04.

For 44.17 tons of asphalt, \$37.00.....	\$1,634.29
"Laid on Polymnia street, 3,975.38 sqr. yds. (official measurement) at 90 yards per ton, equal 44.17 tons."	

In subsequent statements rendered to the Globe Company of expenditures made and the amount of asphalt used, the asphalt was

credited to the Globe Company on the basis of one ton for every 90 square yards of pavement laid, or of one ton for every $67\frac{1}{2}$ yards of pavement laid, according to the thickness of the course constituting the pavement, respectively, and credited at the rate of \$37 per ton so found. These statements so rendered by mail were duly received and retained, without notice of approval or objection being given by the Globe Company. The work was finally completed and accepted by the city, and, on April 10, 1905, the Globe Company served upon the Union Company and each of its guarantors a sworn statement purporting to show a balance in favor of the Globe Company of \$56,176.18. The account of the Union Company, made up to April 15, 1905, showed a balance against the Globe Company of \$707.90. Outside of several minor disputed charges, the whole discrepancy in these accounts arose from the difference in the interpretation of the contract by the two respective parties. The Globe Company based its statement on the theory that the Union Company was to pay for the crude Goleta asphalt at the rate of \$37 per ton for that material, and for the refined liquid Obispo flux at the rate of \$37 per ton for that material. There was a loss of over 40 per cent. in changing the Goleta crude asphalt, as the same was done in the Globe Company's refinery at New Orleans, into asphaltic cement that was used in paving the streets. This loss made the difference, substantially, of the \$56,176.18 between the price claimed by the Globe Company and that contended for by the Union Company. The Union Company, rejecting the interpretation contended for by the Globe Company, refused payment of this account rendered. Thereupon the Globe Company entered its suit at law against the Union Company and its guarantors for the amount claimed. On motion of the defendants, not resisted by the plaintiffs, the Circuit Court ordered the pleadings to be reformed according to the practice in courts of equity, and in compliance therewith in due course the proper pleadings were filed. Thereupon the Circuit Court, of its own motion, ordered the case to be referred to a special master, with direction and authority to report on all questions of fact and law therein, his report to be merely advisory to the court.

The pleadings are extended and somewhat confusing, and the result of the pleadings and of the findings of the master and the substantial admissions of the parties bring the cause to a single issue, which is: Must the defendants pay for crude Goleta asphalt and for the refined Obispo flux, each, \$37 per gross ton f. o. b. New Orleans, or must they pay for asphaltic cement net to them on the basis of the number of square yards of pavement laid. The special master duly reported, after full hearing, his findings of fact, resulting in the ultimate conclusion that the statement of the defendants, showing a balance of \$707.90 due them by complainant, is correct, with the following exceptions (noting the exceptions), which change the balance from \$707.90 against complainants to the sum of \$1,074.12 in favor of the complainants. There were very numerous exceptions to the findings of the master, and at the hearing the Circuit Court sustained these exceptions and passed its decree in favor of the complainants. Due exceptions were reserved to this action of the court and are presented to us by the assignment of errors.

We are clear in our conviction that the Circuit Court erred in passing its decree for the complainants. The complainants insisted below, and now urge, that the letter of October 31, 1903, addressed to the Union Development & Construction Company, Limited, and their guarantors, and signed "The Globe Asphalt Company, J. A. Dubbs, President," and the letter of acceptance of November 19, 1903, addressed to Mr. J. A. Dubbs, President Globe Asphalt Company, and signed, "Union Development & Construction Company, Limited, A. Ledoux, President," "Alfred Hiller," "Sam. Hyman," and "Charles Godchaux," and the letter of guaranty of same date signed by the same parties, constitute a new, separate, unambiguous written contract, susceptible of no other construction than that which complainants put upon it. Without rehearsing the master's arguments, we concur with him in concluding that the contract claimed to be evidenced by the letters to which we have just referred is not plain and unambiguous, and that all competent evidence tending to throw light on what was the real intent of the parties should be considered. It is clear that from July 27 to October 31, 1903, the contract was that the Globe Company would sell to the Union Company Obispo asphalt at the price of \$37 per ton, which would lay 90 square yards of pavement to the ton of 2,000 pounds, finished asphalt pavement, consisting of 1-inch binder course and a 1½-inch top or wearing surface; it being understood that in pavements consisting of 2-inch top coat and a 1½-inch binder course, the asphalt cement is to lay a proportionate number of square yards of pavement, or 67.5 yards to the net ton of asphaltic cement. From a consideration of all the proof, we conclude, with the master, that this feature of the contract was not changed by the writings of October 31st and November 19th, and that the account rendered by the Union Company on the basis of this construction of the contract was the correct account as to that item, and that the correction made by the master of some of the smaller details of debits and credits, showing a balance in favor of the complainant of \$1,074.12, is correct, and should have been made the basis of the decree.

The decree is, therefore, in the largest part reversed, and is here so amended as to be rendered in favor of the appellee for the sum of \$1,074.12, with legal interest from the date of the filing of complainant's bill, and that the costs in both courts be adjudged against the appellee.

WARE et al. v. PEARSONS et al†

(Circuit Court of Appeals, Eighth Circuit. October 11, 1909.)

1. GAMING (§ 14*)—"WAGERING CONTRACTS" FOR DEALING IN GRAIN.

An express agreement in advance between grain brokers and a customer that no grain was to be delivered or received on his contracts, but that the transactions were entirely on margin, and settlements to be made between them on differences in the market, rendered such contracts void as "wagering contracts," and unenforceable in an action by the brokers against the customer, although the customer's orders may in fact have been executed on the exchange by actual purchases from or sales to third

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied December 18, 1909.

persons, who dealt with the brokers as principals without any knowledge of the customer.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 25, 26; Dec. Dig. § 14.*

For other definitions, see Words and Phrases, vol. 8, pp. 7365-7368, 7831.]

2. PRINCIPAL AND AGENT (§ 123*)—AUTHORITY OF AGENT—EVIDENCE CONSIDERED.

Evidence *held* to sustain a finding by a jury that a manager placed by a firm of brokers in charge of a branch office, and who in fact made illegal contracts with a customer, which were executed by the firm, had authority to act for it in agreeing with the customer that there should be no actual delivery or receipt of grain on his contracts.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 123.*]

3. APPEAL AND ERROR (§ 263*)—REVIEW OF INSTRUCTIONS—NECESSITY OF EXCEPTIONS.

Alleged inconsistencies between instructions cannot be availed of in an appellate court as a ground of reversal, unless they were called to the attention of the trial court by an exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.*]

4. APPEAL AND ERROR (§ 1053*)—REVIEW—HARMLESS ERROR—EVIDENCE—EFFECT OF WITHDRAWAL FROM JURY.

Where testimony improperly admitted was readily separable from all other testimony, and was by the court on its own motion stricken out, and the jury charged in clear and unequivocal language to disregard it, the error in its admission was cured.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053; * Trial, Cent. Dig. § 977.]

In Error to the Circuit Court of the United States for the Northern District of Iowa.

Action by John H. Ware, Edward F. Leland, G. W. Lee, and F. J. Fahey, partners as Ware & Leland, against John H. Pearsons and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

D. M. Kirton (D. M. Kelleher and Maurice O'Connor, on the brief), for plaintiffs in error.

M. F. Healy (Robert Healy, Thomas D. Healy, and W. S. Kenyon, on the brief), for defendants in error.

Before HOOK and ADAMS, Circuit Judges, and PHILIPS, District Judge.

HOOK, Circuit Judge. The firm of Ware & Leland sued Pearsons to recover commissions and moneys advanced in various grain transactions alleged to have been executed by them as brokers at his direction. The defense of Pearsons was that it was the intention of both parties not to deal in the actual grain, but, on the contrary, to gamble on the rise and fall of the market by settling their gains and losses by the difference between the contract price and the market value at the times fixed for delivery. *Chicago Board of Trade v. Christie Grain Co.*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031; *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172; *Irwin v. Williar*,

110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225. There was a verdict and judgment for the defendant.

It may be assumed as claimed by the plaintiffs that the evidence showed that the orders given by defendant were in fact executed by them on the Chicago Board of Trade and the Milwaukee Chamber of Commerce, according to the rules of those exchanges, by making sales to and purchases from other persons doing business there; also that the intention of such other persons not to deal in the actual grain was not shown, and presumptively their intent was otherwise. If this was all there was to the case, the plaintiffs should have prevailed, because the mere intent of the defendant to engage in gambling, without a like intent on the part of those with whom he dealt, is not sufficient to condemn the transactions. Cases *supra*, and *Clews v. Jamieson*, 182 U. S. 461, 489, 21 Sup. Ct. 845, 45 L. Ed. 1183. It was claimed, however, by defendant, that he had an express agreement with E. A. Armstrong, plaintiffs' manager, that no grain was to be delivered or received, but that, on the contrary, "if he lost his account would be debited, and if he won it would be credited, or he would get a check immediately if he wanted it"—in other words that whatever plaintiffs might do with others, yet as between them and the defendant there was to be no dealing in actual grain, but a mere course of wagering and settlement according to differences. Whether this agreement was made was the principal question submitted to the jury, and there was substantial evidence supporting their finding for the defendant. So, if Armstrong had authority to bind plaintiffs to such an agreement, it would appear that in this instance their business was so conducted that they stood towards defendant as principals contracting, or rather wagering, with him in their own behalf, and therefore the intent of those they dealt with on the exchanges, whether lawful or unlawful, would be immaterial.

The plaintiffs' headquarters for their grain business were in Chicago, Ill., but they maintained an office at Ft. Dodge, Iowa, in charge of Armstrong as local manager. It was at this office and with Armstrong that defendant dealt. His name did not appear upon the books of the firm in Chicago, and the various persons with whom plaintiffs' transactions were had on the exchanges knew the plaintiffs only, not the defendant. As to Armstrong's authority, Mr. Leland, one of the plaintiffs, testified:

"He there [at Ft. Dodge] represents the firm of Ware & Leland as manager, and in soliciting orders, receiving money, carrying accounts, and things of that kind, he has the same power and authority as if one of the firm were there. He has full authority as manager of that branch of our office."

And it also appeared that his authority was not restricted to dealings in actual grain, but extended to wagering contracts, which were contrary to law. Embraced in plaintiffs' demands were items for moneys claimed to be due upon transactions commonly termed "puts and calls." These transactions were in the form of written offers to contract for the purchase or sale of grain at a designated price, with an agreement to leave the offers open for acceptance until a specified hour for a paid consideration equal to one-tenth of a cent per bushel of grain. Whether the trial court was entirely right in charging generally that

these were mere wagers upon the fluctuations of the market need not be determined. At least such of them as were executed in Chicago were forbidden by the law of Illinois, and we refer to them here simply as bearing upon Armstrong's authority to make the agreement it is claimed he made, and as showing plaintiffs knew of and adopted acts of his that were in accord with what defendant claimed was expressly agreed upon. Section 130 of the Criminal Code of Illinois provides:

"Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity * * * shall be fined not less than \$10, nor more than \$1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts and shall be void."

We think it clear that the "puts and calls," so termed, were within the prohibition of this statute. *Schneider v. Turner*, 130 Ill. 28, 22 N. E. 497, 6 L. R. A. 164. And see *Booth v. People*, 186 Ill. 45, 57 N. E. 798, 50 L. R. A. 762, 78 Am. St. Rep. 229; *Booth v. People*, 184 U. S. 623, 22 Sup. Ct. 425, 46 L. Ed. 623. It therefore appears that by an express agreement between plaintiffs' authorized manager and the defendant there was introduced into all of the transactions, most of which might otherwise have been upheld, an element not countenanced by the law. Though a broker who receives orders from his customer makes corresponding lawful sales and purchases upon a Board of Trade of which he is a member, towards the other members of which he stands as a principal, yet if he agrees in advance with his customer that the latter shall be under no duty to receive or deliver the commodity to be dealt in, but that, as between them, the transactions shall be settled according to the differences between contract and market prices, no obligation arises that is enforceable in a court of justice. They are held to have engaged in wagering upon the rise and fall of the market. The verdict, therefore, established that there was an agreement between the defendant and Armstrong, the duly authorized agent of plaintiffs, that all the transactions, whether "puts and calls" or not, should be mere wagers and not bona fide dealings in grain. In this view of the case which clearly presents itself, many of the assignments of error are unimportant and need not be considered.

Complaint is made that the trial court charged the jury that the burden was on the plaintiffs of proving by a fair preponderance of the evidence that defendant employed them to make actual purchases and sales of grain for future delivery, and also of proving that they accordingly made such actual purchases and sales. But the court in the same connection made it clear that in that matter the plaintiffs were entitled to the presumption that their dealings were valid, and the burden of showing they were wagering was on the defendant. If there was an inconsistency in the charge in this particular, which might have confused the jury, it is sufficient to say the court's attention was not directed to it by an exception, and it is not available here as a ground of error.

Testimony was improperly admitted, over plaintiffs' objection, showing the habit of defendant as to the excessive use of intoxicating liquors. This was upon the theory that being known to Armstrong, it bore upon the claim that he also knew defendant's intention was to

wager, not to deal in actual grain. But before the close of the case the court perceived the error, and then excluded and struck from the record the testimony "as to the habits of Mr. Pearsons and the use of intoxicating liquors," as given by the witness from whom it was elicited. The court of its own motion again referred to the subject in its charge, and said to the jury:

"That testimony was subsequently stricken out and it is not before you. You will therefore determine this case as though that testimony had not been admitted before you."

The improper testimony was of such a character, and was so given, that it was readily separable from the other testimony given at the trial, and the words of the court in excluding it and in directing the jury to disregard it, were clear and unequivocal. The jury could have had no difficulty in extracting it from the evidence and laying it aside as not to be considered. We think that the language of the court was sufficiently comprehensive to exclude all that was objectionable, and that whatever injury was done was cured. *Turner v. American Security & Trust Co.*, 213 U. S. 257, 267, 29 Sup. Ct. 420, 53 L. Ed. 788; *Hopt v. Utah*, 120 U. S. 430, 438, 7 Sup. Ct. 614, 30 L. Ed. 708; *Pennsylvania Co. v. Roy*, 102 U. S. 451, 458, 26 L. Ed. 141.

In the view we take of the case, there is nothing further that requires attention.

The judgment is affirmed.

MOUND MINES CO. v. HAWTHORNE et al.

(Circuit Court of Appeals, Eighth Circuit. September Term, 1909.)

No. 3,084.

1. BANKRUPTCY (§ 116*)—JURISDICTION OF COURTS—SUMMARY PROCEEDINGS AGAINST ADVERSE CLAIMANTS.

Where a third party claims an interest in property which was in the possession of a bankrupt at the time of the bankruptcy and passed into that of his trustee, the referee may by a summary proceeding require such third party to appear in the bankruptcy court and present his claim, and may adjudicate the rights of the parties in respect thereof.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 116.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

2. BANKRUPTCY (§ 440*)—APPELLATE PROCEEDINGS—MATTERS REVIEWABLE BY APPEAL.

A decree of a District Court in bankruptcy, summarily adjudicating the right to property in the possession of a trustee as between him and an adverse claimant, is reviewable by appeal.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 440.*]

Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

3. VENDOR AND PURCHASER (§ 3*)—SPECIFIC PERFORMANCE (§ 99*)—CONTRACTS ENFORCEABLE—CONTRACTS FOR SALE OF REAL PROPERTY.

A contract by which one party agrees to sell and convey real estate on payment therefor at a stated time, and the other agrees to make such pay-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment, although it also provides that if payment is not made at the time stipulated the purchaser shall forfeit all right and the seller be released from all obligation to convey, is not one giving an option, but one of bargain and sale; and where the purchaser has gone into possession and made valuable improvements on the property, a court of equity will decree a specific performance in his favor, notwithstanding his default in payment at the time promised, when there has been no change of circumstances or conditions to defeat his equity.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. § 3; * Specific Performance, Cent. Dig. § 301; Dec. Dig. § 99.*]

4. CONTRACTS (§ 211*)—EFFECT OF DEFAULT OF PLAINTIFF—WAIVER.

Although time is made an essential element of a contract by express stipulation, the party who is entitled to insist on a punctual performance by the other, or else that the agreement be ended, may waive his right and the benefit of any objection he might raise to a performance after the prescribed term, either expressly or by his conduct, and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting after the other party's default.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 938-943; Dec. Dig. § 211.*]

Appeal from the District Court of the United States for the District of Colorado.

Proceeding by Silas T. Hawthorne, trustee in bankruptcy of the Griffith Mines Company, against the Mound Mines Company. From the decree, the Mound Mines Company appeals; one Robert W. Hanington intervening as appellee. Affirmed.

J. E. Robinson, for appellant.

Daniel B. Ellis (Henry T. Rogers, Lewis B. Johnson, Pierpont Fuller, and George A. H. Fraser, on the brief), for appellee Hawthorne.

Ernest Morris (William W. Grant, Jr., on the brief), for appellee Hanington.

Before SANBORN and VAN DEVANTER, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. On August 11, 1906, Mary L. Fletcher, being the owner of the real estate in controversy in this action, on that day entered into an agreement in writing to sell to the Griffith Mines Company, a corporation organized under the laws of Colorado, the said real estate, which agreement contained, among other things, the following provisions:

"That the said party of the first part, for and in consideration of the covenants and agreements on the part of the said party of the second part herein-after contained, and the payment to her by the said party of the second part of the sum of one dollar, the receipt of which is hereby acknowledged, agrees to sell and convey unto the said party of the second part, and said second party agrees to buy, all those certain lots and parcels of lands, * * * for the sum of five hundred (\$500.00) dollars cash, and the said party of the second part, in consideration of the premises, agrees to pay said party of the first part the said sum of five hundred (\$500.00) dollars in cash, for the above-described premises, six months from date hereof; the date of said payment being the 11th day of February, A. D. 1907. In the event of a failure to comply with the terms hereof by the said party of the second part, the said party

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the first part shall be released from all obligations in law or equity to convey said property, and the said party of the second part shall forfeit all right thereto. * * * It is understood and agreed by the parties hereto that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the party of the second part, and that the said party of the second part is to have immediate possession of the said premises."

Immediately after the execution and delivery of said agreement the said second party, the Griffith Mines Company, entered into possession of the real estate and constructed thereon valuable improvements, consisting of a concentrating mill, at a cost of approximately \$15,000. The mill was not completed until about March 30, 1907. One W. D. Hoover was, at the time of the execution of the sale agreement aforesaid, president of the Griffith Mines Company, and continued as such up to the time of the instituting of this action. The Griffith Mines Company did not, on the 11th day of February, 1907, pay to Mrs. Fletcher the said \$500, nor at any time since; nor did Mrs. Fletcher, in February, 1907, or at any time thereafter, make demand for the payment of said sum, or do any act indicating a forfeiture of the contract. On the other hand, her conduct and action thereafter, until in January, 1909, when she conveyed the premises by deed to appellant, indicated that she regarded said agreement of sale as still of binding force. In February, 1908, the Griffith Mines Company endeavored to negotiate a sale of the premises to the Mountain Mining Company, and for that purpose executed a conveyance to the Mountain Mining Company of the property in question and deposited such conveyance in escrow with the State Street Trust Company of Boston, Mass., to be delivered on or before April 1, 1908, upon the Mountain Mining Company performing certain conditions described in the escrow agreement. At the request of Mr. Hoover, president of the Griffith Mines Company, Mrs. Fletcher executed her deed to the premises in question to the Griffith Mines Company, which she forwarded to said State Street Trust Company, with a letter under date of February 21, 1908, in which she stated:

"Gentlemen: I herewith hand you, for the purpose of holding in escrow, under the terms of the escrow agreement between you and the Griffith Mines Company, my warranty deed to the Griffith Mines Company for the following described real estate: [Describing the same property mentioned in the sale agreement.] This deed to be delivered by you to William Tudor and Whitcomb, Reed & Co. for the Mountain Mining Company when the sum of \$500 is received by you in payment therefor; and you are instructed to send to me the said \$500 upon receipt thereof."

Upon the trial of this case Mrs. Fletcher was called as a witness, and among other things testified as follows:

"Q. You knew that a mill had been built upon the lots, did you? A. After it was built; yes. Q. Did you understand that that made you perfectly secure so far as your \$500 was concerned? A. I hoped it did. Q. Mrs. Fletcher, is it or is it not a fact that you were ready and willing at all times to convey this property to the Griffith Mines Company upon payment to you of the \$500? A. Well, it was inasmuch as Mr. Hoover was concerned in it. I always regarded it as a personal matter with Mr. Hoover. Q. You would, at any time that he might have requested it, have conveyed the property to the Griffith Mines Company upon the payment to you of the \$500, without regard to any limitations fixed in any option agreement or escrow agreement? A. Yes, sir."

The whole tenor of the testimony goes to show that, because of the personal friendship existing between Mrs. Fletcher and Mr. Hoover, she would make a conveyance at any time that he might request. On October 23, 1908, a petition in bankruptcy was filed against the Griffith Mines Company, and on November 18th it was adjudged a bankrupt. Appellee Hawthorne was appointed by the court receiver of the bankrupt estate and afterwards duly elected trustee, and in both capacities took and held possession of the premises in controversy. From the time of the execution and delivery of the agreement of sale up to the time that the receiver in bankruptcy took possession of the premises, the same were in the possession of the Griffith Mines Company, the bankrupt. After the proceedings in bankruptcy were instituted, the Mound Mines Company, appellant, was organized and incorporated under the laws of the state of Ohio. In the expectation that it would be a purchaser of the bankrupt's estate at a sale thereof, it obtained, in January, 1909, from Mrs. Fletcher, a deed to the premises in question, paying her therefor \$500; she making the deed at the instance of Mr. Hoover, who was a creditor of the Griffith Mines Company and expected to receive his pay as such creditor through said Mound Mines Company.

Upon proper application by the trustee, he was authorized to sell the property of bankrupt, including the property in controversy; the portion in controversy in this action being purchased by Robert W. Hanington, who has been permitted to intervene as appellee. After the sale to Mr. Hanington, he objected to the confirmation, for the reason that the conveyance by Mrs. Fletcher to the Mound Mines Company constituted at least a cloud upon the title. Thereupon the trustee filed his petition before the referee, setting forth the essential facts, and asking that the Mound Mines Company be required to convey said property to petitioner, upon payment of the sum of \$500. An order to show cause was duly issued and served upon the Mound Mines Company, which appeared at the time stated before the referee and interposed objections on the ground that the court had no jurisdiction to determine the rights of the parties in a summary proceeding, and that the rights of the parties could only be determined by a plenary action for that purpose. The case proceeded to hearing, the objection of appellant to the jurisdiction was overruled, and an order made by the referee that said Mound Mines Company convey said premises to the trustee upon payment to it of the sum of \$500, to which order of the referee appellant filed its petition for review by the District Court, and upon a hearing the finding and order of the referee was affirmed. From the decree of the District Court appellant has prosecuted its appeal to this court. Appellant here insists that the referee had no jurisdiction by summary proceeding to determine the matter in controversy.

The law is now settled that the interest of a third party in property claimed to belong to the bankrupt estate, which, at the time of the institution of the proceedings in bankruptcy, is in the possession of such third person, claiming an interest therein, can only be determined by an original suit brought for that purpose. Where, however, property

which is in the possession of a bankrupt at the time of the bankrupt proceedings, and passes as part of his estate into the possession of the trustee in bankruptcy, and a third party claims an interest therein, the referee may, by a summary proceeding, require such third party to appear in the bankrupt court, present his claim, and the referee adjudicate the rights of the parties in respect thereof. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *In re Rochford et al.*, 124 Fed. 182, 59 C. C. A. 388; *In re Schermerhorn*, 145 Fed. 341, 76 C. C. A. 215; *In re Eppstein*, 156 Fed. 42, 84 C. C. A. 208, 17 L. R. A. (N. S.) 465; *In re Kellogg*, 121 Fed. 333, 57 C. C. A. 547; *In re Noel* (D. C.) 137 Fed. 694; *Plaut v. Graham Mfg. Co.* (D. C.) 159 Fed. 754. The referee, therefore, had jurisdiction.

Appellee Hanington now urges that this court is without jurisdiction to review the decree of the District Court in a proceeding by appeal. That appeal is the proper proceeding in such a case was held by the Supreme Court in *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, by this court in *Dodge v. Norlin*, 133 Fed. 363, 66 C. C. A. 425, and *John Deere Plow Co. v. McDavid*, 137 Fed. 802-810, 70 C. C. A. 422, and was also held in *Franklin v. Stoughton Wagon Co.*, 168 Fed. 857, 94 C. C. A. 269.

Proceeding, then, to the merits of the case, it is urged, on the part of appellant, that the contract of sale in question cannot now be enforced, as the provision therein, providing "that in the event of a failure to comply with the terms thereof by the said party of the second part the said party of the first part shall be released from all obligations in law or equity to convey said property, and the said party of the second part shall forfeit all right thereto," operated to divest the Griffith Mines Company of all title or interest in and to the property, upon its failure to make the payment February 11, 1907, as provided in the agreement. The question has been discussed by counsel upon the theory that the agreement was an optional contract only. We regard the contract, not as an optional one, but a contract of bargain and sale. By its terms Mrs. Fletcher agreed to sell and convey, and the Griffith Mines Company agreed to pay to Mrs. Fletcher the sum of \$500 in cash for, the premises on the date named. This was a binding agreement upon both parties. Not only was the Griffith Mines Company entitled to enforce its performance upon tender of the sum named at the time named, but Mrs. Fletcher could, upon failure of the company to make the payment at the time named, have maintained an action for the purchase price.

While it is competent and legal for parties to a contract to stipulate that time shall be of the essence of the contract, and provide for forfeiture in case the terms of the contract are not complied with, yet a court of equity will determine and decree the rights of the parties in accordance as equity and justice may require. In *Pomeroy's Equity Jurisprudence*, vol. 6, § 816, it is said:

"Contracts often contain a clause that, if payment is not made at the day, the defaulting vendee shall forfeit all payments previously made and lose his right to the land. The courts of equity in England and most American jurisdictions deal with such a forfeiture clause on the principle that equity abhors a forfeiture, and will relieve from it. It will, if possible, consider the clause

as a stipulation for security of performance, and not as intending a great loss to one party by a slight failure to perform, and will decree a performance against the vendor, with compensation for delay by payment of interest on the purchase money, thus relieving against the forfeiture."

In *Cheney v. Libby*, 134 U. S. 68, 78, 10 Sup. Ct. 498, 502, 33 L. Ed. 818, it is said:

"Even where time is made material, by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not in every case defeat his right to specific performance, if the condition be subsequently performed without unreasonable delay, and no circumstances have intervened that would render it unjust or inequitable to give such relief. The discretion which a court of equity has to grant or refuse specific performance, and which is always exercised with reference to the circumstances of the particular case before it (*Hennessey v. Woolworth*, 128 U. S. 438, 442, 9 Sup. Ct. 109, 32 L. Ed. 500), may, and of necessity must, often be controlled by the conduct of the party who bases his refusal to perform the contract upon the failure of the other party to strictly comply with its conditions."

While courts of equity are loth to and will not ordinarily aid a party who is guilty of laches in performing, yet where a party has gone into possession of real estate, made valuable and lasting improvements thereon, and his only breach of the covenant is that of time of payment, and the grantor has only sustained the loss resulting from being kept out of his money, which loss can be compensated by interest, equity under such circumstances usually grants relief to complainant, notwithstanding he is himself in default.

There is, however, another ground which is decisive of appellant's contention; that is, that Mrs. Fletcher, by her acts and conduct, waived the forfeiture and acted upon the theory that the contract was still a subsisting one. Though, by agreement, parties to a contract may make time the essence thereof, and provide that the party in default shall forfeit all rights thereunder, yet it is well established that the party in whose favor the quality exists may either expressly or by conduct waive such provision. In *Pomeroy on Contracts* (2d Ed.) § 394, it is said:

"Wherever time is made essential, either by the nature of the subject-matter and object of the agreement, or by express stipulation, or by a subsequent notice given by one of the parties to the other, the party in whose favor this quality exists—that is, the party who is entitled to insist upon a punctual performance by the other, or else that the agreement be ended—may waive his right and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly or by his conduct, and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting and not ended by the other party's default."

The same rule is announced in *Jones on Real Property*, vol. 1, § 699; *Raymond v. San Gabriel Valley Land & Water Co.*, 53 Fed. 883, 4 C. C. A. 89 (8th Circuit); *Thayer v. Star Mining Co.*, 105 Ill. 540; *Phillips v. Carver*, 99 Wis. 561, 75 N. W. 432; *Robinson v. Trufant*, 97 Mich. 410, 56 N. W. 769; *Blair v. Blair et al.*, 48 Iowa, 393.

It being clear from the evidence that Mrs. Fletcher waived her right of forfeiture, the bankrupt having expended a large amount of money in permanent improvements thereon, which would be lost to the bank-

rupt estate if the relief asked was not granted, and it being apparent that appellant, who has acquired the interest of Mrs. Fletcher, can be fully compensated for all loss by the payment of interest, the decree of the court below was in substantial harmony with the equitable rights of the parties. As the decree, however, did not provide for the payment of interest upon the \$500, it will be modified, so as to require the trustee to pay the sum of \$500, with legal interest thereon from the 11th day of February, 1907.

In all other respects the decree is affirmed.

MECHANICS' INS. CO. OF PHILADELPHIA et al. v. C. A. HOOVER
DISTILLING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. September 9, 1909.)

No. 3,040.

1. INJUNCTION (§ 26*)—ACTIONS ON INSURANCE POLICIES—EQUITABLE JURISDICTION.

The fact that the several policies of insurance on property destroyed by fire each contained a clause providing that the insurer should not be liable thereunder for a greater proportion of any loss than the amount of such policy bore to the total amount of valid insurance on the property does not give a court of equity jurisdiction of a joint bill by the insurers to enjoin the insured from maintaining actions at law on the policies, and to draw to itself the adjudication of the rights of the parties on the ground that the policies are interdependent contracts and that an accounting is necessary; neither one of complainants having in fact any interest in the amount of recovery from any other.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 28-49; Dec. Dig. § 26.*]

2. EQUITY (§ 51*)—JURISDICTION—PREVENTING MULTIPLICITY OF SUITS.

Complainants cannot join in invoking the jurisdiction of a court of equity, on the ground that it will prevent a multiplicity of suits, because defendant has brought similar actions at law against each of complainants on a separate cause of action, and where complainants separately have no cause of action against defendant, either legal or equitable.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 167-171; Dec. Dig. § 51.*]

3. INSURANCE (§ 608*)—ACTIONS ON POLICIES—EQUITY JURISDICTION.

An averment by insurers that an insured made excessive and fraudulent claims of loss under policies may be tried and determined in actions at law on the policies, and is no ground of equitable jurisdiction.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1517; Dec. Dig. § 608.*]

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

Suit in equity by the Mechanics' Insurance Company of Philadelphia and others against the C. A. Hoover Distilling Company and others. From a decree dismissing the bill, complainants appeal. Affirmed.

Charles B. Obermeyer (A. C. Parker, N. T. Guernsey, and W. E. Miller, on the brief), for appellants.

H. H. Sheriff, for appellees Insurance Companies.

CARLAND, District Judge. The C. A. Hoover Distilling Company, an Iowa corporation doing business at Oskaloosa, in said state, on May 15, 1908, suffered a loss of property by fire. On the property destroyed were insurance policies to the amount of \$85,500, distributed among different insurance companies as follows:

No. of Policy.	Name of Company.	Amount of Policy.
608206	Mechanics' Insurance Company of Philadelphia.....	\$3,000 00
2833	The Home Insurance Company of New York.....	5,000 00
2309	" " " " " "	5,000 00
25069	Buffalo German Insurance Company of Buffalo.....	2,000 00
1272	St. Paul Fire & Marine Insurance Company of St. Paul...	5,000 00
2505	Phenix Insurance Company of Brooklyn, N. Y.....	3,000 00
2551	" " " " " "	3,000 00
104	Royal Insurance Company of Liverpool.....	5,000 00
1390	German American Insurance Company of N. Y.....	5,000 00
1378	" " " " " "	2,500 00
1557	The Insurance Company of North America of Philadelphia	4,000 00
5237659	North British & Mercantile Insurance Company of London and Edinburgh.....	3,000 00
5239476	North British & Mercantile Insurance Company of London and Edinburgh.....	2,500 00
1243	The Rochester German Insurance Company of Rochester..	1,500 00
51604	" " " " " "	3,000 00
62049	The Phoenix Insurance Company of Hartford, Conn.....	3,000 00
62052	" " " " " "	2,000 00
3885018	Fire Association of Philadelphia.....	2,500 00
3885038	" " " " " "	4,000 00
5004	City of New York Insurance Company of New York.....	3,000 00
22087	Security Insurance Company New Haven, Conn.....	2,500 00
2360	Aetna Insurance Company of Hartford.....	3,000 00
2383	" " " " " "	2,500 00
26105	Milwaukee Mechanics' Insurance of Milwaukee.....	2,000 00
52501	Milwaukee Fire Insurance Company of Milwaukee.....	1,500 00
1675	Commercial Insurance Company of Buffalo, N. Y.....	2,000 00
2990150	The London Assurance Corporation, United States Branch, New York City.....	5,000 00

On August 25th the Distilling Company commenced actions at law in the district court of Iowa, in and for Mahaska county, against each of said insurance companies to recover the loss caused by said fire. Subsequently the defendants in each of said actions at law, where the amount in controversy was sufficient, removed said actions to the United States Circuit Court for the Southern District of Iowa. The removal proceedings brought 15 actions to the United States Circuit Court and left 4 actions pending in the state district court. October 15, 1908, the 15 insurance companies which had removed the cases against them filed a bill in equity in said United States Circuit Court against the Distilling Company and the four insurance companies who did not remove their cases from the state court, wherein complainants prayed that the Distilling Company be enjoined from prosecuting

any of said actions at law either in the state or federal court; that the court ascertain what, if any, sum is due from any of the insurance companies to the Distilling Company on the policies of insurance issued by them; and that it be decreed accordingly, but, if no sum should be found due, that said policies be decreed to be delivered up and canceled. The bill stated the foregoing facts, and also alleged that each of the policies issued to the Distilling Company by the insurance companies contained the following provision:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole amount of valid and collectible insurance covering such property."

The Distilling Company demurred to the bill for want of equity, and for the reason that complainants had an adequate remedy at law. The Circuit Court sustained the demurrer and dismissed the bill, but continued a temporary injunction pending an appeal to this court. There are many legal conclusions and matters of argument stated in the bill, but the facts upon which the jurisdiction of the United States Circuit Court as a court of equity must depend have all been stated. If the bill in this case states a cause of action cognizable in equity, it is plain that the days of jury trial in insurance litigation are numbered, as there are extremely few insurance losses not covered by at least two or more policies in different insurance companies. In view of the great number of actions to recover losses upon policies of insurance heretofore triable at law, any decision which would strike down this jurisdiction and transfer the whole litigation to courts of equity ought to be founded upon the soundest reason and declared only after careful consideration.

If we understand counsel for complainants their position is this: First. As each insurance company agrees to pay such a proportion of the total loss as the amount of its policy bears to the total amount of valid insurance on the property damaged or destroyed, the insurance policies become interdependent contracts, necessitating an accounting, so to speak, between the insurers and insured, in order to ascertain the amount due on each policy. Second. That by all insurance companies joining in the bill as complainants a multiplicity of suits will be saved.

In order to fully appreciate the position of complainants in the present action, it will be helpful to view their position standing alone. Thus viewed, each insurance company has a valid contract or contracts with the Distilling Company, upon each of which, according to the allegations of the bill, the Distilling Company may maintain an action at law for damages against each insurance company. There are no facts stated in the bill that show that any insurance company, standing alone, has any cause of action whatever, either legal or equitable, against the Distilling Company. The different insurance companies having no cause of action individually, so far as appears, against the Distilling Company, we are led next to inquire as to what cause of action of equitable cognizance in favor of complainants and against the Distilling Company has been created by joining in the bill filed in this cause, as appears from the allegations thereof.

We think it clearly appears that complainants have no more cause of action cognizable in equity in combination than if each stood alone. The method adopted by the parties to the insurance contracts for ascertaining the amount payable thereunder in case of loss does not make the contracts interdependent. No one insurance company has any interest in what any other insurance company shall pay under its policy. It is only interested in what it shall pay, and as a consequence in the value of the property destroyed. So far as the allegations of the bill are concerned, there is not a disputed question between any of the insurers and the insured, except as to the value of the property destroyed; and it is asked that a court of equity take jurisdiction of the case for the purpose of ascertaining this value, for the reason that different juries in actions at law might return different verdicts as to the value of this property, and thus the amount to be paid by one insurance company might be greater or less than that of some other company. If the peculiar and special duty of juries to pass upon property values in matters at law may be taken away and given to a chancellor, merely because different juries may render different verdicts upon like or similar facts, then trial by jury in civil actions no longer exists. The idea of handling these cases through a master in chancery, when the only question at issue is the value of the property destroyed, because there is no adequate remedy at law, shocks the legal mind.

But it is also urged that complainants have a right to file this bill in equity in order to save a multiplicity of suits. The phrase "multiplicity of suits," in connection with the jurisdiction of courts of equity, has often been carelessly used, but, it seems, never more so than in this proceeding. Each of these complainants were sued by the Distilling Company at law. In order to save the Distilling Company from prosecuting 19 different suits at law, complainants urge that they may bring this action in equity. There are two reasons why the rule in regard to saving a multiplicity of suits as applied to matters of equity jurisdiction may not be invoked in this proceeding:

First. There can be no claim that any complainant is saved from a multiplicity of suits by the maintenance of this action in equity. The Distilling Company is not in court asking it to take jurisdiction of its suits against the insurance companies in order to save it, the Distilling Company, from a multiplicity of suits against it or by it. It does not rest with the complainants to urge as a foundation for their suit that the defendant, the Distilling Company, may thereby be saved a multiplicity of suits. *Equitable Life Assurance Society of the United States, Petitioner, v. Brown*, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682.

Second. The complainants, in our opinion, present no cause of action, either legal or equitable, against the Distilling Company by the allegations of their bill. The prevention of a multiplicity of suits is not, considered by itself alone, an independent source of jurisdiction in equity, in such a sense that it can create a cause of action where none had ever existed. As is said in section 250, *Pomeroy's Equity Jurisprudence*:

"In other words, a court of equity cannot exercise its jurisdiction for the purpose of preventing a multiplicity of suits in cases where the plaintiff, in-

voking such jurisdiction, has not any prior existing cause of action, either equitable or legal—has not any prior existing right to some relief, either equitable or legal. The very object of preventing a multiplicity of suits assumes that there are relations between the parties out of which other litigations of some form might arise."

If we are right in saying that the complainants have no cause of action against the Distilling Company, then they have no right to ask a court of equity to save any one from a multiplicity of suits. In support of the provision that the bill in this case states a cause of action cognizable in equity, the case of *Home Ins. Co. of America et al. v. Virginia-Carolina Chemical Co.*, 109 Fed. 681, is cited. This case was affirmed on appeal. 113 Fed. 1, 51 C. C. A. 21. The case arose in the Circuit Court for the District of South Carolina, and was followed by the same court in *Rochester German Ins. Co. v. Schmidt et al.* (C. C.) 126 Fed. 998, and also in *Tisdale v. Ins. Co. of North America*, 84 Miss. 709, 36 South. 568. We have carefully examined the opinions in those cases, and, if those opinions are to the effect that the bill in this case states a cause of action of equitable cognizance, then we must say that they are not persuasive, and are a distinct departure from what has heretofore been recognized as the law in regard to equity jurisdiction.

Without entering into a detailed discussion as to when a court of equity will or will not entertain jurisdiction of a cause, we are clearly of the opinion that the case now before us is not one of equitable cognizance. Amendments to Constitution of the United States, art. 7; Rev. St. U. S. § 723 (U. S. Comp. St. 1901, p. 583); *Deweese v. Reinhard*, 165 U. S. 386, 17 Sup. Ct. 340, 41 L. Ed. 757; *Thomas v. Council Bluffs Canning Co.*, 92 Fed. 422, 34 C. C. A. 428; *Scottish Union, etc., Ins. Co. v. Mohlman* (C. C.) 73 Fed. 66; *High on Injunctions*, vol. 1 (4th Ed.) § 63a (disapproving *Tisdale v. Ins. Co.*, 84 Miss. 709, 36 South. 568); *Boise Artesian Hot & Cold Water Co. v. Boise City*, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796; *Equitable Life Assurance Society v. Brown*, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682; *Travelers' Association v. Gilbert*, 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Barnes v. City of Beloit*, 19 Wis. 93; *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672; *Gormley v. Clark*, 134 U. S. 339, 10 Sup. Ct. 554, 33 L. Ed. 909; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; *Hipp v. Babin*, 19 How. 271, 15 L. Ed. 633; *Buzzard v. Huston*, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451; *Tribette v. Illinois Central Co.*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642; *Winslow v. Jenness*, 64 Mich. 84, 30 N. W. 905; *Douglass v. Boardman*, 113 Mich. 618, 71 N. W. 1100.

We do not wish to base our decision upon the proposition that complainants have an adequate remedy at law because the cases pending in the federal court may be consolidated for the purpose of trial. Still this may be done. *Insurance Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706; section 295, Rev. St. U. S. (U. S. Comp. St. 1901, p. 176). There is an allegation in the bill filed by complainants in regard to the presentation of proofs of loss by the Distilling Company in which the value of the property destroyed is fraudulently exces-

sive. This kind of fraud, if it existed, can form no basis for equitable jurisdiction, as it has nothing to do with the insurance contracts themselves; and, furthermore, such a fraud is just as easily disposed of in an action at law as in an action in equity. *Equitable Life Assurance Society of the United States v. Brown*, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682.

We see no error in the ruling of the trial court upon the demurrer, and its judgment is therefore affirmed.

NOTE.—The following is the opinion of Smith McPherson, District Judge, in the court below:

SMITH MCPHERSON, District Judge. This case is by a bill in equity filed by 15 fire insurance companies against the Hoover Distilling Company of Oskaloosa, Iowa, and 4 fire insurance companies. The distilling company was insured against loss by fire by the 19 companies, complainants and defendants, each issuing a separate policy, and each policy providing for concurrent insurance, and all but 6 being for an amount in excess of \$2,000. All the policies were of like form, being the Iowa standard form. A recital in every of the policies contained this clause: "This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole amount of valid and collectible insurance covering such property."

May 15, 1908, while all the policies were in force, a fire occurred, destroying the whisky in barrels and in bond, being a total loss. The companies do not expressly admit, but impliedly, certainly inferentially, admit, a liability. Actions at law, 19 in number, were brought in the Mahaska county district court. Fifteen of the cases—those against complainants herein—were removed to this court by reason of the amounts involved and diverse citizenship. The 4 cases against the companies defendants herein, either because of the small amounts involved or by reason of their being incorporated in Iowa, were not removed, and are still pending in the Iowa state court. The insured and the companies have been unable to agree as to the value of the loss, the difference being many thousands of dollars between them; this large difference arising by reason of what the distilling company had fixed for whiskies of certain age at its distillery, and the prices the insurance companies insist that such whiskies can be bought for in Peoria, Louisville, and other whisky markets. By reason of the foregoing, the 15 companies have joined in a bill to enjoin the maintenance of said action at law both in this and the 4 actions in the state court. A restraining order, as prayed, was issued on an *ex parte* application, and the case set down for hearing on the application for a temporary writ of injunction; and the defendant distilling company has filed a demurrer to the bill.

It follows, from the foregoing, that the sole question is: Are the foregoing matters cognizable in equity? If the pleadings admit a liability, or on the evidence a liability is established, then the next question is as to the value of the loss. When that is found by the verdict of a jury, or by the court if a jury should be waived, or by the court or a master if in equity, then what is to be ascertained? Simply add the sums for which insurance was granted by the 19 policies, and divide the value of the loss by the amount of the insurance, and multiply that quotient by the sum named in each policy. That result would be the liability of that company. Is that an accounting? It seems to me that it is not. And it seems to me scarcely possible that a jury could not readily and easily make the computation. Or, if there should be any apprehension of confusion, the court could easily submit special interrogatories to the jury, to be answered, something like these: (1) What do you find as to the value of the loss? (2) What was the total amount of insurance in force at the time of the loss? (3) What was the amount of the insurance covered by the policy issued by the ——— Company? (4) And a like interrogatory as to every of the other 18 companies.

Could not the court, upon such special verdicts, by using a simple rule of primary arithmetic, render judgments? A bookkeeper or skilled accountant

could render no service. There are no complicated mutual accounts of which equity will take cognizance. The most that can be said is that the company will be entitled to a set-off. As to that Adams' Equity (8th Ed.) p. 222, says: "But it is otherwise with respect to mere matters of set-off; for right of set-off can be effectually tried at law, and can only be transferred to chancery by some special equity." Blackstone (book 3, p. 437) says: "For want of this discovery at law, courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account." But here there is no matter for discovery. There are no vouchers for examination, no balance to be found, and no account to be stated. And see Story, Equity, §§ 450-453. Pomeroy's Equity (volume 3, § 1421) states the three tests with accuracy: (1) Where each party has received and paid on account of the other. (2) Where the accounts are all on one side, attended with great complication. (3) Where a fiduciary relation exists.

Some of the cases cited by complainants' counsel will be briefly noticed. The case of *Fuller v. Insurance Companies* (C. C.) 36 Fed. 469, 1 L. R. A. 801, was one in which there were a number of policies, some for fire insurance and others for marine insurance. The insured asked to be relieved of a multiplicity of suits, and to have the losses of the two kinds apportioned against the various companies, and Judge Blodgett held that to make such inquiry was within the power of a court of chancery. But that is a different question than the one now being considered. *Home Insurance Company v. Virginia Company* (C. C.) 109 Fed. 681, affirmed in 113 Fed. 1, 51 C. C. A. 21, is not in point, as will be seen from a statement of Judge Simonton at page 688 of 109 Fed., where he says: "In order, therefore, in each case to ascertain the amount to be paid by each insurer, if liability exists, the policy must be reformed in so far as it states the value of the property insured, and then the proportion which the amount or sum each assumed bears to the entire insurance must be ascertained." In other words, because of an alleged fraud, the policy had to be reformed before making the case like the one at bar. *Rochester Co. v. Schmidt* (C. C.) 125 Fed. 998, shows that there were grounds of fraud which would give jurisdiction to a court of equity.

But it is said that equity will prevent a multiplicity of suits. But that proposition is to be invoked by an injured party. Here each insurance company can be compelled to defend but once, and that the insured must bring many actions is of no concern to any company as an insurer. This bill of complaint, stripped of all verbiage, shows that the insured has a contract of insurance with each company which, as alleged, has matured and is now a naked money claim. No one doubts but that, if there had been but one insurer, the action necessarily would be one at law; and there being 19 policies, issued by as many companies, does not change matters further than to give each company the right of set-off. The following cases are in point: *Scottish Co. v. Mohlman Co.* (C. C.) 73 Fed. 66; *Thomas v. Council Bluffs Co.*, 92 Fed. 422, 34 C. C. A. 428; *Travelers' Ass'n v. Gilbert*, 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 538; *Tribette v. Railroad*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642.

It is said that the 4 cases still pending in the state court cannot be consolidated for trial purposes under the Iowa practice. Quite likely this is so, unless consolidated by agreement. But this court cannot enjoin those actions, for the reason that they will be attended with expense and time. That is a matter for the state court. The 15 cases in this court can be consolidated for trial purposes. *Insurance Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706. It is true that under that decision, and in the same case when before the Circuit Court of Appeals for this circuit later on (107 Fed. 834, 842, 46 C. C. A. 668), each party in each case will be given 3 challenges, making 45 such challenges to a side, or 90 in all. But it will not be presumed that this will be done, or if it is done, it can only subject the court to inconvenience, by reason of which this court cannot ride down the right of trial by jury.

This court, sitting in equity, cannot take jurisdiction of the subject-matter. Record entries in harmony with the foregoing will be presented for signature.

VAN SICE v. IBEX MINING CO.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1909.)

No. 2,894.

1. MINES AND MINERALS (§ 23*)—ACQUISITION OF MINING CLAIMS—FORFEITURE OF INTEREST FOR FAILURE TO CONTRIBUTE TO ASSESSMENT WORK.

The provision of Rev. St. § 2324 (U. S. Comp. St. 1901, p. 1426), for the extinguishment of the interest of a co-owner in a mining claim for his failure to contribute to the assessment work required thereby, is constitutional and valid.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 58; Dec. Dig. § 23.*]

Mining partnerships, see note to *G. V. B. Mining Co. v. First Nat. Bank of Hailey*, 35 C. C. A. 515.]

2. MINES AND MINERALS (§ 23*)—DEFAULT IN ASSESSMENT WORK—FORFEITURE.

A forfeiture will be enforced in a court of equity, when such relief accords more with the principles of right and justice than would the denial thereof; and this rule is particularly applicable to a forfeiture of the interest of a co-owner in a mining claim, expressly provided for by Rev. St. § 2324 (U. S. Comp. St. 1901, p. 1426), for his failure to contribute to the work of development required thereby as a matter of public policy.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 23.*]

3. MINES AND MINERALS (§ 23*)—MINING CLAIMS—FORFEITURE OF INTEREST FOR FAILURE TO CONTRIBUTE TO ASSESSMENT WORK—SUFFICIENCY OF NOTICE.

The beneficial owners of part interests in a mining claim are the proper parties to give the notice to a co-owner, under Rev. St. § 2324 (U. S. Comp. St. 1901, p. 1426), to forfeit his interest for a failure to contribute to assessment work, although they have conveyed their interests in trust.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 23.*]

4. MINES AND MINERALS (§ 34*)—MINING CLAIMS—PATENTS—ESTOPPEL.

It is a common and approved practice to obtain patents from the government to mining claims in the names of the original locators, without regard to intervening changes in right or ownership, and the fact that a corporation grantee of certain owners proceeded upon an application made by prior owners, and obtained a patent running to them or their heirs and assigns, does not estop it from asserting that the interest of one of such patentees had been forfeited under the statute and vested in its grantors prior to the patent.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 34.*]

Conclusiveness of patents for mining claims, see notes to *Carson City Golf & Mining Co. v. North Star Mining Co.*, 28 C. C. A. 346; *Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co.*, 48 C. C. A. 674.]

Appeal from the Circuit Court of the United States for the District of Colorado.

Suit in equity by the Ibex Mining Company against C. L. Van Sice. Decree for complainant, and defendant appeals. Affirmed.

Edwin H. Park, for appellant.

Charles J. Hughes, Jr. (Charles Cavender, on the brief), for appellee.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HOOK, Circuit Judge. C. L. Van Sice brought an action in ejectment against the Ibex Mining Company to recover an interest in the San Jose lode mining claim in Lake county, Colo. The company, claiming to have equitable defenses, filed its bill in equity to avail itself of them and to enjoin the action at law. This appeal was taken by Van Sice from a decree sustaining the bill.

The mining claim once belonged to John W. Gordon, J. B. Bissell, and John P. Van Sice. The appellant asserts ownership of the interest which belonged to the latter, as his son and sole heir. In 1888 Gordon and Bissell caused to be published in a newspaper a notice to their co-owner, Van Sice, that they had paid for the work on the mine for the preceding year, necessary under the law for the preservation of the claim, and demanding contribution from him on the penalty of the forfeiture of his interest. This was done under the provisions of section 2324, Rev. St. (U. S. Comp. St. 1901, p. 1426). Van Sice did not contribute. Thereafter the title of Gordon and Bissell passed by conveyances to the mining company, which subsequently secured a patent for the entire claim in the names of the three men who owned it in 1880, one of whom was appellant's father. Section 2324, Rev. St., provides among other things that:

"Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

Appellant contends that the proceeding under this provision of the statute did not extinguish his father's interest in the claim, for the reasons that the provision is contrary to the fifth amendment to the Constitution, in that it does not afford due process of law; that, if the requirement to do annual labor upon unpatented mining claims is a condition subsequent, such condition cannot be reserved by the government to be enforced by a third person; that it does not provide any evidence of title or transfer thereof, nor any method of recording or proving it; that it is a delegation of judicial power; that the title to an unpatented mining claim is a vested interest, which is not destroyed by the mere failure to do the work; and, finally, that the statute is an invasion of the rights of the state to regulate the tenure of private property within its borders. These contentions are so clearly wanting in merit that a detailed consideration of them is unnecessary. The mineral lands were the property of the government, and for the disposal of them it was competent for Congress to prescribe such conditions as in its judgment were required by a wise public policy. The section of the statute providing for the extinguishment of the interest of a co-owner for his failure to contribute to the work of exploration and development is part of the very law upon which he is compelled to rely for the source of his title—for the existence of any right whatever. He cannot well claim a vested interest, freed from the statutory conditions which qualify it.

The right and its limitations go together. There can be no real question about the effect of a notice rightly published under section 2324. *Elder v. Horseshoe Mining & Milling Co.*, 194 U. S. 248, 24 Sup. Ct. 643, 48 L. Ed. 960.

It is also contended that a court of equity will not aid in enforcing a forfeiture; but that is not invariably true. The rule is that a forfeiture will be enforced in a court of equity, when such relief accords more with the principles of right and justice than would the denial thereof. *Brewster v. Lanyon Zinc Company*, 140 Fed. 801, 72 C. C. A. 213; *Lindeke v. Associations Realty Co.*, 146 Fed. 630, 77 C. C. A. 56. There is the more reason for it in a case like the present, where the duty imposed by the statute upon a co-owner is not alone to his associates, but is also because of considerations of the common welfare. It is of public importance that the mineral resources of the country be explored and developed, and not left in indolent or indifferent hands. The policy exhibited in the statute would be ill subserved if, in the annual performance of labor and making of improvements, a co-owner of an unpatented claim might safely refuse or neglect to co-operate or contribute.

Again, it is argued that Bissell and Gordon, who signed the notice of forfeiture, were not co-owners within the meaning of the statute. We think they were. True, their interests had been conveyed to a trustee upon an adjustment of conflicting neighboring claims; but theirs was the beneficial ownership, and it was their duty and right to protect the title.

The mining company alleged in its bill that it had been in the open, continuous, exclusive, and adverse possession of the claim for more than seven years prior to the action in ejectment, and in reliance upon full ownership, and with the knowledge and consent of John P. Van Sice, it had paid the taxes and had expended large sums of money upon the property and in perfecting the title; also that neither John P. Van Sice nor the appellant made any such expenditures, nor objected to the mining company doing so. Upon this an estoppel was asserted. Appellant now says laches cannot be a ground for enjoining, in equity, an action at law, and cites *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167. But it was said in that case that laches would be considered in equity as one of the elements of an estoppel not available at law. In the case at bar, however, the decree may rest upon the extinguishment of the Van Sice interest by the proceeding under the act of Congress, irrespective of laches or estoppel. It should be said in this connection that the mining company interposed that proceeding as a defense in the ejectment action; but at the instance of the plaintiff, appellant here, the court ruled it constituted no defense in law. This was evidently upon the ground that, the mining company having afterwards procured a patent in the names of John P. Van Sice and his associates, the defense was cognizable only in a court of equity.

It is further claimed by the appellant that, even if his father's interest had been forfeited to Gordon and Bissell, the share Bissell took never passed to the mining company. But we think it clear that Bissell intended all his interest should be conveyed, including that former

ly owned by John P. Van Sice, and his grantee evidently acted upon the same supposition. So far as appears, Bissell has never denied it, and he would be in no position to do so now. The appellant is certainly no better qualified to raise the question. Another claim, somewhat similar in character, relating to the interest of one Stone, who was a former owner, is not sustained by the record.

There remains but one other matter that requires attention. In 1880 John B. Stone, Henry M. Jones, and John P. Van Sice, who were the owners of the claim at that time, made application to the land office at Leadville, Colo., for a patent, but did not press it to a hearing. After the forfeiture of the Van Sice interest in 1888 to Gordon and Bissell, his then co-owners, and after the conveyances to the mining company in 1893 and 1894, the latter entered the claim for patent in the names of the original applicants, and received a patent running to them, their heirs and assigns. Upon this it is claimed the mining company is estopped from asserting the forfeiture proceedings and from disputing the continued existence of the Van Sice interest. It is common practice to obtain patents from the government in the names of the original locators or entrymen, without regard to intervening changes in right or ownership. The patents generally run to the grantees named and their legal representatives, or, as in the case here, "their heirs and assigns," and the question to whose benefit the title should inure is left open in the courts. *Hogan v. Page*, 2 Wall. 605, 17 L. Ed. 854. The practice was in view of the difficulty and the burden that would be imposed on the land office of inquiring into and determining derivative titles. The claim of the mining company to the Van Sice interest under the forfeiture proceedings was not in issue before the land office, and was not one of the things necessary to be determined before the granting of a patent. *Turner v. Sawyer*, 150 U. S. 578, 587, 14 Sup. Ct. 192, 37 L. Ed. 1189. That Van Sice was at the time of the original application entitled to be a grantee in the patent was conceded. Whether he afterwards parted with his interest, voluntarily or involuntarily, was not inquired into when the patent was issued, and it was unnecessary to make such inquiry. The claim of the mining company to his interest was a derivative one, like that of an heir, or a grantee in a deed voluntarily executed, or in a deed made by a sheriff on execution sale. *Landes v. Brant*, 10 How. 348, 13 L. Ed. 449; *Carpenter v. Rannels*, 19 Wall. 138, 22 L. Ed. 77; *De La Vergne Machine Co. v. Featherstone*, 147 U. S. 209, 223, 13 Sup. Ct. 283, 37 L. Ed. 138. Indeed, so far as concerns the question here, the title accruing to a co-owner by a rightful notice, under section 2324, Rev. St., is much like that conveyed by a sheriff's deed after judgment and execution sale. Each results from a default in obligation, followed by proceedings authorized by law. The case before us is distinguishable from *King v. McAndrews*, 111 Fed. 860, 50 C. C. A. 29, and the others cited by appellant.

The decree is affirmed.

ARKANSAS BROKERAGE CO. et al. v. DUNN & POWELL, Inc. †

(Circuit Court of Appeals, Eighth Circuit. October 25, 1909.)

No. 2,916.

MONOPOLIES (§ 17*)—COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—COMBINATION PROHIBITED.

The organization by a number of mercantile jobbers located in the same city of a brokerage company, of which they owned the stock, and the purchase of merchandise required by them from manufacturers and jobbers in other states through such company, instead of through other brokers previously patronized, although there was no agreement binding them to do so, and the use of their influence to extend its business, did not constitute a combination or conspiracy in restraint of interstate trade or commerce, or to monopolize the same, in violation of the Sherman anti-trust act (Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), but was a legitimate and lawful business enterprise.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. § 17.*]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Action by Dunn & Powell, Incorporated, against the Arkansas Brokerage Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

Charles T. Coleman and W. T. Wooldridge (Frank G. Bridges, N. J. Gannt, Jr., George W. Murphy, and W. M. Lewis, on the brief), for plaintiffs in error.

J. W. House (M. House, on the brief), for defendant in error.

Before ADAMS, Circuit Judge, and RINER and AMIDON, District Judges.

ADAMS, Circuit Judge This was an action at law to enforce liability for threefold damages created by the seventh section of the anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 210 [U. S. Comp. St. 1901, p. 3202]). Dunn & Powell, a corporation engaged in the merchandise brokerage and commission business, with its chief office in Little Rock and a branch office in Pine Bluff, Ark., charged the defendants the Arkansas Brokerage Company and five other domestic corporations doing business in Pine Bluff, together with two foreign corporations doing business in other states, with entering into a combination and conspiracy in restraint of trade and commerce among the states, and with monopolizing such trade and commerce, in violation of sections 1 and 2 of that act, and thereby injuring the plaintiff's business. The facts disclosed by the pleadings and proof are substantially these:

Plaintiff had been for many years prior to 1906 conducting a lucrative brokerage business in Pine Bluff, by negotiating sales of merchandise between manufacturers and wholesale dealers of other states and jobbers doing business in that region, and had built up in its branch office at that place a profitable business. In the year 1906 the five domestic corporations, constituting substantially all the jobbers in Pine Bluff, concluded to organize and did organize a corporation to do their own brokerage business, as well as that of any others which it might

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied December 4, 1909.

secure. Each of them took and paid for two shares of its capital stock, which they caused to be issued to one of their officers or members as their representatives, and this constituted all of its stock, excepting two shares, which were sold to one Russell, who was chosen to be manager of the new corporation. Practically speaking, therefore, the wholesale business houses of Pine Bluff organized, owned, and operated the new corporation, which was named the Arkansas Brokerage Company, the main defendant herein. The other defendants were the five domestic corporations and two manufacturing corporations of other states, all of whom were alleged to be parties with the new brokerage company to the combination and conspiracy. While there was no agreement or understanding that the defendants the Pine Bluff jobbers should cease dealing with the plaintiff, they naturally enough preferred to deal and did deal with the brokerage company after its organization, and gave preference to it in the conduct of their business. There is evidence that those jobbers would not purchase through the plaintiff's agency, unless it would quote prices sufficiently low to neutralize the advantages they would secure by making their purchases through their own agency. The fact also appears that some foreign manufacturers, deciding that their business interests would be better served thereby, ceased to employ plaintiff, and voluntarily placed their accounts with the brokerage company. There was such a failure, however, to connect the foreign corporations which were made defendants to this suit in any improper, unfair, or unlawful way with the other and main defendants that the court at the close of the case directed a verdict in their favor, and no complaint is made of that action by the plaintiff.

While the bill of complaint and argument of plaintiff's counsel abound in repeated and diversely stated charges of confederacy, conspiracy, and unlawful contrivances to bring about the destruction of plaintiff's business and to appropriate it by the defendants, the proof, as we gather it from a patient and careful reading of the record, discloses but few actual and material facts. The five jobbers undoubtedly conceived a purpose to save the brokerage charges, which they had before then been required to pay, by negotiating their purchases through their own agency, and at the same time inaugurate and conduct another branch of business. By reason of their advantageous situation as jobbers who furnished a large part of the brokerage business of Pine Bluff, and by dint of business sagacity and industry, their new brokerage company was able to outstrip most of its competitors, including the plaintiff, and as a result the latter soon abandoned its branch office in Pine Bluff and ceased doing business there. There is little, if any, competent evidence of unfair competition by the brokerage company, unless it be in the fact that it secured the trade of its own stockholders and availed itself of their valuable influence for the extension and success of its business. To pronounce such action unfair and unlawful would disrupt many existing business corporations and effectually prevent the organization of any more. It would contravene one, if not the chief, reason for their creation or existence.

The contention of the plaintiff is therefore reduced to this: That the defendant jobbers wronged the plaintiff by arranging to do for

themselves what they had formerly employed it to do for them, and that the brokerage company wronged the plaintiff by availing itself of all its opportunities and favorable conditions for successful competition in a branch of business legitimately open to all comers. We agree fully with certain propositions of law urged by plaintiff's learned counsel in support of their contentions in this case, namely: (1) That the anti-trust act denounces as illegal any contract, combination, or conspiracy of whatever form or nature which directly or necessarily operates to restrain or obstruct the free flow of commerce between the states, and that this denunciation includes contracts, combinations, or conspiracies to restrain the liberty of a trader in such commerce to engage or continue therein. *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, and cases cited. (2) That any such contract, combination, or conspiracy which directly restrains the purchase, sale, or exchange of manufactured commodities among the several states is illegal. *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. (3) That the destruction, restriction, or stifling of free competition in trade and commerce among the states constitutes a restraint of that trade, and is within the inhibition of the statute. *Northern Securities Co. v. United States*, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679. (4) That a broker, acting for individuals or firms doing business in one state, when soliciting or taking orders for the sale and delivery of their merchandise to jobbers or dealers located in other states, is in so doing engaged in interstate commerce. *Robbins v. Shelby Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368.

But it is not perceived how the principles so invoked apply to the facts of this case or control its decision. The organization of the brokerage company as a competitor in business open to all had no natural tendency to directly or necessarily restrain commerce between the states, and the proof fails to show that it actually did restrain, lessen, or in any way stifle its free flow. The volume of that commerce, after as well as before the organization of the brokerage company, was determined by the fixed economic laws of demand and supply. The whole field was open to competition, and while the plaintiff, whose chief place of business was elsewhere, and one other broker in Pine Bluff, soon abandoned it, others operating there and in that vicinity remained in active competition, and without doubt all together were able and zealously disposed to keep the wheels of commerce as active as the demand for foreign merchandise required. Any one who had been in the business before could remain in it, and any one who wished to enter it afterwards could freely do so; but they had necessarily to compete with others, including the brokerage company, with whatever advantages they possessed for conducting a prosperous business. The fortuitous circumstance that the brokerage company had five important jobbers in the city so situated as to give it a preference arose from strictly legitimate relations. No one can deny that the jobbers had a right to organize a corporation to do their own brokerage business, as well as that of others. The law gave them that right, and they availed themselves of its provisions for that purpose. It cannot be doubted that

the five jobbers could have given their brokerage business to any broker on terms to be agreed upon, and it seems equally clear that by participating in the organization and ownership of the brokerage company they did no more than this, if indeed as much; for there was no obligation, express or implied, requiring them to deal with the brokerage company, except and so far only as their best interests from time to time dictated.

The mere fact that the broker, while engaged in negotiating sales of merchandise between an owner in one state and a jobber or consumer in another, is engaged in a species of interstate commerce, is quite unimportant, provided the business be done in a lawful manner. It becomes unlawful only when it is so done as to directly and substantially restrain that commerce or stifle its free flow. The proof, in our opinion, affords no warrant for a finding that any such consequences actually flowed, or had a natural tendency to flow, from the organization complained of in this case. The principles announced in the two cases of *Hopkins v. United States*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290, and *Anderson v. United States*, 171 U. S. 604, 19 Sup. Ct. 50, 43, L. Ed. 300, fully sustain the conclusions we have reached in this case. In the latter case the court said:

"It has already been stated, in the *Hopkins Case* above mentioned, that in order to come within the provisions of the statute the direct effect of an agreement or combination must be in restraint of that trade or commerce which is among the several states or with foreign nations. Where the subject-matter of the agreement does not directly relate to, act upon, and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object."

In *Field v. Barber Asphalt Co.*, 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142, the court said:

"In this day of multiplied means of intercourse between the states, there is scarcely any contract which cannot in a limited or a remote degree be said to affect interstate commerce. But it is only direct interference with the freedom of such commerce that brings the case within the exclusive domain of federal legislation."

This court, in *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593, 61 C. C. A. 19, said:

"This act of Congress [anti-trust act] must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states."

See, also, *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689.

From these cases, and many others to which attention might be called, it seems clear that the Pine Bluff jobbers merely resorted to a common

expedient, recognized by law and sanctioned by practice, of forming a subsidiary corporation to promote economy in the management of their existing business and to extend it into other fields of legitimate enterprise. If the new expedient affected interstate commerce at all, it was not in that direct, immediate, or necessary way which alone would make it obnoxious to the law, but only in an indirect, incidental, and unimportant way not within the denunciation of the law. The worst that can be said is that the parties availed themselves of certain advantages and opportunities which their relation to the brokerage business gave them and which materially aided them in the race of competition. If this resulted in injury to the plaintiff, it was *damnum absque injuria*. Free competition is the life of trade and commerce, and it is quite as important to approve all lawful, fair, and reasonable expedients devised to promote individual success as it is to condemn vicious and unlawful practices which violate individual right and the public weal.

The learned trial judge should have given the requested instruction to the jury that plaintiff was not entitled to recover. The judgment is therefore reversed, and the cause remanded to the Circuit Court for a new trial in harmony with the views here announced.

LITTLE ROCK RY. & ELECTRIC CO. v. BILLINGS.

(Circuit Court of Appeals, Eighth Circuit. October 25, 1909.)

No. 3,017.

1. NEGLIGENCE (§ 88*)—CONTRIBUTORY NEGLIGENCE—EFFECT OF INTOXICATION.

A person who has become intoxicated by his own voluntary act is chargeable with the result of his acts, deemed by the law to constitute contributory negligence, in the same degree and to the same extent as though he had been duly sober.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 119, 120; Dec. Dig. § 88.*]

2. STREET RAILROADS (§ 118*)—ACTION FOR INJURY TO PERSON ON TRACK—INSTRUCTIONS.

In an action against a street railroad company for injury by being struck by a car while walking toward it on the track in an intoxicated condition, where plaintiff was clearly guilty of contributory negligence, an instruction which warranted the jury in assuming that his intoxication relieved him from the consequences of such negligence was erroneous, and prejudicial to defendant.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 118.*]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Action by F. N. Billings against the Little Rock Railway & Electric Company. Judgment for plaintiff, and defendant brings error. Reversed.

James P. Clarke (W. E. Hemingway, G. B. Rose, D. H. Cantrell, and J. F. Loughborough, on the brief), for plaintiff in error.

Frank Pace (Jeff Davis and T. M. Seawel, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and POLLOCK, District Judge.

POLLOCK, District Judge. This action was commenced by F. N. Billings, as plaintiff, against the Little Rock Railway & Electric Company, as defendant, to recover damages for personal injuries sustained. The facts material to a decision of the case, as gleaned from the record, are these:

Plaintiff was an electrical worker, engaged as a lineman in the employ of the Rock Island Railway Company in the state of Louisiana, earning in that capacity about \$2.50 per day. He had come to the city of Little Rock, Ark., in company with his work foreman, to secure his pay from the railway company. After arriving there on November 23, 1907, he commenced drinking, and was intoxicated at the time he received his injury. About the hour of 1:30 o'clock in the morning of November 24, 1907, as he was walking along the track eastward on Markham street, in that city, he was struck by an electric car running westward on defendant's line, knocked down, and his left leg crushed in such manner as to require its amputation above the knee joint. At the time the collision occurred Markham street was being paved with brick. Red lights were placed by the company as a warning to travelers thereon of the unsafe condition of the street. The car was equipped with an electric headlight, burning brightly. There was no evidence that it was being run at an unusual or high rate of speed. The motorman could and did see the plaintiff approaching the car on Markham street about 200 feet from the car. He testified plaintiff came upon the track when about 100 feet from the car. At the time plaintiff had lost his hat and was bareheaded. The collision occurred some 30 or 40 feet east of the intersection of Markham and Sherman streets, in said city. Plaintiff received a verdict and judgment of \$14,000. Defendant brings error.

From our consideration of the case we have deemed it necessary to discuss but one of the many assignments of error presented on brief and in argument; for, in the view we have taken of the one question thus presented, which goes to the very right of the case, other errors assigned become unimportant. The question thus presented is this: Did the trial court misdirect the jury, to the prejudice of defendant, in stating the rule of actionable negligence applicable to the facts of the case on the theory of the case adopted by all in the court below? The charge of negligence laid in the petition reads as follows:

"That plaintiff was run over by said car, and injured, by reason of the negligence of those in charge of said car, as follows: That plaintiff at the time was intoxicated and upon the tracks of the said railway company, insensible to the danger of his position; that he was discovered upon the track by those in charge of the car, and his dangerous position was apparent and known to them in time to have stopped the car and avoided injuring him, by the use of ordinary care; and that those in charge of said car failed to exercise such care, but negligently and recklessly ran over the plaintiff, injuring him as aforesaid."

The undisputed evidence shows plaintiff was intoxicated when the injury occurred to him. From the fact that he was an electrical worker employed by the Rock Island Railway Company as lineman, and from

all the other facts and circumstances in the case, it is undisputed this state of intoxication was brought by plaintiff on himself by his voluntary act. He was, therefore, chargeable with the result of his acts, deemed by the law to constitute contributory negligence, in the same degree and to the same extent as though he had been and remained duly sober. *McKillop v. Duluth St. Ry. Co.* (Minn.) 55 N. W. 739; *Rollestone v. T. Cassirer & Co.*, 3 Ga. App. 161, 59 S. E. 442; *Keeshan v. Elgin Traction Co.*, 229 Ill. 533, 82 N. E. 360; *Railway v. Wilkerson*, 46 Ark. 513.

While one who, from the excessive use of intoxicating liquors, brings on himself such a condition of permanent imbecility or idiocy as to thereafter render his acts done wholly involuntary, may be regarded in law with the same favor as he who by the operation of natural laws is born or becomes an idiot or a lunatic, yet men who voluntarily "put an enemy in their mouths to steal away their brains" must and will in law be held to the same high degree of care for their personal safety as though they had not voluntarily made themselves drunk. In other words, a man will not be permitted to plead and prove his own voluntary self-intoxication to his profit. Therefore, in so far as plaintiff alone is concerned, his conduct in coming and remaining on the track of defendant at the time, in the manner, and at the place he did must be viewed in the same light as though he had not intoxicated himself, but had remained duly sober; and his pleading and proof of voluntary intoxication in this case will not avail to excuse him in the doing of any act which would have constituted negligence on his part, had he remained sober.

Viewed in this light, the act of plaintiff in coming on the track of defendant in front of an approaching car, burning a bright electric headlight, the view of which was entirely unobstructed, and which he saw or could have seen, had he looked, and his remaining on the track, walking toward the car, until he was struck and injured, undeniably constitutes such gross contributory negligence on the part of plaintiff as will bar a recovery in this case, unless there is in the case ground for the application of the qualification of the rule of contributory negligence sometimes termed the doctrine of "last clear chance," as declared and applied in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, *Washington & Georgetown Railroad Co. v. Harmon*, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284, *St. Louis, etc., Railway Co. v. Schumacher*, 152 U. S. 77, 14 Sup. Ct. 479, 38 L. Ed. 361, *Chunn v. City & Suburban Railway*, 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219, *Denver City Tramway Co. v. Cobb*, 164 Fed. 41, 90 C. C. A. 459, *Illinois Central Ry. Co. v. Ackerman*, 144 Fed. 959, 76 C. C. A. 13, *Gilbert v. Erie R. Co.*, 97 Fed. 747, 38 C. C. A. 408, *Missouri Pacific Ry. Co. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641, and other cases.

As deduced from the foregoing authorities, and many others that might be cited, this qualification may be stated as follows: A., who by his own negligent act or conduct has placed himself in a position of imminent peril, of which he is either unconscious or from which he is unable to extricate himself if conscious, may not be carelessly,

recklessly, or wantonly injured by B., who, after he has discovered and knows the helpless and perilous condition of A., has it within his power to avoid doing him an injury by the exercise of reasonable care and diligence in the use of such instrumentalities as he can command; and the failure to exercise such reasonable care and diligence on the part of B., under such circumstances, will constitute actionable negligence, rendering him liable in damages to A., notwithstanding the prior negligent act of A. in placing himself in position to receive the injury.

From the extract above quoted from the petition of plaintiff, the claim made by plaintiff in this case is within the qualification to the doctrine of contributory negligence stated, if proper legal effect be given the conduct of plaintiff in becoming voluntarily intoxicated; and as there seems to be evidence to support the charge made, and as the case was tried in the court below on this theory, it remains to consider whether the court properly defined the doctrine of "last clear chance" as applicable to the facts of this case, and the legal effect of plaintiff's voluntary intoxication, as shown by its charge to the jury, or by its denial of requests made by defendant to charge. On this branch of the case the defendant requested the court to charge, as follows:

"(6) It is the duty of a person walking upon a street railway track to make vigilant use of his senses of sight and hearing, to see if a car is approaching dangerously near. If you find from the evidence that at the time of this accident plaintiff was walking upon the street car track, facing towards the car, it was his duty to use ordinary care to protect himself from injury; and if you find from the evidence that the injury was the proximate result of his failure either to look or listen, or to use other careful, prudent means of protecting himself from injury, then he was guilty of negligence which contributed to his injury, and cannot recover in this action, unless you further find from the evidence that the motorman, by the exercise of ordinary care, could have prevented the accident after he discovered the peril of the plaintiff and his insensibility of danger, yet failed to do so.

"(7) You are instructed that the motorman operating the car had the right to presume that the plaintiff was in the full possession of his senses, and would appreciate his danger in walking down the track, and would act with discretion, and that he had the right to operate his car with that presumption in his mind, and to go on with the car until such time as he discovered that the plaintiff was not in the possession of his senses and did not appreciate his danger, or understand how to protect and guard himself from injury, when it would then become his duty to stop the car and avoid the accident, if possible.

"(8) The fact that the plaintiff was drunk, if you find from the evidence that he was drunk, did not relieve him from his duty to exercise ordinary care and prudence for his own safety. Drunkenness will never excuse one for failure to exercise the measure of care and prudence which is due from a sober man under the circumstances. Men must be content to enjoy the pleasures of intoxication with the perils attending it. When they make themselves drunk, and in that condition wander upon a railroad track and sustain an injury, they will not be heard to plead their intoxication as an answer to a charge of negligence, or as a reason why the railroad company should be held responsible to them for damages; but, on the other hand, if the motorman operating the car discovered that the plaintiff was drunk and insensible of his danger, or unaware of what he was doing, in time to have stopped the car and avoided the accident, and failed to do so, then the defendant would be liable."

The requests so made were denied, and the court, among other things, charged as follows:

But, on the other hand, if you believe that this motorman, as the agent of the defendant, did not exercise ordinary diligence, such as a reasonable man

under like circumstances would have exercised, could have seen that this man's condition was such that he did not know how to get off, or would not know the danger he was in, and that he was, in fact, helpless, and for that reason he would not get off, and that he could have ascertained and did ascertain that fact in time to have stopped his car, and thus prevented the injury, but failed to do so, then the defendant is guilty of negligence, and the plaintiff is entitled to a verdict at your hands."

"Then it becomes the duty of the man in charge of the car to give signals or warnings to the person in order that he may leave the track, and if, after such signals are given, the party still fails to leave the track, so that a person of ordinary intelligence and exercising ordinary and reasonable diligence could see that there must be something the matter with the party, then it is the duty of the person in charge to stop that car, or else use whatever means are in his power for the purpose of stopping it; and if he fails to do so, but recklessly and carelessly goes on with the car, only trying to stop it when it is too late to prevent the accident, then the defendant company is liable for the injuries caused by reason of such accident."

"This witness, who was the motorman in charge of the car, seems to have been somewhat mixed up. He said he could stop it and did stop it within 10 feet, and then afterwards said, first he put the brakes on within 10 feet of the man, just when he came back in front of the track and walked into the car, and after the car had struck the man it still ran on 10 feet more, and so the wheel went over his leg and injured him."

"Now, this instruction as to drunkenness is hardly applicable. The mere fact that a man is drunk would be no excuse for him not to keep out of danger; but if the man's condition is such, whether it is caused by drunkenness or otherwise, that he is absolutely helpless, that he can't tell right from wrong, can't tell the danger when it confronts him, then the law is otherwise."

The requests made contain clear, concise, and accurate statements of the law applicable to the facts of the case, which either should have been given, or the court should have clearly, distinctly, and accurately charged the jury the voluntary act of plaintiff in becoming intoxicated and going upon the track of defendant, and there remaining under the circumstances shown by the evidence, constituted such negligence on his part as precluded all recovery for damages sustained by him, unless the case, viewed solely and alone from the standpoint of the negligent and reckless conduct of the motorman in charge of the car, after the perilous position of plaintiff was known to him, would permit plaintiff to recover, notwithstanding his own negligent conduct had placed him in such position of peril, and under such negligent circumstances as precluded him from extricating himself. From the charge given the jury may well have thought, and doubtless did think, the fact that plaintiff was, as admitted, highly intoxicated, excused or relieved him from the consequence of his negligent acts; that the motorman should have exercised care and diligence to ascertain whether plaintiff, when first seen on the track, was in such a state of intoxication that he would fail to use his sense of sight and hearing to warn him of the approach of danger and his power of locomotion to avoid it.

On the contrary, when the motorman discovered plaintiff approaching on the track, he had the right to assume he would use his sense of sight and see the on-coming car with its bright electric headlight, the view of which was entirely unobstructed, and on seeing it would exercise such care and prudence for his safety as is usually employed by reasonable men, and step from the track in time to avoid a collision; and not until it became "apparent and known" to the motorman that

plaintiff would not so act as a prudent man, was it incumbent upon him to exercise reasonable care and diligence, by the use of such instrumentalities as were at his command, to stop the car. While all the facts and circumstances immediately attending the accident, including the appearance plaintiff presented, his manner of walking, etc., were proper evidential facts for the consideration of the jury in arriving at a determination of the issue presented, yet the jury were not warranted in assuming, from the mere fact that plaintiff presented the appearance of drinking, he had reached such state of intoxication as to be insensible to all danger or his duty to protect himself, nor was the motorman bound to so assume. It is neither axiomatic nor knowledge common to all that men when drinking are utterly reckless of their safety or insensible to their duty to protect themselves. No reward of merit accompanies the act of voluntary intoxication. As said by Mr. Beach in his work on Contributory Negligence (2d Ed.) 391:

"Men must be content, especially when they are trespassers, to enjoy the pleasure of intoxication cum periculis."

It follows, for the error thus committed, the judgment must be reversed, and the case remanded for a new trial. It is so ordered.

WELLINGTON v. PELLETIER.

(Circuit Court of Appeals, First Circuit. November 16, 1909.)

No. 838.

1. APPEAL AND ERROR (§ 231*)—REVIEW—RECEPTION OF EVIDENCE.

The rule applied that, under the federal practice, a party who relies on a general objection to evidence must show that the defects in the evidence admitted, which are relied on, could not have been cured by the party offering it, if his attention had been called to them.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 231;* Trial, Cent. Dig. § 194.]

2. MASTER AND SERVANT (§ 235*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—DUTY TO OBSERVE AND AVOID DANGER.

Plaintiff's decedent, while at work making a trench between the rails of a private spur track which led from a railroad siding to defendant's quarry, was struck and killed by a car which had been standing with others on the siding, but, being insufficiently blocked, started and ran downgrade upon the spur track. *Held*, that the circumstances were not such as to make the rule applicable which requires unusual care and vigilance on the part of persons on railroad tracks where trains are frequently passing, and that deceased was not chargeable with contributory negligence because he did not keep a constant lookout, and that the circumstances are analogous to those cases requiring the employer to furnish a safe place for working.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 235.*]

3. MASTER AND SERVANT (§ 139*)—INJURY TO SERVANT—PROXIMATE CAUSE OF INJURY—INTERVENING CAUSE.

Where cars were negligently left standing on a side track at the top of a grade by defendants' employes without being secured, except by the setting of the brakes, and one of such cars ran down upon and killed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff's intestate, the fact that the brake was released by children playing about the cars did not constitute such an intervening cause as would prevent defendant's negligence from being the efficient proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 275-292; Dec. Dig. § 139.*]

4. MASTER AND SERVANT (§ 287*)—NEGLIGENCE OF SUPERINTENDENT UNDER MASSACHUSETTS STATUTE.

The question whether a person temporarily in charge of defendant's business was one whose principal duty was that of superintendence, so as to render defendant liable for injury to another employé through his negligence under the Massachusetts employer's liability statute, *held* properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 287.*]

In Error to the Circuit Court of the United States for the District of Massachusetts.

Action by Emma M. Pelletier against Arthur J. Wellington. Judgment for plaintiff, and defendant brings error. Affirmed.

Olcott O. Partridge and H. Eugene Bolles (Henry M. Channing, on the brief), for plaintiff in error.

William A. Pew, Jr., for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This suit was brought by the administratrix of the estate of George Pelletier against Wellington, who was operating a quarry, with a verdict for the plaintiff. Wellington owned a spur track which led from a side track of the Boston & Maine Railroad. This side track and the spur track were on a grade. The side track was used for storing empty cars to be loaded in connection with Wellington's business. These cars were left by the Boston & Maine Railroad near the head of the grade on its own siding; and when Wellington or his employés desired cars they were accustomed to select them as needed, and run them down to his spur track. They were ordinarily left near the head of the grade by the railroad corporation with the brakes set, and with a tie across the track blocking the wheels. If the cars were left by the Boston & Maine Railroad on its siding in an unsafe condition with reference to starting down the grade, the fault was with it. So long as the cars remained at that point without any disturbance of the status in which they were left there by the Boston & Maine Railroad, Wellington was, of course, not at fault. It is claimed that, in connection with the injury to the deceased, Wellington's employés ran one or more cars down the grade, and left the remaining cars with their brakes set, without any blocking of the wheels, and that thereupon the boys playing about the cars, and who were accustomed to play about them, in some way started them, and caused them to run down the grade and kill Pelletier. Pelletier was in the employ of Wellington, and at the time was working between the rails of Wellington's spur track, excavating a trench. He appears to have had no connection with the handling of the cars, at least none at

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the essential time involved here. There was no evidence that he was looking at the cars, or otherwise watching for a possibility of their running down the grade. The verdict was for the plaintiff, and there-upon Wellington brought this writ of error.

There were a number of minor exceptions taken at the trial, only one of which has been urged upon our attention. This suit being for the negligence of defendant's superintendent, or rather of one who was temporarily acting as superintendent, the statute requires a notice; and it is now urged on us that the notice was not sufficient under the law. The objection to the admission of this notice was only general, which is insufficient to base an exception on under the circumstances of the case, because non constat, if the objection had been specific, it might not have been met by the plaintiff on the spot. Under the federal practice, whoever relies on a general exception must point out that the defects in the evidence admitted could not have been cured by the party offering it, if his attention had been called to those relied on.

Passing by these propositions, the alleged errors are based very largely, if not entirely, on questions of fact which we will deal with quite summarily, because no prejudice can come in any future case from thus dealing with them.

It appears in the record that, when the cars were left by the Boston & Maine Railroad, they were chained to the track. There is no claim that, when any of the cars were taken away as we have described, Wellington's employes replaced the chain with reference to the cars remaining. We pass by this because, under the circumstances, it is clear that the jury could not have been properly instructed to the effect that a mere omission to replace the ties was not a negligent act, as the appellant claims they should have been. This is one of the class of facts within the province of the jury, supported in this case by the almost universal custom to protect railroad cars left near the head of a grade, as these cars were, by something more than merely setting up the brakes.

It is claimed that there was no evidence that the tie was not replaced; but on this point the record stands as follows: Three men went up to bring down the cars. One of them came down with the last car, leaving the two to secure those that remained. One of these men testified that he did not put the tie back, and he added that he had no business to put it back. No one told him to do so. The other one, who was called by the defendant, testified generally, with reference to all the cars, that the tie was put back. He testified that he and the first witness, to whom we have referred, went to the last car which went down the grade, and that one of them handled the tie; but he admitted he did not know whether he did it himself, or the other person we have named. Under the circumstances, we are not only of the opinion that we would not be justified in reversing the finding of the jury on that point, but that, on the other hand, its conclusion was correct.

It is maintained that the deceased was not in the exercise of due care, and there is some discussion with reference to the question of the burden of proof under the Massachusetts statute on which this suit is

based. The ground of this objection is that the deceased was an able-bodied, experienced workman, in full possession of his faculties, familiar with his surroundings, and knew that the cars were stored on the side track above described, that his view was not obstructed, and that he could easily see in each direction. But this is not the case of either a main track or a siding on which trains were regularly or frequently run, or even run at all, so far as the record shows. It shows only the circumstances which we have stated, circumstances to which the duty of listening and looking, so frequently concerned in accidents resulting from the movement of railroad trains proper, has never been applied. This duty relates to circumstances where persons may be in known danger, although every other person does his full part according to law or custom. It does not necessarily apply to the ordinary conditions of work where no danger is customarily expected, provided others than the one injured have used due care. In other words, there is no rule which requires a universal duty of looking and listening under the ordinary circumstances of performing labor, and thus at all times incumbering and delaying its performance. This case is rather of the class where the person held in fault is required to secure the person injured a safe place for working, as a consignee unloading a car. *Wright v. The Railway*, L. R. 10 Q. B. 298, affirmed 1 Q. B. 252 (1876); *Mullins v. Railroad Co.*, 201 Mass. 38, 87 N. E. 476.

It is claimed that the interposition of the boys in this case was the interposition of a new efficient cause, which, if interposed, the law says eliminates the original cause. On the other hand, it has been thoroughly understood, since the leading case of *Scott v. Sheperd*, 2 W. Bl. 892, well known as the "Squib Case," that the interposition even of human beings, acting under circumstances which deprive them of periods for reflection, or known to be of classes which are ordinarily governed by unreasoning impulses, does not come within the class of responsible interventions referred to. This is illustrated in one direction by the squib case, and in the other direction by the well-known cases where young children, either through carelessness or inattention, have been intrusted with dangerous weapons. The general principle is sufficiently discussed in *Pollock's Law of Torts* (8th Eng. Ed.) 45 et seq. The rule on which the plaintiff relies in this respect was authoritatively stated and applied by the Court of Appeal in 1896 in *Engelhart v. Farrant*, [1897] 1 Q. B. 240. Oddly enough, in *McDowall v. Great Western Railway Company* (in the Court of Appeal in 1902) 2 Q. B. [1903] 331, the circumstances with reference to cars and boys were strictly like those at bar and the case was distinguished solely on the point that the jury expressly found that the defendant was not at fault. Therefore, of course, there was no operative negligence which could be either an immediate or a remote cause of the accident.

After all, the only close point in the case is on the question of superintendence. The intestate and the man through whose negligence the tie was not replaced were coemployés. The usual superintendent was absent. Of course, evidence of a much less striking character may be required to prove the characteristics of one exercising superintendence temporarily under the Massachusetts statutes than those of the usual

superintendent. We went into the law regarding this question of superintendence sufficiently in *Canney v. Walkeine*, 113 Fed. 66, 51 C. C. A. 53, 58 L. R. A. 33, decided June 14, 1901, and in *Munroe v. Ley*, 156 Fed. 468, 84 C. C. A. 278, decided October 22, 1907. We need in this case to add nothing to what is there stated by us. It is not at all improbable that, if we had been the jury, instead of the appellate court, we might have found on the facts otherwise than was found. Nevertheless, the charge of the presiding judge was very full and clear, and called the attention of the jury carefully and correctly to all phases of the facts, which were multifarious; and, taken altogether, the condition is such that we cannot lawfully interfere with the result.

The judgment of the Circuit Court is affirmed, with interest, and the defendant in error recovers her costs of appeal.

RUDD v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1909.)

No. 2,875.

1. POST OFFICE (§§ 35, 50*)—USING MAILS TO DEFRAUD—PROSECUTION—DEFENSES.

In a prosecution under Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), for using the mails to defraud, it is a defense that defendant honestly believed that the representations made in the letters or circulars which he is charged with having sent through the mails were true, and that he had no actual intent to defraud, and when such defense is made it is for the determination of the jury.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. §§ 35, 50.*]

2. CRIMINAL LAW (§ 755½*)—TRIAL—COMMENTS OF JUDGE ON EVIDENCE.

While it is the right of the judge of a federal court, in a criminal as well as a civil case, to comment on the facts in his charge to the jury, his comments should be judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1731; Dec. Dig. § 755½.*]

3. CRIMINAL LAW (§ 823*)—REVIEW BY APPELLATE COURT—COMMENTS OF JUDGE ON DEFENSE.

Where the language of a court in commenting on the defense relied on in a criminal case in its charge to the jury was so positive and emphatic and of such a character that the jury may have believed that a finding for the defendant would subject them to ridicule, a mere withdrawal of such language, and a direction to the jury that the question is for them, may be of doubtful sufficiency to correct such impression, and in such case the just remedy is a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1995; Dec. Dig. § 823.*]

In Error to the District Court of the United States for the Western District of Missouri.

John F. Rudd was convicted of using the mails to defraud, and brings error. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Paul R. Stinson (R. R. Brewster, on the brief), for plaintiff in error. A. S. Van Valkenburgh, U. S. Atty., and Leslie J. Lyons, Asst. U. S. Atty.

Before HOOK, Circuit Judge, and RINER and AMIDON, District Judges.

HOOK, Circuit Judge. Rudd was convicted of using the mails in aid of a scheme to defraud, contrary to section 5480 of the Revised Statutes (U. S. Comp. St. 1901, p. 3696). He had been associated with others in selling county rights to handle a machine for which one of them had secured a patent, and to facilitate the business they were engaged in they sent through the mails circulars and other communications containing alluring representations which the government charged and the evidence showed quite clearly were contrary to well-known fundamental physical laws. The machine was designed as an attachment to a pump for lifting water, and it consisted principally of a heavy pendulum, a lever, some cogwheels, and a spring. It was represented that the power for the operation of the pump came from the swing of the pendulum and the spring; that the latter was auxiliary to the pendulum, and replenished the loss in the momentum of the swinging weight. It was also said that they were adapted to pumps in wells as deep as 300 feet; that there were three sizes of them, and each stroke of the pendulum on size No. 1, which was the smallest, exerted a lifting power of 500 pounds and had a capacity of 20 gallons of water per minute; that one winding of the spring would require only about 15 minutes of labor, and would furnish enough power for 12 consecutive hours of operation, or for about 12 days for the average user of water; also that the arrangement was so simple a 17 year old boy could attend to it. There were other representations; but the above will indicate with sufficient particularity the character of their literature.

The main defense was that, though the machine may have been impracticable, the accused honestly believed in its efficiency, and that what he did was without intent to defraud. Of course, if this was so, there was no violation of the law which was designed to prevent the use of the post office in intentional efforts to despoil. *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709. A representation may be so obviously without foundation as to afford cogent evidence of a criminal intent in him who makes it; but nevertheless, if in fact it proceeds from honest ignorance or delusion, it does not help to make a scheme to defraud within the statute. Complaint is made that the trial court, by extended remarks in the presence of the jury, erroneously prejudiced the accused in respect of this defense. It is sufficient to say, without going into details, that the view was undoubtedly impressed upon the jury that no one with the slightest degree of intelligence above insanity could believe the machine was practicable. The accused was sane; but the remarks of the court left no room for the probability of his self-deception. Whether conduct which is made the subject of a criminal charge results from a credulous self-deception, or, on the other hand, evinces a design to defraud the public, is a question for the determination of the jury; and it is none the less so,

though the truth of the matter may be clear to most intelligent minds. That so many projects, which to the discerning are manifest schemes for spoliation, meet with success and find victims among honest, well-meaning people, shows how futile it is to attempt to define the bounds of human credulity. If the jury believed the accused was of sane mind, of which there was no question, the remarks of the court were calculated to impose upon them a constraint that interfered with an independent consideration of his defense. As Chief Justice Fuller said in *Starr v. United States*, 153 U. S. 614, 626, 14 Sup. Ct. 919, 38 L. Ed. 841, the influence of the trial judge on the jury is necessarily and properly of great weight, and his lightest word or intimation is received with deference and may be controlling. So positive and emphatic were the remarks of the court that it is not too much to say the jury may have believed a finding for the accused would have subjected them to ridicule. True, the court afterwards withdrew the language, and said that "it does not follow that a man is a fool or insane who believes the representations," and that it was a question for the jury; but it is doubtful the damage was repaired, and when that is the case the just remedy is a new trial. A mere withdrawal of words, and a direction to the jury that the question is for them, is not always sufficient. The effect of what was said may remain.

We do not mean to impair in any degree the right of a trial court in both civil and criminal cases to comment upon the facts, to express its opinion upon them, and to sum up the evidence, for that is one of the most valuable features of the practice in the courts of the United States. A judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done. But his comments upon the facts should be judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment.

The other matters of which complaint is made need not be considered.

The judgment is reversed, and the cause remanded for a new trial.

ILLINOIS CENT. R. CO. v. NELSON.

Circuit Court of Appeals, Eighth Circuit. October 25, 1909.)

No. 2,902.

1. RAILROADS (§ 338*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—INJURY AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Under the rule that a railroad company may be liable for the injury of a person at a crossing, notwithstanding his contributory negligence, if after actually discovering his peril the servants of the company could by the exercise of ordinary care have avoided his injury, but failed to do so, the company cannot be held liable if such failure resulted from a defect in appliances of the train, which existed previously, and which made it impossible to stop the train in time, notwithstanding the efforts of the trainmen.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1096-1099; Dec. Dig. § 338.*]

2. RAILROADS (§ 338*)—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—INJURY AVOIDABLE NOTWITHSTANDING.

Plaintiff's intestate negligently walked upon a railroad crossing immediately in front of a freight train, which was being backed toward the crossing at a speed of four or five miles an hour, and was knocked down between the rails, and two or three cars passed over him, causing his death. It was claimed by plaintiff that he was not killed until struck by the second car, and that the train could have been stopped before such car reached him by the exercise of proper care after his danger was discovered; but the evidence left both of such questions in doubt. It was further shown that, as soon as the brakemen on the cars saw that deceased was about to step upon the track, they shouted warnings to him, and also signaled the engineer, and that as soon as the latter saw the signals he did everything possible to stop the train; but he was not certain that he saw the first signal, nor was it certain that the failure to stop within a shorter distance was not due to defective brake appliances. *Held*, that such evidence did not warrant a recovery against the company; the negligence of deceased being conceded.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1099; Dec. Dig. § 338.*]

In Error to the Circuit Court of the United States for the District of Nebraska.

Action by Benjamin Nelson, administrator of the estate of Henry C. Miller, deceased, against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

William Baird (W. S. Kenyon, Thomas D. Healy, and J. M. Dickinson, on the brief), for plaintiff in error.

Francis S. Howell (Albert W. Jefferis, on the brief), for defendant in error.

Before HOOK, Circuit Judge, and RINER and AMIDON, District Judges.

HOOK, Circuit Judge. This writ of error assails a judgment obtained by the administrator against the railroad company for negligently causing the death of Henry C. Miller. About 11 o'clock in the forenoon of a bright, clear day the deceased, who was 44 years of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

age, in the full possession of his faculties, and familiar with the locality, with no obstacle to his view of an approaching train, walked directly in front of it, and was run over and killed. It is not important whether the company was negligent in the first instance. The contributory negligence of the deceased was admitted in the petition, and the plaintiff, his representative, relied for recovery upon what is sometimes termed the "last chance rule." In the case of *St. L. & S. F. R. Co. v. Summers* (decided at this term) 173 Fed. 358, Judge Adams, speaking for the court, said:

"The rule is well settled that, notwithstanding such contributory negligence of a traveler in crossing a railroad track as precludes recovery for the primary negligence of the railroad company in operating its train so as to bring about a collision with him, yet another and different cause of action arises in favor of the traveler if for any reason he is exposed to imminent peril and danger, and the railroad company, after actually discovering that condition, could by the exercise of ordinary care have stopped its train, or otherwise have avoided injuring him, and failed to do so. *Chunn v. City & Suburban Railway*, 207 U. S. 302, 28 Sup. Ct. 63, 52 L. Ed. 219; *Denver City Tramway Co. v. Cobb*, 90 C. C. A. 459, 164 Fed. 41. But in the application of this rule care must be taken to avoid undermining the rule of contributory negligence. Such negligence of the traveler, in law, fully exonerates the railroad company from the consequences of its original negligence, and some new and subsequent act of negligence must arise to create a cause of action; and this new or secondary act must be established by proof unaided by the former acts, which have been excused by the traveler's contributory negligence. Let us, therefore, inquire whether the servants of the railroad company had actual knowledge of the peril of the decedent, and whether with that knowledge it exercised reasonable care to avoid injuring him?"

To bring his case within this rule of law, the plaintiff introduced witnesses who testified to the following facts: The train was composed of 16 freight cars, of which 9 were loaded and 7 empty. Seven were equipped with air brakes, and 9 not. They were being backed southward towards a street crossing at a speed of 4 or 5 miles an hour; the engine being at the north end. The deceased was walking westward towards the crossing upon the north side of the street; but his intention to cross the track in front of the cars was not discovered until too late. He was knocked prostrate between the rails, and was finally taken out 70 feet or so further south, and from under either the second or the third car, according to which of conflicting accounts is true. When it became apparent deceased was about to go upon the track, the brakemen on the cars hallooed and whistled to warn him, and then gave and repeated emergency signals. The engineer, with all possible speed after he received the signals, shut off steam, reversed the engine, applied the air, and let sand upon the rails. He said he did everything possible, and stopped as quickly as he could. The engine and its appliances were in good order. Witnesses testified for the plaintiff that under the conditions which were described the train could have been stopped within from 12 to 20 feet; whereas, it actually ran more than 100 feet after the collision. Deceased, when first struck, was knocked 4 or 5 feet, and fell between and parallel with the rails, with his head to the south. He lay face downward in that position until the first car had passed over him, and was then picked up and rolled by the trucks of the second, and also by those of the third, according to some witnesses, and was mutilated by the wheels.

As the verdict was for the plaintiff, the case is stated as above from his standpoint. It should be added that the engineer, who was introduced as a witness for the plaintiff, testified that he had just been engaged in some other duty about the engine, and did not know whether he received the first emergency signal. Witnesses for the company said that after the receipt of the signal a stop in three car lengths would have been a very good one. The only evidence of negligence after the discovery of the danger of deceased was the bare fact that the train ran further than the distance within which plaintiff's witnesses said it could have been stopped, and it is claimed that the fatal injuries were inflicted, not by the collision with the first car, but by the trucks and wheels of the car or cars which followed it. But the running of the train beyond the shorter distance must not only have been the cause of the fatal injuries, but must have resulted from some negligent act or omission after the dangerous position of deceased was discovered. Counsel for plaintiff appreciate this, and say:

"We do not want the court to get the notion that we contend, had the death of Miller resulted from the impact itself, or from the fall which it caused, the railroad company would be liable, provided he was guilty of negligence in coming into a collision."

As already stated, the petition disclosed his negligence. The evidence also showed it beyond question. After it became apparent deceased was in danger, the brakemen promptly gave such signals as were within their power, and no charge of negligence can justly be made against them. But, though they discovered the danger, they could not stop the train. All they could do was to give the signals. It is not suggested that the application of hand brakes would have been of any avail. So we must look to the engineer for the negligence within the rule. It does not follow from the mere fact that the train moved the distance it did after the brakemen discovered the danger. Their duty being performed, their knowledge was no more effectual in preventing the accident than would have been that of a flagman at the crossing. The movement of the train was consistent with the undisputed testimony of the engineer that he had been engaged upon some other duty about the engine and did not know he got the first signal of the brakemen, but that when he did get it he acted promptly and did all he could. It should be borne in mind in this connection that, even at the slow speed it is said the train was running, it moved a car length in a few seconds, and brought the trucks of the second car upon the deceased.

Again, the testimony produced by the plaintiff as to the condition of the appliances related to those of the engine, not to the air brakes on the cars, and the failure to stop within the short distance may have been due to a defective condition and operation of the latter, for aught the evidence showed. If so, that would not bring the case within the rule. A defect in mechanical appliances, existing before and continuing until after the injury, not susceptible of being rectified after the discovery of the danger carelessly incurred and before the injury is done, is not supervening negligence within the rule invoked. Were it otherwise, negligence on the part of others would have to be anticipated

and provided for in adopting precautions to prevent accidents; but that is not in the measure of one's duty.

We should further say that, giving the fullest credence to the unusually minute description of what happened to deceased while under the cars, it closely approaches mere conjecture that he was not fatally injured before the second car reached him. We think defendant's motion for a directed verdict should have been granted.

The judgment is reversed, and the cause remanded for a new trial.

CHICAGO GRAIN DOOR CO. v. NATIONAL MALLEABLE CASTINGS
CO. et al.

(Circuit Court of Appeals, Sixth Circuit. November 16, 1909.)

No. 1,938.

PATENTS (§ 328*)—ANTICIPATION—BRACKET FOR CAR DOORS.

The Hill patent, No. 527,792, for a bracket for car doors, fastened to the side of the car by a screw having a square countersunk head, not rotatable on the bracket, and removable only by revolving the bracket itself, which cannot be done when the door is closed, is void for anticipation by the Eubank patent, No. 512,467, the device of which operates on the same principle; the only difference being that instead of a screw, a stud integral with the bracket, and having flanges working in the manner of the threads of a screw, is used.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

Suit in equity for infringement of patent by the Chicago Grain Door Company against the National Malleable Castings Company and A. A. Pope. From a decree dismissing the bill, complainant appeals. Affirmed.

O. R. Barnett, for appellant.

C. P. Byrnes, for appellees.

Before LURTON, SEVERENS, and WARRINGTON, Circuit Judges.

SEVERENS, Circuit Judge. The patent of the appellant, for the infringement of which this suit was brought, is No. 527,792, and was granted to Edward A. Hill, October 23, 1894, for an invention by him of improvements in brackets for car doors. The appellant derives his title from him and his assignees. The defenses are that the invention was anticipated by an earlier patent to Eubank, No. 512,467 and a prior use of similar devices by the Louisville & Nashville Railroad Company, and that the defendants do not infringe. At the hearing upon pleading and proofs, the court held that there was no novelty in the supposed invention; that it was anticipated by the Eubank patent,

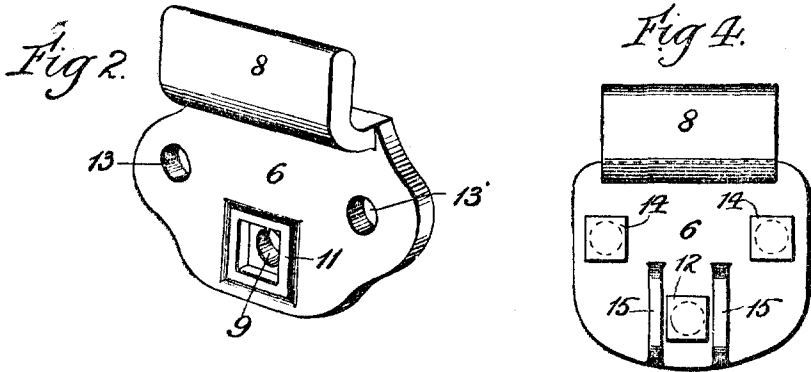
*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and probably by the prior use above mentioned; and, further, that, if the appellant's patent were held valid, the appellees have not infringed it. Thereupon the bill was dismissed.

It appears that, prior to either of the inventions above mentioned, brackets for car doors had long been in use for the purpose of guiding the doors while sliding along the side of the car, and preventing them from opening away from the car at the bottom. Such brackets consisted of cast-iron plates, having a flat inner surface where they came in contact with the car, a horizontal offset a little wider than the thickness of the door, and an upward projection at the outer end of the offset. This upward projection overlapped the outside of the door at the bottom. The brackets were fastened to the side of the car by ordinary screws running into the sill, or by bolts running through it. The door was also equipped with a lock and seal at one side. Depredations by thieves upon the cars, while they were closed and locked, for the purpose of stealing their contents, had become common. Their method of getting into a car was by taking out the screws or bolts by which the brackets were attached. This being done, the lower part of the door was pulled outwardly to a sufficient extent to enable the thief to get in. After getting his plunder, he came out, put the brackets back, and attached them as before. So no indication from the appearance of the car that it had been opened would be given to operators or inspectors. It was the object of these inventions to provide means for attaching the brackets to the car in such a way that they would be inaccessible to the thief when the door was closed. It had been customary to make this attachment by three screws or bolts, the central one being at and somewhat below the middle of the horizontal length of the bracket; and all of them had their heads exposed.

Hill's method, as disclosed by his patent, was to use a lag screw, having a square head, at the middle of the length of the bracket, and countersink it in the outer surface of the bracket, either by forming a square recess in the casting of only a sufficient size and depth to receive the square head of the lag screw, or by raising two parallel projections on the casting, one on each of the two sides of the hole for the screw and far enough apart to take in the head of the screw. In either case, the bracket and the screw were not rotatable upon each other when the head of the latter was sunk in the recess of the former provided for it; nor could the screw be turned by any other means than by turning the bracket, and this could not be done when the door was closed, because the horizontal extension of the bracket would be under the door. The two outside screws might be taken out, and still the bracket be held fast by the middle screw and the bottom of the door. But when the door stands open, and the end screws are removed, the central lag screw may be turned out by revolving the bracket until the head of the screw rises out of the recess, when it may be seized by a wrench. The bracket is attached by turning in the central lag screw until its head is engaged in the recess of the bracket, or driving it in, whereupon the process is finished by revolving the bracket until the latter is brought up to the side of the car, and thereupon turning in the end screws. All this, of course, while the door is standing open. Then

all is ready for sliding it to its closed position. The whole organization is illustrated by figures 2 and 4 of the drawings which are here inserted.



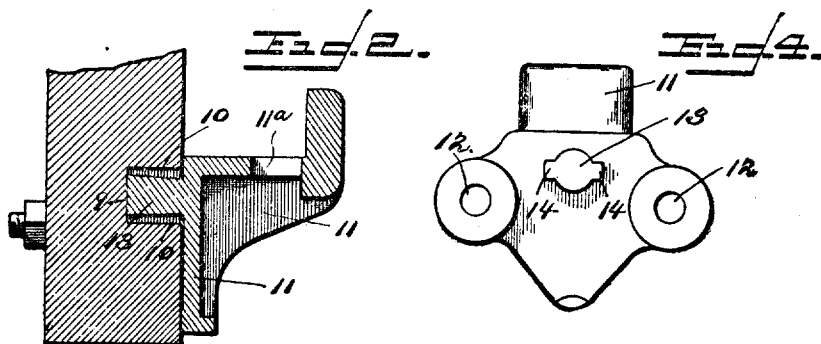
The claims are as follows :

1. The combination, with a sliding door, of a bracket and an attaching screw or bolt having nonrotative engagement with the bracket; said bracket having movable contact with a part of the structure in such manner as to prevent rotation of the bracket, substantially as set forth.

2. The combination, with a sliding door, of a guide bracket engaged and held against rotation by the door and a retaining screw or bolt having non-rotatable engagement with the bracket, substantially as and for the purpose described.

We think there is sufficient ingenuity in this to justify a patent, unless the device had been anticipated; and this is the next question to be considered. The earlier patent to Eubank disclosed one way by which the same result could be accomplished; that is, so attaching the bracket that its fastening was inaccessible when the door was closed. It appears to have been the first one to have accomplished this object. For this reason it embraced a wider range of equivalents than if it had followed other inventions attaining the same result. Nevertheless, Eubank could not usurp the whole field, but would subject all other devices for attaining the same result by employing the same or substantially equivalent means. To be substantially equivalent means, they must perform the same office by a similar organization and mode of operation. Given the problem of making inaccessible the means of attaching the bracket, he adopted this method of organization: He prepared the place for inserting his fastening by boring a hole into the side of the car, and on two opposite sides of the hole made slots extending to the bottom of the hole. Then on the inner side of the bracket he erected a stud, having flanges or projections on the further end adapted to fit the slots at the sides of the hole in the side of the car. These flanges had a narrow beveled edge on one side. In order to effect the attachment, the stud on the bracket was pressed into the hole; the flanges on the further end of the stud passing in through the slots at the sides of the hole. Then, when the stud had reached the bottom of the hole, he turned the bracket a quarter way around. The flanges on the stud, passing out of the slots, entered the wood of

the car sill; the operation ending when each of the flanges was a quarter way around a circle. The bracket was in its place and anchored to the side of the car, and when the door was closed the bracket was immovable, and was held so in precisely the same way as in Hill's patent. Supplementing this description with figures 2 and 4 of the drawings of Eubank, which we here insert, we presume no difficulty will be found in understanding the patent.



In the Eubank patent, the stud was integral with the bracket, and so was not rotatable upon it. In Hill's patent the bracket and the screw were not rotatable upon each other. They were in two parts; but in their application and effect, when applied, they performed the same office and by the same mode of operation. There was no invention in making two parts or two pieces of the integral member as employed by Eubank. *Bundy Mfg. Co. v. Detroit Time Register Co.*, 94 Fed. 524, 36 C. C. A. 375; *D'Arcy v. Staples & Hanford Co.*, 161 Fed. 733, and the cases cited at page 742, 88 C. C. A. 606. The threads of the screws of Hill's patent performed the same office as the flanges on the stud of the Eubank patent, and are in substance a multiplication of those flanges. Thus the stud with its flanges are in principle the equivalent with the stem of the lag screw and its threads, and in combination with the bracket make the same or an equivalent organization. In both inventions the same result was accomplished. Slight differences no doubt exist, as must always exist where one device is not a mere copy of another. There is more similarity between these two forms than there is between the combination of Hill's patent and that of the defendants which is alleged to infringe it. It seems to us that the Hill device was an infringement of Eubank's, and, if it was so, the latter was an anticipation of Hill's.

Having reached this conclusion it is unnecessary to consider the structure of the bracket in prior use on the Louisville & Nashville Railroad, which we regard as more remote than Eubank's patent, or the question of infringement.

The judgment must be affirmed, with costs.

WARD v. MERRITT & CO.

(Circuit Court, E. D. Pennsylvania. November 18, 1909.)

PATENTS (§ 328*)—INFRINGEMENT—METAL JOINT FOR FENCES.

The Ward patent, No. 502,840, for a metal joint for fences, *held* infringed by one structure made by defendant, and not infringed by another.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 328.*]

In Equity. Suit by Joseph T. Ward against Merritt & Co. Decree for complainant.

John P. Croasdale, for plaintiff.

Ernest Howard Hunter, for defendants.

J. B. McPHERSON, District Judge. The plaintiff is the inventor and owner of the metal joint for fences that is described in letters patent No. 502,840. The object of the invention is "to afford a simple and durable connection and support for rods, bars, or rails where they cross the posts of fences." This object is attained by the following device:

"The sleeve or joint is a hollow pipe or tube, bulging midway between its two extremities, with a rectangular hole or slot cut vertically through this bulging or enlarged part and at right angles to the longitudinal axis of said pipe or tube; said transverse rectangular hole being larger at the bottom, E, than at the top, A, to permit play of the post within this hole in cases of grades—that is, to allow the post always to remain perpendicular, whether the bars or rods are horizontal or not. One rod or bar, passing into and part way through the hole, B, of this sleeve, passes also through the post, thus locking post, sleeve, and bar together. The other rod or bar passes into hole B at other end of sleeve until it meets the bar coming through from opposite end. * * *

"The rods, F and G, do not meet at or near the point of intersection of the sleeve and the post, so that when the sleeve rusts through just at the outer line of contact of sleeve and post at H (which frequently occurs by reason of water accumulating there), the rod does not fall, as it would, were the end also at this point; that is to say, in case of such breaking of the sleeve at point of contact, H, the rod, by passing beyond this point, H, sustains the piece of the broken sleeve, and thus the other rod resting therein."

The present suit involves claims 2 and 3, which are as follows:

"2. The combination with a post of a sleeve or joint with longitudinal tube for rods, and rods meeting within the sleeve at a point an inch more or less to one side of post, substantially as described.

"3. The combination with a post of a sleeve or joint with longitudinal tube for rods and transverse slot for post, and rods meeting within the sleeve at a point an inch more or less to one side of the post, substantially as described."

The case does not seem to require discussion. The answer admits infringement, and the testimony proves it beyond doubt. This statement, however, applies only to defendants' joint No. 1; for in my opinion joint No. 2 does not infringe the patent in suit. Whether it offends against any other patent owned by the plaintiff is not now in question. It does not infringe the foregoing combination claims, because it does not employ one of the elements of the combination, or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

its substantial equivalent, namely, the specific construction described in the clause, "rods meeting within the sleeve at a point an inch more or less to one side of post." On the contrary, it prevents such meeting by interposing a closed stop or solid diaphragm at a different point, H, the intersection of the sleeve and the post, so that neither rod can go beyond that point, and therefore the advantages set forth in the second paragraph above quoted from the specification cannot exist.

As the validity of the patent in suit is conceded, a decree in the usual form may be entered in favor of the plaintiff.

S. MORGAN SMITH CO. v. ROCKINGHAM POWER CO. et al.

KNICKERBOCKER TRUST CO. v. SAME.

(Circuit Court, W. D. North Carolina. September 24, 1909.)

CLERKS OF COURTS (§ 54*)—COMPENSATION—COMMISSIONS—STATUTES.

Rev. St. § 828 (U. S. Comp. St. 1901, p. 635), provides that the clerk may be paid for receiving, keeping, and paying out money, pursuant to any statute or order, 1 per cent. on the amount so received, kept, and paid. *Held*, that such section was applicable only to money which the clerks were required to receive, keep, and pay out pursuant to statute or order of court, and did not entitle such clerks to commissions on funds paid into the hands of court commissioners and disbursed by them, without at any time being in the custody or under the control of the clerks.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 77; Dec. Dig. § 54.*]

Suit by the S. Morgan Smith Company against the Rockingham Power Company and another, in which the Knickerbocker Trust Company filed a cross-complaint against the Rockingham Power Company and others. On exceptions by the Knickerbocker Trust Company and others to commissions taxed by the clerk in the cost bill in his own favor. Exceptions sustained.

O. A. Moore, for the motion.

PRITCHARD, Circuit Judge. This is a motion heard on the exception to the bill of costs, which is filed by the attorneys of the Knickerbocker Trust Company, S. Morgan Smith Company, and W. H. Calvert. The exception is embraced in the following language:

"The complainant and cross-complainant herein except to the bill of costs taxed by the clerk, in that the clerk has allowed himself commissions of \$508.60 on \$50,860.60, required by the decree to be paid to the commissioners."

This exception involves the question as to whether the clerk is entitled to a commission on funds paid into the hands of the commissioners and disbursed by them; the fund at no time being in the custody or under the control of the clerk.

Section 828 of the Revised Statutes (U. S. Comp. St. 1901, p. 635) provides that the clerk may be paid:

"For receiving, keeping and paying out money, in pursuance of any statute or order, one per centum on the amount so received, kept and paid."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This statute is intended to authorize the payment of commissions to clerks when they are required to receive, keep, and pay out money in pursuance of any statute or order of the court. In this instance it appears that the amount upon which a commission is sought to be collected by the clerk was never paid to the clerk; but, on the other hand, it was paid to the commissioners, and it is provided by the decree that the same shall be disbursed by them.

There are a number of decisions bearing upon this question. In the case of *Michigan Central R. Co. v. Harsha*, Clerk, 134 Fed. 217, 67 C. C. A. 145, the Circuit Court of Appeals for the Sixth Circuit passed upon this question; Judge Lurton rendering the opinion. In discussing this phase of the question the court said:

"This sum of \$424,000 was never received, kept, or paid out by the clerk. It was never subject to his check, and he never became in any way responsible for it. But it is said that, when it was paid by the master in chancery into the New York depository, it was within the 'registry' of the court and constructively within the possession of the clerk. If being subject to the order of the court is to be within the 'registry' of the court, then this money, from the time it was paid into the hands of the master in chancery, was within the 'registry' of the court. But being subject to the order of the court does not necessarily place it in the keeping of the clerk, either actually or constructively. To entitle the clerk to this commission of 1 per cent., it must be paid to him or be subject to his order, so that he becomes responsible for its keeping and payment. The test is: Did the clerk receive, keep, and pay this fund over to the railroad company? The answer is: He did not. The court described the money as 'in the hands' of Mandell, and it was withdrawn upon Mandell's indorsement, and was by Mandell paid over to the railroad company. It was never actually or constructively within the clerk's custody, or paid out by him.

"4. The suggestion that he did have the constructive possession of the collateral bonds of the railroad company, and paid them out when he returned them to the railroad company, and that for this service the clerk is entitled to the commission of 1 per cent., has nothing in it. Section 995, Rev. St. (U. S. Comp. St. 1901, p. 711), supra, only requires that 'money' shall be deposited as therein prescribed, and section 828, supra, only allows the payment of 1 per cent. on 'moneys' received, kept, and paid out. This is recognized in *Thomas v. Chicago, etc., Ry. Co.* (C. C.) 37 Fed. 548, 550.

"5. We know of no authority for the allowance of such a commission outside of the statute. The clerk's only service, aside from those matters for which he has asked and been allowed \$50 without contest, was in keeping the key to a vault rented by the railroad company in which nonnegotiable securities were deposited. This vault could not be opened without the order of the court, and the bonds could not be collected or disposed of without a like order.

"The order must be reversed, with directions to set aside the judgment, and to render judgment of \$50.85, the amount of the two items uncontested, and to dismiss the petition in so far as any further fees, allowance, or costs is prayed."

This view is sustained in *Johnson v. Southern B. & Loan Ass'n* (C. C.) 95 Fed. 922; also *Leach v. Kay* (C. C.) 4 Fed. 72.

Under these circumstances, I am of the opinion that the exception filed herein should be sustained, and an order will be entered to that effect.

THE BEE.

(District Court, S. D. New York. November 5, 1909.)

COLLISION (§ 36*)—EVIDENCE.

Collision between the steamtug Bee, bound up the East River, and the gasoline tug Magnet, bound down the river. The Magnet was on the Bee's starboard hand and the latter *held* in fault for failure to navigate according to the starboard hand rule.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 33; Dec. Dig. § 36.*

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]
(Syllabus by the Judge.)

In Admiralty. Action by W. Dixon Ellis against the steamtug Bee to recover for injury to libellant's tug in collision. Decree for libellant.

Harrington, Perkins & Englar, for libellant.
Alexander & Ash, for claimant.

ADAMS, District Judge. On the 19th of February, 1908, about 7 o'clock p. m., there was a collision between the libellant's gasoline tug Magnet and the steamtug Bee, in the East River somewhat above the Brooklyn Bridge.

The libel alleges that the Magnet was bound, light, from Newtown Creek for Edgewater, New Jersey, and proceeded down the East River in about the center; that when she reached a point below Fulton Ferry, the Bee was seen coming up the river from Buttermilk Channel, showing both side lights; that the Magnet at this time was shaping her course to round the Battery and her heading was such that she displayed to the Bee her red light only; that she blew a signal of one whistle and held her course but that the Bee responded with a signal of two whistles, whereupon the Magnet immediately blew alarms and again gave a signal of one whistle; that the Bee made no reply to the Magnet's second signal of one whistle, but continued on changing her course somewhat toward New York; that upon observing this, the Magnet again sounded alarms and blew one whistle, but the Bee made no reply and continued on with unabated speed, without change of course; that realizing that collision was then inevitable, the master of the Magnet stopped and reversed his engines in an effort to throw the stern of the Magnet away from the Bee, to ease the blow, but the Bee kept on and struck the Magnet, the bow of the former penetrating the port side of the Magnet a little aft of amidships, causing damages estimated at \$2,500. The main charges of fault were: that the Bee had no competent lookout; that she failed to keep out of the way of the Magnet, the vessels being on crossing courses and the Bee having the Magnet on her own starboard hand; that the Bee failed to give proper signals, to heed the signals given by the Magnet, and that the Bee failed to stop and back in time to avoid the collision.

The Bee's answer alleges that she left South Brooklyn light, bound for the foot of Clinton Street, East River, and entered the river

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

through the Buttermilk Channel and proceeded a little on the Brooklyn side of mid stream; that as she was going up the river and when she had reached a point somewhat above Catharine Street, she made out ahead two ferryboats crossing the river, one bound from the foot of Catharine Street to her destination in Brooklyn and the other in the contrary direction; that not deeming it advisable to cross ahead of either of said boats, the tug slowed down, put her wheel to starboard, headed toward the New York docks and waited for them to pass; that as the boats drew apart, she made out the lights of a vessel which subsequently proved to be the Magnet off her starboard bow, well up stream from her; that the Magnet was then exhibiting to the Bee her red, green and bow lights; that in this situation the Bee blew a signal of two whistles to the Magnet but the latter made no reply and instead of complying with the signal of the Bee, she sheered to starboard shutting in her green light; that the Bee immediately blew an alarm signal, stopped, reversed and blew a signal of three whistles, indicating that her engines were in a reverse motion; that notwithstanding these signals given by the Bee, the Magnet came down the river at a high rate of speed and brought her port side aft in contact with the bow of the Bee; that at the time of collision the Bee had overcome her headway and had commenced to go astern. The principal charges of fault against the Magnet were: that she did not maintain a proper lookout, did not reply to the signals of the Bee or give proper signals, did not have a proper and sufficient whistle, did not reply to the Bee's signal of two whistles and sheer to starboard, was traveling at too high a rate of speed and did not stop and back in time.

The testimony on the part of the Magnet with respect to the place of collision is vague and uncertain and doubtless the testimony of the Bee that it was above the bridge on a line between the different slips of the Catharine Street ferry is correct but this does not establish any fault on the part of the Magnet. It was simply a mistake as to locality, unimportant in view of what was developed from the Bee in regard to the occurrences.

The master of the Bee said that when he discovered the Magnet, after the Catharine Street ferryboats had passed each other, the Bee was heading toward New York, showing the Magnet her green light and the latter, then about 700 feet away, was showing to the Bee both side lights. He admitted that at this time the courses of the vessels were crossing and that he had the Magnet on his starboard hand. He then blew a signal of two whistles and claimed it was the duty of the Magnet to answer with a similar signal and starboard, allowing the Bee to cross her bow. This he said the Magnet could have safely done, if she had stopped, and there would have been no collision. According to the statements of the master of the Bee, it was a clear case for the application of the starboard hand rule and his testimony that the situation was brought about by the ferryboats crossing ahead does not tend to relieve him, because when he saw that they were likely to make trouble for him, he should have stopped and waited until they were out of the way, instead of changing his heading toward New York as he says he did.

As it appeared to the master of the Magnet, it was a case for the application of the starboard hand rule and he navigated properly in that view. It has been claimed by the master of the Bee that the vessels were so close together, it was practically impossible for the Bee to navigate to the port of the Magnet. If he had tried to perform that manoeuvre and failed, or if he had immediately stopped and reversed, it would lend some strength to the claim, but when, on a contention that giving a signal of two whistles and starboarding across the Magnet's bow was correct navigation, he deliberately did what the law condemns, and his vessel must suffer the consequences.

The Bee's failure to act in conformity with the starboard hand rule so plainly and completely covers the situation, that further discussion is unnecessary. I do not see any fault on the part of the Magnet. Her signal would no doubt have been sufficient if the Bee had been paying proper attention. The Magnet kept her course and speed until collision was imminent, when she stopped and reversed.

Decree for libellant, with an order of reference.

HENRY W. BROWN & CO. v. NORWICH & L. ACCIDENT INS. ASS'N.

(Circuit Court, E. D. Pennsylvania. November 11, 1909.)

No. 598.

1. MASTER AND SERVANT (§ 40*)—ACTION FOR BREACH OF CONTRACT—EVIDENCE.

In an action to recover damages for the alleged wrongful termination of a contract of employment by the employer, evidence that both parties anticipated before the contract was made that plaintiff's net earnings thereunder would be small for the first year or two was admissible as bearing on the question of damages.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 40.*]

2. PRINCIPAL AND AGENT (§ 41*)—ACTION FOR BREACH—INSTRUCTIONS—MEASURE OF DAMAGES.

In an action for breach by the principal of a contract of agency under which plaintiff's profits depended on the amount of business done, an instruction that the volume of business done while the contract was in force might be considered in estimating profits reasonably to be anticipated in the future if the contract had been continued in force, together with all other evidence tending to explain why such volume was not greater or less, was not erroneous.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 41.*]

Action by Henry W. Brown & Co. against the Norwich & London Accident Insurance Association. On motion by defendant for new trial. Motion overruled.

Burr, Brown & Lloyd, for plaintiffs.

Maurice W. Sloan, for defendant.

J. B. McPHERSON, District Judge. The letter of April 8, 1907, to which the defendant objected at the trial, and continues to object,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was admitted (to use the words of plaintiff's offer) "as tending to prove knowledge on the part of the defendant company of the fact that this contract, which was shortly afterwards made, was of such a character that during the first year or two of the contract the expenses to the plaintiff would be large and the returns small, as tending to prove, therefore, that the contract was in that respect a peculiar one, and that the plaintiff is not limited in his recovery to the amount that he earned during the first year or so of the contract; the measure of damages being quite important." It did not in the slightest degree contradict the agreement for whose breach the suit was brought, and I am still of the opinion that it was relevant evidence. It certainly helped to show what both parties anticipated would be the course of events, and what might reasonably be expected from their common enterprise in the later years of the term during which the contract was to run.

That the measure of damages was correctly explained to the jury will sufficiently appear, I think, by reference to *Lazier Gas Engine Co. v. Du Bois* (C. C. A., Third Circuit) 130 Fed. 834, 65 C. C. A. 172. It was there held that:

"Where, in an action for breach of a contract to manufacture and sell certain machinery, plaintiff showed that the average profits made during the 16 months in which the contract was performed was \$911 per month, a verdict allowing plaintiff profits at that rate during the 8 remaining months of the contract period after breach was not objectionable, on the ground that such profits were remote and speculative."

In the present case the jury were instructed that the plaintiff might recover such profits as were reasonably to be anticipated if the defendant had not put an end to the contract; and in considering that question they were directed to take into account the volume of business that had already been done while the contract was in force, together with all the evidence that tended to explain why such volume was not greater or less, and also with whatever evidence bore upon the question whether such volume would in all probability have increased or diminished in the future. They were restricted to the evidence, and forbidden to guess at what the plaintiff might have made. I still believe these instructions to be correct, and shall therefore adhere to them until I am advised that they were wrong. The verdict seems to be just in principle and moderate in amount.

The motion for a new trial is overruled, and judgment may be entered on the verdict.

THE HELYS.

(District Court, S. D. New York. November 12, 1909.)

ADMIRALTY (§ 8*)—JURISDICTION—VALIDITY OF MORTGAGE.

Where a libel for the possession of a vessel shows that the action, which it institutes, involves a mortgage, the validity of which the court would be required to pass upon, and to try questions of fraud and mis-

*For other cases see same topic & § NUMBER in Dec. & Am.Digs. 1907 to date, & Rep'r Indexes

take, jurisdiction will not be entertained for the purpose of ousting the mortgagee from possession.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 125; Dec. Dig. § 8.*]

(Syllabus by the Judge.)

In Admiralty. Action by Frank E. Crosby and others against the gasoline launch Helys. Richard H. Gillespie, claimant, excepts. Exceptions sustained.

Dennis F. O'Brien, for libellant.

Cushman & Dewell, for exceptions.

ADAMS, District Judge. The libellants Frank E. Crosby and others allege that they are the true and lawful owners of the gasoline yacht Helys and that she has since the 21st of October, 1909, been wrongfully withheld from them by one Richard H. Gillespie, on alleged ground of title. The third allegation of the libel is:

"Third: That the said claim of title to the possession of the said launch is entirely false and invalid, the said title depending upon and being referred to a certain mortgage made by the libellants hereto to the said Richard H. Gillespie, as mortgagee, on or about the 6th day of July, 1909, which mortgage was made upon fraudulent misrepresentations and it was fraudulently made and executed in failing to conform to the provisions mutually agreed upon and was in fraud of the rights of the libellants and that therefore the libellants aver is utterly void."

They then pray that the said Gillespie may be cited to show cause why possession shall not be delivered to them.

The claimant, Gillespie, appeared and excepted to the libel as follows:

"First: In that the court is wholly without jurisdiction in the premises and in this action.

Second: In that the libel in this action does not state facts sufficient to constitute a cause of action."

While the claim is nominally for possession, the action obviously involves the consideration of the disputed mortgage. The libellants claim in their brief:

"This whole transaction was on maritime contract of sale and the question involves a maritime mortgage and the libellants are merely endeavoring to preserve their legal title under the contract of sale and are therefore clearly within their rights in bringing this action within the jurisdiction of this court."

So far, however, as appears from the libel, the question involves a mortgage of the vessel and the court in order to determine the action would be required to adjudicate upon the validity of the mortgage and try the questions of fraud and mistake. Gillespie is apparently rightfully in possession and until these questions are determined adversely to him, should continue in possession. It is well settled that admiralty will not entertain jurisdiction of a matter of this kind. *The G. Reusens* (D. C.) 23 Fed. 403; *The Amelia* (C. C.) 23 Fed. 406.

The exceptions are sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 173 F.—59

CHICAGO & A. R. CO. v. INTERSTATE COMMERCE COMMISSION.

ILLINOIS CENT. R. CO. v. SAME.

(Circuit Court, N. D. Illinois, E. D. June 29, 1908.)

Nos. 29,115, 29,116.

CARRIERS (§ 32*)—INTERSTATE COMMERCE—DISCRIMINATION BY RAILROAD—
DISTRIBUTION OF CARS TO COAL MINES.

It is a charter duty of railroads to provide cars, as well as tracks and locomotives and in the distribution of cars by an interstate railroad company among coal mines on a percentage basis in times of shortage of cars, private cars owned by shippers or consignees, which have no right upon the company's tracks except by virtue of its charter, must be considered as leased to it and as forming a part of its commercial equipment, and while the owner is entitled to the exclusive use of such cars, they are to be counted against the mine as a part of its percentage in the distribution, and this even though the particular owner does only an intrastate business; the carrier having no right under the interstate commerce law to discriminate in favor of local commerce, as against interstate or foreign commerce. The same rule also applies to fuel cars of foreign railroad companies, sent to the mines to be loaded with coal and transported to their lines for their own use; the fact that they are also common carriers making no distinction between them and other consignees. But cars of the distributing carrier used for its own fuel supply which are loaded and delivered to it at the mine tipples, are not engaged in transporting a commodity in commerce, but in the operating service of the company, and not to be counted in its distribution of cars as a part of its commercial equipment, although they are to be counted in reduction of the percentage to which the mine loading them is entitled which is not based on its output as a producer of coal, but as a shipper, and should be fixed by the quantity it offers for transportation in commerce.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 32.*

Duties and liabilities of carriers as to furnishing facilities for transportation, see note to *Harp v. Choctaw, O. & G. R. Co.*, 61 C. C. A. 414.

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to *Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co.*, 94 C. C. A. 230.]

In Equity. Suits by the Chicago & Alton Railroad Company and by the Illinois Central Railroad Company against the Interstate Commerce Commission. Injunction granted against enforcement of a certain part of an order of the commission.

These causes are substantially alike and were submitted together for final decree upon bill and answer.

Complainants are interstate common carriers. Along the line of each in Illinois are mining districts within which the operators are dependent upon one or the other of these carriers to get to market their product in excess of local consumption.

Following are the classes of cars involved: (1) Coal cars owned by complainants and used by them in hauling coal for shippers generally; (2) private cars owned by coal mining companies or by their customers and used in conveying coal from the mines to the customers; (3) fuel cars owned by foreign railroads and used on complainants' roads in hauling coal from the mines to the delivery points for the foreign railroads; (4) fuel cars owned by complainants and used by them in carrying coal from the mines to their own coal chutes. Complainants purchase no coal except for their own use.

The greater part of the year there is more equipment at hand than there is coal to haul. But during the winter months a car shortage generally oc-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

curs. Prior to April 13, 1908, complainants were accustomed to deal with a shortage of coal cars in this way: They rated each mine according to the relation its average producing capacity bore to the average producing capacity of the district in which it was located, and they distributed to each mine its pro rata share of the available equipment of class 1, above enumerated; but they did not count or in any way take into consideration the available equipment of classes 2, 3, and 4.

On April 13, 1908, the Interstate Commerce Commission, in a proceeding duly pending, made the following order:

"It is ordered that the defendants, the Chicago & Alton Railroad Company, the Chicago, Peoria & St. Louis Railway Company of Illinois, and the Illinois Central Railroad Company, be, and they severally are hereby notified and required, on or before the 1st day of July, 1908, to cease and desist, and during a period of at least two years thereafter to abstain, from maintaining and enforcing the present practice or regulation of failing or refusing to make any account of foreign railway fuel cars, or of leased or so-called private cars, or of their own fuel cars in the distribution of coal cars for, or affecting, interstate shipments of coal among the various coal operators along their lines.

"It is further ordered that said defendants be, and they severally are hereby, notified and required to establish, on or before said 1st day of July, 1908, and during a period of at least two years thereafter to maintain and enforce, a practice or regulation taking into consideration system cars, foreign railway fuel cars, leased or so-called private cars, and cars used for their own several fuel supplies in determining the distribution of coal cars among the various coal operators along their lines for, or as affecting, interstate shipments of coal; and if the number of foreign railway fuel cars, or leased or so-called private cars, or carrier's own fuel cars, or any or all of them, is less than the percentage or proportion of the mine to which such cars are consigned, leased, or assigned, then such mine must be given all the foreign railway fuel cars consigned to it, and all the cars owned or leased by it, and all the carrier's own fuel cars assigned to it, and a sufficient number of system cars to make up its proportion; but if the number of foreign railway fuel cars consigned to it, and the leased or so-called private cars delivered to it, and the carrier's own fuel cars assigned to it, is greater than its proportion, all such cars so consigned or assigned to it, or leased by it, must be delivered to it, and the available system cars must be divided among the other said coal operators on the basis of a changed percentage, because of the elimination of the mine or mines to which the foreign railway fuel cars, carrier's own fuel cars, or so-called private cars have been assigned; that is, the lessee of certain of said so-called private cars, and the consignee of foreign railway fuel cars, and the one to whom carrier's own fuel cars are assigned, must be given full and exclusive use of them, but must not be given, in addition thereto, a division of the system cars, except when its supply of the so-called private cars and of foreign railway fuel cars and of carrier's own fuel cars is less than its proportion of the total of available cars, including system cars, foreign railway fuel cars, carrier's own fuel cars, and so-called private cars."

Complainants, contending that their method of distribution is right, ask to have the enforcement of the commission's order enjoined.

The commission's report is found under the title of *Traer v. Chicago & Alton R.R. Co. et al.*, 13 *Interst. Com. Rep.* 451. Other cases bearing upon the questions herein involved are *Ry. Com. of Ohio et al. v. Hocking Valley Ry. Co. et al.*, 12 *Interst. Com. Rep.* 398; *U. S. ex rel. Pitcairn Coal Co. v. B. & O. Ry. Co. (C. C.)* 154 *Fed.* 108; *Logan Coal Co. v. Pa. Ry. Co. (C. C.)* 154 *Fed.* 497.

Winston, Payne, Strawn & Shaw, for complainant Chicago & A. R. Co.

J. M. Dickinson and W. S. Kenyon, for complainant Illinois Cent. R. Co.

L. A. Shaver, for defendant.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

I. The So-Called Private Cars.

BAKER, Circuit Judge (after stating the facts as above). A charter duty of railroads is to provide cars, as well as tracks and locomotives. So far as the shipping public is concerned, it is a matter of indifference whether railroads discharge this duty by purchasing or by renting or by borrowing cars. But since no vehicle for transporting commodities in commerce can have any rights upon the tracks of a public carrier except under and by virtue of the carrier's charter, a shipper who is not also a lessor or lender of cars is interested in seeing that the carrier abstains from discriminations in conditions of service on account of the ultimate ownership of any of the instrumentalities used by it in the transportation of commodities in commerce. A shipper who owns cars is not entitled on that account, or on any account, to a preference in rates or in promptness of service. If his cars are used, all that he is entitled to is to be paid the just value of the use, whether measured by mileage or otherwise. If he has a contract with the carrier that calls for more, that contract is pro tanto void. In our judgment, therefore, the so-called private cars, if accepted by an interstate carrier for use by it in transporting a commodity in commerce, must be treated as constituting a part of the carrier's available commercial equipment.

It appears that certain shippers who own cars do no business outside of Illinois. In their behalf it is suggested that, even if private cars used in interstate commerce must be counted, the complainant carriers cannot be required to take into consideration the cars of shippers who do only an intrastate business.

Where federal authority exists, it is paramount. It exists here by virtue of the fact that complainants are interstate carriers. No practices on their lines can be permitted which favor local commerce at the expense of interstate and foreign commerce. In case of a conflict with a rule for the protection of interstate commerce, which has been duly made by the Interstate Commerce Commission, local Constitutions, statutes, orders of Railway Commissions, and regulations of the carriers, all must give way.

II. Fuel Cars of Foreign Railroads.

The fact that these railroads are themselves common carriers has nothing to do with the case. Here they stand as mere consignees of a commodity that is transported in commerce by an interstate common carrier, which is forbidden to prefer them in any way above other consignees or shippers. In so far as complainants receive upon their roads the fuel cars of foreign railroads, they must count them as part of their own available commercial equipment.

III. Fuel Cars of Complainants.

Coal is brought by complainants from mines along their roads under contracts whereby the coal is delivered to them at the mine tipples. Some is there loaded directly into the tenders of the locomotives. The remainder is taken in cars to the railroads' coal chutes. All is for the complainants' own consumption.

Commerce in these instances ends at the tipples. From there on, whether the coal goes directly or indirectly to the tenders, there is no consignor, no consignee, no shipper, no common carrier, no freight, no vehicle transporting a commodity in commerce. These cars are withdrawn from complainants' available commercial equipment, just as are flat cars while being used to distribute gravel for ballast. It is erroneous, therefore, to require complainants, in distributing their available commercial equipment among their shipping patrons, to take account of cars that are being used in hauling their own fuel.

But this does not mean that these cars do not affect the problem of an equitable distribution of commercial equipment. The mine operators are objects of interest under the interstate commerce law, not as diggers of coal, but as shippers who tender a commercial product for transportation by interstate common carriers. The basis, therefore, on which the mines in a district should be rated, is not their average output as a physical question, but the average output which they respectively tender for transportation in commerce. If two mines have capacities of producing 1,000 tons each per day, they should have the same rating if they are each offering the whole amount for transportation in commerce. But if one of these mines, by reason of exhaustion of a vein, or flooding of a shaft, or the operator's local consumption of his own fuel, can and does offer for transportation in commerce only 500 tons per day, equity requires that the carrier should rate it at only one half of the other mine. And we perceive no just ground for a difference, if the mine's diminished capacity comes from the carrier's act. While the carrier's cars that are being employed in hauling its own fuel are not a part of the available commercial equipment, yet the diminished capacity of the mine to tender coal for transportation in commerce should be taken into consideration, and computing the average number of the carrier's own fuel cars set out at a mine may be the easiest and surest way of gauging that mine's diminished capacity.

In our judgment, complainants are not entitled to relief against that part of the order which requires them to count the so-called private cars and the fuel cars of foreign railroads as available commercial equipment; but they are each entitled to an injunction against the enforcement of that part of the order which commands them to count their own cars that are being employed in hauling their own fuel as available commercial equipment, and against their being compelled to take such fuel cars into consideration, except as a means in determining the true capacities of the mines to tender coal to them for transportation in commerce.

Decrees will be entered accordingly.

In re HUDSON RIVER ELECTRIC POWER CO.

(District Court, N. D. New York. September 27, 1909.)

1. BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO ACT—NATURE OF CORPORATE BUSINESS—"MANUFACTURING"—"MERCANTILE."

A corporation engaged in generating electricity, transmitting it, and selling power or light to consumers, is neither a "manufacturing" nor a "mercantile" corporation within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025), and is not subject to adjudication as an involuntary bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4346-4357; vol. 8, p. 7716; vol. 5, pp. 4477, 4478.]

2. BANKRUPTCY (§ 60*)—"ACT OF BANKRUPTCY"—RECEIVERSHIP.

The appointment of temporary receivers for a corporation by a Circuit Court, under its general equity powers, in a pending suit which has not been heard, and in which there has been no adjudication of insolvency, does not constitute an "act of bankruptcy," under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 60.*]

For other definitions, see Words and Phrases, vol. 1, p. 118; vol. 8, p. 7562.]

3. BANKRUPTCY (§ 63*)—ACTS OF BANKRUPTCY—ADMISSION BY DEBTOR—CORPORATIONS.

Where a Circuit Court appointed receivers of the property of a corporation, and granted an injunction restraining its officers and agents from commencing or prosecuting any proceeding "involving in any way the property or property rights" of the corporation, or incurring or embarrassing the same, the subsequent adoption by the directors of a resolution confessing its insolvency and stating its willingness to be adjudged a bankrupt was a violation of the injunction, and unauthorized, and did not constitute an admission by the corporation, which constitutes an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 63.*]

4. BANKRUPTCY (§ 18½*)—CONFLICTING JURISDICTION.

Where a Circuit Court in a suit in equity has taken possession by its receivers of the property of a number of related public service corporations operated as one, and is continuing the business in the same manner, a District Court, as a court of bankruptcy, will not, on petitions against one or more of such corporations, make an adjudication of bankruptcy, and thus interfere with the possession and administration of its property by the Circuit Court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 18½.*]

5. BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO ACT—NATURE OF CORPORATE BUSINESS—"PUBLIC SERVICE CORPORATION."

An electric company, organized under the transportation law of New York, was engaged in transmitting and selling electricity for light and power to private consumers and street railway lines in a number of towns and villages, for which it had franchises. It also kept electrical supplies in store, which it sold chiefly to its consumers of electricity. It did not generate electricity, and had no plant for so doing, but purchased the same from other corporations, although it owned its own transmission lines and stations. *Held*, that it was a public service corporation, and not principally, if at all, engaged in trading or mercantile pursuits, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32

Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025), and was not subject to adjudication as an involuntary bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*]

6. BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO ACT—NATURE OF CORPORATE BUSINESS.

A corporation, organized under the transportation laws of New York, which owns and operates a plant for generating electricity, which it transmits by means of its own lines and sells chiefly to municipal corporations for power and light, and to railroad and traction companies for running cars, is not engaged principally in manufacturing, trading, or mercantile pursuits, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*]

7. BANKRUPTCY (§ 76*)—PETITIONING CREDITORS—PERSONS ENTITLED TO JOIN IN PETITION.

One who shipped goods to a corporation on its order, and billed and charged the same to said corporation, by which it was customarily paid, is not entitled to join in a petition in bankruptcy against another corporation merely because its stock was owned and its business controlled by the purchasing company, which fact did not make the latter an agent, even though by its directions the goods were shipped to the subsidiary company.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 76.*]

8. BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO ACT—NATURE OF CORPORATE BUSINESS—"ENGAGED PRINCIPALLY IN MANUFACTURING, ETC., PURSUITS."

A gas and electric company, organized under the transportation laws of New York, having a franchise to maintain pipes and wires in the streets of a village and a contract for lighting its streets, which manufactures gas and purchases or generates electricity, both of which it transports or transmits and sells to its customers, its electrical business exceeding its gas business in volume and revenue, is not "engaged principally in manufacturing, etc., pursuits," within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*]

For other definitions, see Words and Phrases, vol. 8, p. 7650.]

9. BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO ACT—NATURE OF CORPORATE BUSINESS.

A gas company, which makes, transports through pipes, and sells gas to special customers within a limited area, is not principally engaged in either manufacturing, trading, or mercantile pursuits, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*]

10. BANKRUPTCY (§ 72*)—CORPORATIONS SUBJECT TO ACT—PUBLIC SERVICE CORPORATIONS.

Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1025), does not include in the classes of corporations thereby made subject to the act public service corporations or quasi public service corporations, such as water, gas, or electric companies, operating under franchises.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 72.*]

What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank v. First Nat. Bank, 42 C. C. A. 4.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

11. **BANKRUPTCY (§ 78*)—INVOLUNTARY PROCEEDINGS—RIGHT OF RECEIVER TO CONTEST.**

Receivers appointed by a Circuit Court for the property of corporations, who are in possession of the property and conducting the business under orders of the court, have the right to contest proceedings in bankruptcy against such corporations.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 78.*]

12. **BANKRUPTCY (§ 91*)—INVOLUNTARY PROCEEDINGS—BURDEN OF PROOF.**

In involuntary proceedings in bankruptcy against a corporation, the burden rests on the petitioners to prove by a fair preponderance of evidence that the corporation is within one of the classes against which such proceedings are authorized by the bankruptcy act.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 91.*]

In Bankruptcy. Separate petitions in the matter of the Hudson River Electric Power Company, of the Hudson River Electric Company, of the Hudson River Power Transmission Company, of the Saratoga Gas, Electric Light & Power Company, and of the Madison County Gas & Electric Company, alleged bankrupts. Petitions dismissed.

See, also, 167 Fed. 986.

These are five independent proceedings, in a sense, and still the same determination that is reached in one should obtain in all for reasons stated. The main question is: Are the corporations involved subject to the bankruptcy law? As the same questions, on similar facts, not identical, are involved in each case, they will be considered together.

Abram J. Rose and George B. Curtiss, for alleged bankrupts (each case).

James A. Van Voast, for a creditor in each case opposing adjudication, except in the Saratoga Gas & Electric Co. case.

Wyman S. Bascom (H. C. Todd, of counsel), for petitioning creditors in Hudson River Electric Power Co. case.

Henry W. Williams (H. C. Todd and C. S. Lester, of counsel), for petitioning creditors in Hudson River Electric Co. case.

C. C. & C. S. Lester (H. C. Todd, of counsel), for petitioning creditors in Hudson River Power Transmission Co. and Saratoga Gas, Electric Light & Power Co. cases.

James Moore, for petitioning creditors in Madison County Gas & Electric Co. case.

RAY, District Judge. By purchase of stock and otherwise the corporations above named and the Hudson River Water Power Company, the Empire State Power Company, and the Ballston Spa Light & Power Company, eight corporations in all, came under one ownership and management. They, and the companies as a whole, were organized and combined to generate electricity and manufacture gas, and transmit and sell same to customers and consumers, in the main to corporations, municipalities, and railroads. Each was a public service corporation. Each was incorporated under the transportation laws of the state of New York. While engaged in this business, and under the one management, and on the 26th day of October, 1908, a bill in equity was filed in the Circuit Court of the United States for the Northern District of New York, the district of the residence of such corpora-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tions, and where they were carrying on business, alleging their insolvency, unwise and prodigal management, etc., asking the appointment of a receiver and the winding up of the corporations. Each corporation is heavily bonded, the bonds being secured by mortgages on the properties, and each has a large unsecured indebtedness. This bill was presented to the court some days before its filing, and an order to show cause and containing an injunction clause was issued.

On the 31st day of October, 1908, George W. Dunn, Charles W. Andrews, and Milton Delano were appointed receivers of the properties of said companies and authorized to continue the business; the allegation and general concession being that all the companies should be conducted as one, and the business conducted as one business enterprise, as formerly. Since the institution of these proceedings in bankruptcy, permission has been granted to the parties interested to intervene in that suit and commence and prosecute foreclosures of the mortgages referred to, and such foreclosures have been instituted and the receivership extended to such foreclosure suits. A careful inventory and appraisal of the various properties has been made by such receivers, and appraisers duly appointed, and from such appraisal it appears that the value of the properties involved are as follows:

Hudson River Water Power Company.....	\$3,049,642 40
Hudson River Electric Power Company.....	1,526,037 03
Hudson River Electric Company.....	852,803 89
Hudson River Power Transmission Company.....	681,199 21
Empire State Power Company.....	357,654 73
Saratoga Gas, Electric Light & Power Company.....	443,701 98
Madison County Gas & Electric Company.....	150,634 69
Ballston Spa Light & Power Company.....	56,024 29
Total	<u>\$7,117,698 22</u>

This puts no value on the various franchises owned by the various companies. The inventoried value of the companies involved in these bankruptcy proceedings, exclusive of franchises not valued, is \$3,654,-376.80. There are litigations pending and conflicting claims as to the ownership of properties, or some of them, or some parts thereof, as between these companies, and their liability to creditors, etc. If placed in bankruptcy, it is quite certain that several trustees would be elected, and that almost interminable litigation would arise between them. It would in such event be difficult, if not impossible, to continue to operate the companies as one whole until a sale, and the effect upon a pending effort to reorganize, protect all, so far as practicable, and continue this vast and important business, cannot be foretold.

While these considerations are not to affect or deter this court in making adjudications, if the companies are subject to the bankruptcy law, they are worthy of consideration in determining the real purpose of Congress in enacting that law and the character of the corporations that are subject to adjudication. If all corporations, including public service corporations and transportation corporations, had been included, the law would have been singularly and obviously incomplete and inefficient, without the addition of many provisions to take care of important situations, for instance one like the present. No petition in bankruptcy was filed against either corporation until after the commence-

ment of the equity suit referred to. The petition in bankruptcy filed against the Empire State Power Company, after the adjudication was opened by this court, was dismissed on evidence taken and the consent of the petitioning creditors.

The bill of complaint was filed, as stated, October 26, 1908, and an order to show cause why receivers should not be appointed issued, and made returnable October 26, 1908. Such order, duly served October 24, 1908, also enjoined and restrained each of said companies, their agents, servants, employes, and officers, from commencing or prosecuting either in the state or United States courts any action or proceeding involving in any way the property or property rights of either of said companies, or incumbering or embarrassing the same. On the 27th day of October, 1908, the day after such order to show cause, etc., was returnable, and several days after its service on the officers of the companies, the board of directors of the Hudson River Electric Power Company had a meeting and adopted the following resolution:

"Resolved, that this company is unable to pay its debts, and for that reason is willing to be adjudicated a bankrupt on that ground.

"Further resolved, that the secretary be authorized to certify a copy of the above resolution for such use as may be required."

A copy was furnished to aid a petition in bankruptcy filed by certain alleged creditors, who thereupon instituted this proceeding. It is based on that resolution and allegation of insolvency. It is evident that some one was endeavoring to thwart the purposes of the suit in equity and interfere therewith, and that the directors either intelligently consented and violated the spirit of the injunction or were induced to take such action ignorantly.

The Hudson River Electric Power Company was incorporated on or about December 28, 1903, under the transportation corporation law of the state of New York, the object of its formation being:

"To maintain, conduct, and manage, in the state of New York and elsewhere, the business of generating, manufacturing, producing, purchasing, selling, transmitting, and dealing in electricity; the use of electricity for light, heat, and power; the carrying on of the business of lighting by electricity, and using it for heat and power, in cities, towns, and villages within this state, and the streets, avenues, public parks, and places thereof, and public and private buildings therein, and for the purpose of such business to generate and supply electricity, and to make, sell, or lease all machines. * * * and to lay, erect, and construct suitable wires and other conductors, with the necessary poles, pipes, or other fixtures, in, on, over, and under the streets, * * * for conducting and distributing electricity," etc.

The evidence gives quite in detail what this corporation actually did, and it may be summarized fairly as follows:

In 1904 and 1905 it constructed a steam electrical plant at Utica, N. Y., for the generation of electricity, and was generating electricity and supplying same to one or more electric railroads. It acquired the site for same, constructed a tower transmission line from Ballston Spa to Amsterdam, N. Y., transmission lines from Utica to Clark's Mills, N. Y., substation building and apparatus at Amsterdam, and electrical machinery and substation at Oriskany, Frankfort, and Little Falls, N. Y., and acquired the Freeman property at Glens Falls to cover and protect water power and lands for a storage reservoir in Scandaga Valley,

N. Y. It has also acquired franchises in Johnstown, Little Falls, Ft. Plain, and Nelliston. This company also acquired and owns all the capital stock of the Hudson River Electric Company, 30,000 shares, 2,108 shares of the capital stock of the Saratoga Gas, Electric Light & Power Company, 7,000 shares of the capital stock of the Ballston Spa Light & Power Company, 2,900 shares of the Empire State Power Company, 47,947 shares of the issue of 50,000 shares of the Hudson River Water Power Company, and the capital stock of the Madison County Gas & Electric Company, 1,820 shares, common stock. In April, 1905, after it had acquired these interests, or most of them, it took over the keeping of the books of all the companies, and its officers became the managing and controlling officers of all the companies.

Considered as a whole, as one corporation and business enterprise, the evidence shows conclusively and beyond all doubt that the principal business was generating electricity and transmitting it to consumers. The Hudson River Electric Power Company had a store in the city of Albany, with two employés, where it kept electrical supplies issued to the other companies as required. This company, from the opening of this supply store in 1905, to November 1, 1908, delivered supplies to the other companies in carrying on the business to the value of \$426,376.17, viz.: Hudson River Water Power Company, \$8,645.82; Ballston Spa Light & Power Company, \$10,764.04; Hudson River Power Transmission Company, \$2,301.41; Hudson River Electric Company, \$54,102.77; Saratoga Gas, Electric Light & Power Company, \$23,728.66; Empire State Power Company, \$124,559.01; Madison County Gas & Electric Company, \$20,330.06; for its own use, \$132,200.68; and for use in general offices of the companies and prorated to all, to the value of \$2,261.09. The gross sales and delivery of electrical energy by the Hudson River Electric Power Company for the 12 months of 1907, from its own plant, were \$153,332.96, and for the first 10 months of 1908, \$136,945.72. The total gross sales of electrical energy by such company and the subsidiary companies (the others named) for the 12 months of 1907, were \$1,124,514.51, and for the first 10 months of 1908, \$889,826.85. The Hudson River Electric Power Company owned no gas plant, except in the way mentioned, and in that way controlled the gas plants of the Saratoga Gas, Electric Light & Power Company and the Madison County Gas & Electric Company.

The cost of the Utica plant was \$950,000, and of the tower transmission line from Ballston to Amsterdam \$250,000, including its other transmission lines. This company was engaged entirely in furnishing the public street lighting and the Utica & Mohawk Valley Railroad Company electrical power. It did no private lighting. Having certain of the farm properties on hand, purchased to gain and control the water powers, it rented some of them, deriving a rental of \$1,200 to \$1,500 per year. The store in Albany was simply a distributing warehouse. This company, having control of all the companies, and running them as one whole and as a single business, established this to enable it to purchase large quantities of material cheaper than if bought in small lots. When the management put supplies, etc., into the plant of a company, it charged up the cost to that company.

The bankruptcy law (Act July 1, 1898, c. 541, § 4, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1025]) provides:

"Who may Become Bankrupts. (a) Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

"(b) Any natural person, except a wage earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts.

"The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a state or territory or of the United States."

If we assume that generating electricity is manufacturing, and that transporting and selling it is a mercantile pursuit, we may say that this company was engaged principally in manufacturing and mercantile pursuits and is subject to be adjudicated a bankrupt, if public service corporations of this kind are subject to the law at all. I am of the opinion that generating electricity is not manufacturing, and that transmitting electricity over lines of wire to the consumer and delivering it for a consideration is not a mercantile pursuit, within the meaning of the bankruptcy act.

Electricity is a force of nature; but, so far as I know, or am informed, no one is able to take materials and by combining them and operating on them, producing chemical changes or otherwise, produce therefrom electricity. We are able to gather it, store it temporarily, measure it, apply it by mechanical means, cause it to run in currents, and by interfering with such currents cause great heat and light, and exert mighty force in moving machinery and railroad trains, etc. But, so far as known, we cannot manufacture it. If by means of exciters, generators, so called, etc., operating by steam engines heated by coal or wood, we get electricity, we obtain the same result when we operate all these by water power or any other power. We do not transform anything used in generating electricity into electricity. The coal is burned in running the machinery; but it is not, nor is any part, converted into electricity. The water turns the wheels, but passes on without diminution or change. Do we gather it from the air or from the earth? If so, we simply separate a force of nature, an existing material, it may be, from other material things with which it is mixed, or by which it is surrounded, and then confine, store, measure, and use it. We do not manufacture it. So far as known, we do not change its form in any way. Its shape, form, constituent elements, abiding places, are unknown. We know some of the things it will do, its manifestations. We generate, but do we manufacture, electricity?

Gathering electricity from earth or air is like mining, but not mining. In mining coal, or lead, or gold, or silver, we find these things in the earth, surrounded or mixed with many other things. We separate the coal or metal from its surroundings by digging, picking, by

the application of water or mechanical means, and so gain control of the unmixed coal or metal; but we do not manufacture it. This was decided by the courts, and thereupon the bankruptcy law was amended, by expressly including mining corporations in the section quoted. This was a legislative declaration that to do what I have described is not manufacturing, within the meaning of the law. Within the authorities the generating of electricity is not manufacturing. *People ex rel. v. Roberts*, 145 N. Y. 375, 377, 40 N. E. 7; *People ex rel. v. Roberts*, 155 N. Y. 408, 411, 50 N. E. 53, 41 L. R. A. 228; Webster's Dictionary, "Manufacturing;" *Lawrence v. Allen*, 7 How. 785, 12 L. Ed. 914; *Tidewater Oil Co. v. U. S.*, 171 U. S. 210, 216, 18 Sup. Ct. 837, 43 L. Ed. 139; *Com. v. Northern Elec. Co.*, 145 Pa. 105, 22 Atl. 839, 14 L. R. A. 107; *Com. v. Edison, etc., Co.*, 170 Pa. 231, 32 Atl. 419; *People v. Knickerbocker Ice Co.*, 99 N. Y. 181, 1 N. E. 669; *Collier on Bankruptcy* (7th Ed.) 104, 105; *Byers v. Franklin Coal Co.*, 106 Mass. 131; *Butt v. Construction Co.*, 15 Am. Bankr. Rep. 515, 140 Fed. 840, 72 C. C. A. 252; *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240, 30 L. Ed. 1012.

If it be true, as said by Mr. Justice Brown, in *Tidewater Oil Co. v. U. S.*, 171 U. S., at page 216, 18 Sup. Ct., at page 839 (43 L. Ed. 139), that:

"The primary meaning of the word 'manufacture' is something made by hand, as distinguished from a natural growth; but, as machinery has largely supplanted this primitive method, the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product. Ordinarily, the article so manufactured takes a different form, or at least subserves a different purpose, from the original materials; and usually it is given a different name. Raw materials may be, and often are, subjected to successive processes of manufacture, each one of which is complete in itself, but several of which may be required to make the final product,"

—and, as said by Bartlett, J., in giving the opinion of the Court of Appeals of the state of New York, in *People ex rel. v. Roberts*, 145 N. Y., at page 377, 40 N. E., at page 8, that "the process of manufacture is supposed to produce a new article by the application of skill and labor to the raw material," and the gathering, storing, preserving, and preparing for market natural ice is not manufacturing, or, as said by Webster, in substance, that a manufacture—that is, the result of manufacturing—is "anything made from raw materials by the hand, by machinery, or by art, as clothes, iron utensils," etc., and that shells cleaned by acid, then ground on an emery wheel, and some of them then etched by acid, and all intended to be sold as ornaments, are not a "manufacture of shells," as was held by the Supreme Court of the United States in *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240, 30 L. Ed. 1012, it is impossible to hold, under the evidence in this case—that of the witness John D. Hilliard, conceded to be a competent electrical expert—that generating electricity is manufacturing. What is the raw material operated upon, and how is anything that goes into or makes the electricity changed in form? Who knows what electricity is composed of? The witness said he did not, that he could not give a chemical analysis of electricity, does not know of any one who can, and that there is no book that tells. He does say:

"The energy of the combustion of the coal is transformed into electrical energy through the medium of the expansion of the steam in the steam engine and the passage of the magnetic field by the armature bars."

But this fails to make electricity a manufactured product. Later he said that all the coal does is to make power to turn the wheel of the engine, which turns the wheels of the electrical machinery, and that it makes no difference whether the machine that produces the power is a steam engine, a water wheel, or a windmill. It is true that in *People ex rel. v. Wemple*, 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708, the Court of Appeals of New York held that a domestic corporation organized under the general manufacturing act, engaged in producing electricity and supplying it to customers, was a manufacturing corporation within the meaning of that act, exempting manufacturing corporations from taxation until 1889, when electric lighting companies were taken out of the exemption clause. It would be tedious to quote the opinion in that case and point out the process of reasoning upon which the court proceeded. It is sufficient to say that it is clear the case is not authority for holding these companies to be "manufacturing companies," within the meaning of the bankruptcy act.

But it is said this corporation, the Hudson River Electric Power Company, was engaged principally in a mercantile pursuit. It was transmitting and selling electricity, or electrical power, more properly, and also furnishing to the so-called subsidiary companies electrical supplies of all kinds. But there was no sale by this company or purchase by the others. Having gained control, this company supplied all the companies so controlled, ran their business as its own, and kept track of what was earned by each, or the plants of each, and what it cost to operate them, and the supplies, etc., furnished. This was not a mercantile pursuit. So, transmitting and disposing of the electrical energy, as this was done, was not a mercantile pursuit, within the meaning of the bankruptcy law. Furnishing these supplies in its own business, which it was conducting, and using them to keep the various plants in operation, while charged up to the accounts of the respective companies, did not make this corporation a mercantile corporation, or this a mercantile pursuit. A corporation is engaged in cutting timber and logs from its own lands, transporting them to market, and delivering them to its customers, with whom it has special contracts. Is this a mercantile pursuit? I think not, in the ordinary meaning of the word, and certainly not within the meaning of the bankruptcy act. Is a farmer who raises produce on his own farm for the market, as all do, produces milk, butter, or cheese from his dairy for sale, and who sells same to special customers, engaged in a mercantile pursuit, or in trading, within the meaning of the bankruptcy act? I think not. *Zugalla v. International Mercantile Agency*, 16 Am. Bankr. Rep. 67, 142 Fed. 927, 74 C. C. A. 97. These persons are not engaged in buying and selling commodities.

The attorney for the petitioning creditors contends in his brief that "this corporation was organized to engage in manufacture, trade, and commerce." I do not so understand. He cites one case only to sustain his contention that this is a manufacturing and trading corporation, that of *Re Tecopa Mining & Smelting Co.* (D. C.) 110 Fed. 120.

If in smelting we simply separate the gold, or silver, or copper, from its surroundings, the material with which it is mixed, by melting the ore, I question whether it is engaged in manufacturing within the meaning of the law. But it is unnecessary to question or discuss the authority of that case. Clearly we do not, so far as appears, produce, or liberate, or gather, electricity by smelting or any similar process.

It is contended that this corporation committed an act of bankruptcy, in that on the 31st of October, 1908, receivers were appointed and put in charge of its property by the Circuit Court of the United States in the equity action mentioned, on charges of insolvency, mismanagement, etc., and that such receivership was not terminated, etc. This is denied by the opposing parties. That suit is at issue, but has not been tried. No judgment has been pronounced. No adjudication of insolvency has been made. The receivers were appointed, and are in possession of the property, to protect and preserve it *pendente lite*, not as owners, and were appointed under the general equity powers of the Circuit Court of the United States. Within the authority of *Zugalla v. International Mercantile Agency*, 16 Am. Bankr. Rep. 67, 142 Fed. 927, 74 C. C. A. 97, this was not an act of bankruptcy.

By resolution, after the commencement of that suit and the service of the injunction, the board of directors, as stated, adopted a resolution confessing its inability to pay its debts and signifying its willingness to be adjudicated a bankrupt on that ground. When that resolution was adopted the Circuit Court of the United States had taken jurisdiction, issued an order to show cause why a receiver should not be appointed, and enjoined the directors of the company from commencing or prosecuting any proceeding "involving in any way the property or property rights of either of said companies, or incumbering or embarrassing the same." The adoption of this resolution was, as stated, the very foundation of the bankruptcy proceedings, which sought to, and in their effects, if carried on, would, take the property of the corporation from the hands and control of the Circuit Court. Thus would necessarily arise, as there has arisen, a conflict of jurisdiction between the Circuit Court of the United States and the District Court of the United States sitting and acting as a court of bankruptcy. This act of the directors clearly was a step, and a necessary step, in the commencement of a proceeding which "involved" the property of the corporation and "embarrassed" the same.

I am of the opinion, and hold, that under such circumstances and conditions the act of the board of directors was an unauthorized act, invalid, and not an admission by the corporation constituting an act of bankruptcy. "Where the bringing or continuing of legal proceedings is prohibited by injunction, any steps, although merely preliminary or incidental, taken for the purpose of bringing or continuing such proceedings, constitute a violation of the injunction." Before any adjudication could be made, the Circuit Court had taken actual possession of the property, and now has such possession. If the commencement of such an equity suit as mentioned in the Circuit Court of the United States for such a purpose and the proceedings taken constitute an act of bankruptcy, which, taken advantage of by other creditors, aided

by the directors under injunction, result in ousting the Circuit Court of the United States, we have an anomalous situation.

In such a case as this, or these eight corporations in all, only five involved in the various bankruptcy proceedings, there is every reason for holding that the jurisdiction and control of the Circuit Court should not be ousted or superseded by the bankruptcy proceedings. At the time the equity suit was commenced, the eight were being conducted as one. It was not a merger or a monopoly, but was done for the benefit and advantage of all. The Circuit Court has determined that the business should be continued, and the same is being continued as one business; the accounts being kept separate. With one receivership, and in one proceeding, the affairs of the eight corporations can be wound up, the creditors ascertained, their rights adjusted and protected, and the property sold and distribution made. In bankruptcy we must have eight separate proceedings before possibly (and probably) eight referees, with eight (and it may be twenty-four) trustees, and at least eight sets of attorneys representing them. I can see no end to the complications that would arise in such event.

Again, the powers of the Circuit Court as a court of general jurisdiction, with broad equity powers, having control of all intervening suits affecting the property, are much more ample and efficient in such a situation. Considering all this, it seems to me clear that the law will not sanction or permit adjudications in bankruptcy against these corporations, based on the voluntary acts of their boards of directors, respectively, when under the injunction of the Circuit Court of the United States prohibiting them from instituting any proceeding which would involve the property or property rights of either of these corporations or embarrass same. It cannot be that such acts, which plainly violate the injunction of the court, are valid and binding on the court. For this court to recognize the validity of such acts of the directors, and enforce them, would be to aid and make effectual their violation of the injunction of the Circuit Court. An injunction must be obeyed in its spirit as well as its letter.

Without taking time or space to cite all the authorities, attention is called to the rules of law as stated in 22 Cyc. 1016, 1017, 1025, and the many cases there cited. It is there said:

"Acts Constituting Evasion.—(a) In General. No subterfuge, amounting to a substantial violation of an injunction, will be allowed to succeed simply because not contrary to the letter of the prohibitory clause. * * *

"Particular Acts.—(a) Bringing or Continuing Legal Proceedings. Where the bringing or continuing of legal proceedings is prohibited by injunction, any steps, although merely preliminary or incidental, taken for the purpose of bringing or continuing such proceedings, constitute a violation of the injunction.

"Undoing the Wrong. Where defendant has interfered with property in violation of an injunction, he may be required to restore the property to its former condition."

And in *Seligson v. Collins*, 64 Tex. 315, it was held that:

"An execution * * * issued in violation of a pending injunction is void, and will not support a title made under it."

The same is held in *Morris v. Bradford*, 19 Ga. 527, and *Farnsworth v. Fowler*, 1 Swan (Tenn.) 1, 55 Am. Dec. 718. In *Byne v. Byne*, 54

Ga. 257, defendant took possession of land in violation of an injunction, and the court directed the sheriff to restore the possession.

If necessary, I think a contempt proceeding against all such directors would lie, and that the Circuit Court would have power to compel them to assemble and rescind such resolutions, adopted in the very face of the injunction. But I do not think that necessary, as the Circuit Court, having possession of all the property and jurisdiction of all the parties, may protect that jurisdiction and possession; and this court, fully informed of the facts by the record before it, should take no step in recognition or aid of acts violating the order of that court. In *Ex parte Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689, the court, by Mr. Chief Justice Fuller, pointed out distinctly the jurisdiction and power of a court where a receiver has been appointed. He said:

"No rule is better settled than that, where a court has appointed a receiver, his possession is the possession of the court, for the benefit of the parties to the suit and all concerned, and cannot be disturbed without the leave of the court, and that, if any person, without leave, intentionally interferes with such possession, he necessarily commits a contempt of court, and is liable to punishment therefor."

Here we have no conflict between the courts of the United States in bankruptcy and the state courts, where, in such matters, the laws of the United States are paramount, but one between different courts of the United States, both acting under the Constitution of the United States and the laws of Congress enacted by virtue thereof. It seems to me that a decent respect for the authority of the Circuit Court demands that the District Court, acting as a court of bankruptcy, refrain from recognizing and enforcing acts of parties within its jurisdiction done in violation of the orders of that court. If where parties have interfered with property, or done acts which, if recognized as valid, will interfere with property, in violation of an injunction, they may be required to restore the property to its former condition (see authority cited, and *In re Fortunato*, 123 Fed. 622, 625; 1 *Beach on Injunctions*, p. 291, § 281; *Woodley v. Boddington*, 9 *Simons*, 214; *Daniel v. Ferguson*, 2 Ch. 27), it seems to me that a court of concurrent jurisdiction in some matters, but subordinate in others, advised of the facts, may refuse to recognize such acts, and thus refuse to consummate the injury against which the injunction was directed. If such acts are void, as was held in *Seligson v. Collins*, *Morris v. Bradford*, and *Farnsworth v. Fowler*, *supra*, that ends the contention, and this court is bound to regard the resolutions referred to as void and of no force.

We come, then, to consider the facts in the other cases, regarding the other corporations, involved here, that we may see how far they are within the propositions stated and decided.

Hudson River Electric Company.

This is one of the defendants in the equity suit referred to. The corporation was organized under the transportation law of the state of New York, and the purposes of its organization, as recited in the articles of incorporation, are substantially the same as those recited in

the case of the Hudson River Electric Power Company. It is not necessary to quote them. This company has not, however, engaged in the generating or collection of electrical energy, and had no plants or facilities for so doing, but has confined its operations exclusively and wholly to the transmission and distribution of electrical energy or electricity. It cannot be claimed, therefore, that it is a manufacturing corporation, or one engaged in manufacturing. It has franchises from some fifteen towns and villages, including two or more cities. Under them it was given power to erect and maintain necessary poles and wires, and other structures necessary, over, upon, and along public streets and highways, for the transmission and distribution of electrical power, and has done so in certain places. Its distribution has been to towns and villages and cities, and the inhabitants thereof, and to companies running cars. It is decidedly a public service corporation in its actual business. It has purchased its electrical power from the Hudson River Water Power Company, Hudson River Power Transmission Company, and the Kane's Falls Electric Company. During the first ten months of the year 1908 there was furnished to said company the following:

By Hudson River Water Power Company.....	5,411,222	K. W. H.
By Hudson River Power Transmission Company.....	85,907	K. W. H.
By Kane's Falls Electric Company.....	396,975	K. W. H.
Total	5,894,104	K. W. H.

The rate paid therefor was one cent per K. W. H., or \$58,941.04. This was distributed to 1,694 customers over overhead distribution system at Watervliet; overhead and underground system at Glens Falls; overhead system at Green Island and Lake George; transmission lines, pole 166, to Watervliet; Watervliet to Troy, Watervliet to Latham's, Latham's to Ludlen S. & S. Company, and Geyser Station to Hudson River Railway Company line; one circuit on Hudson River Power Transmission Company poles, Alplaus to Schenectady, and two circuits on same, Watervliet to Albany; also an underground system in the city of Albany. It had a substation, site building, and electrical apparatus at Glens Falls, N. Y., at Watervliet, N. Y., at Cohoes, N. Y., Albany, N. Y., Ballston, N. Y., and switch house sites at Alplaus, N. Y., and Saratoga, N. Y., and other small properties. During the first ten months of the year 1908 the gross earnings of the Hudson River Electric Company for electrical energy delivered was as follows:

Light, public and private.....	\$ 39,184.43
Power, public and private.....	59,354.01
Municipal street lighting, arcs.....	12,458.35
Municipal street lighting, incandescent.....	13.60
Total	\$111,010.39

There was a contract between the Hudson River Electric Company, the Hudson River Water Power Company, and the Hudson River Power Transmission Company to furnish electrical energy to the General Electric Company at Schenectady, N. Y., and during the first ten months of 1908 the Hudson River Electric Company furnished energy

under that contract that was not paid for to the amount of \$260,000 or \$270,000. This company also sold electrical supplies and wired houses for electricity at Glens Falls, Watervliet, and Cohoes, maintaining a store at each of these places. The gross sales during the time mentioned was \$8,484.22, including charges made for wiring done by the company. The Hudson River Electric Company also owns the stock of the Hudson River Power Transmission Company. The stores mentioned were, in reality, depots of supplies used as follows: When the company secured a new customer for electrical energy, or light, or power, it wired his building or buildings, putting in the necessary fixtures, taking the material from its stores or depots. Thereafter the customer, if he desired, could get new or additional supplies from the same place. But very little was sold to outsiders.

The question presented is: Was this company engaged principally in trading or mercantile pursuits, within the meaning of the bankruptcy law? It, of course, first purchased its materials and supplies. It purchased its electrical energy or electricity, the terms being used synonymously. It transported it by electrical lines of vast extent to distributing points. It had distributing points and machinery for making distribution, and it distributed it by transportation on lines of wire, etc., over a vast area of country, as well as over thousands of miles of streets and avenues in cities and villages. In view of many authorities, especially *In re New York & New Jersey Ice Lines*, 147 Fed. 214, 77 C. C. A. 440, and *In re Wentworth Lunch Co.*, 159 Fed. 413, 86 C. C. A. 393, decided by the Circuit Court of Appeals in the Second Circuit, and *Zugalla v. Int. M. Agency*, 16 Am. Bankr. Rep. 67, 142 Fed. 927, 74 C. C. A. 97, and *In re New York & W. Co. (D. C.)* 98 Fed. 711, as well as on general principles, I must hold that this corporation was not engaged principally, if at all, in trading or commercial pursuits, within the meaning of Bankr. Act July 1, 1898, as amended, and is not, therefore, subject to be adjudicated a bankrupt. Really, its main and principal business was that of transporting electrical power, although the evidence does not point out this fact clearly, by showing the cost or value of the transportation lines and the cost of operating same. It does show purchases by this corporation in 1908 of electrical power at a cost of \$58,941.04, and a sale thereof, transported and delivered, for \$111,010.39 generally, and \$260,000 additional to the General Electric Company, or \$361,010.39 in all.

It is argued by the attorney for the petitioning creditors that transportation companies may be adjudicated bankrupts; but, in view of the fact that the bankruptcy act itself points out and names the particular classes of corporations that may be adjudicated bankrupt, I am quite clear that all others are excluded. I know of no principle of law that will permit their inclusion in the list, unless actually engaged principally in manufacturing, trading, or mercantile pursuits. This has been many times decided.

Hudson River Power Transmission Co.

This, also, is one of the defendants in the equity suit referred to. It was incorporated under the transportation law of the state of New York. Its plant is situated at Mechanicsville, N. Y., on the Hudson

river, in the town or village of Half Moon Bay. The corporation owns a water power plant, with steam auxiliary, for the purpose of generating electricity or electrical power, and that is the business done at the plant. It also owns transmission lines, for transmitting electrical power, extending from Mechanicsville to Alplaus, and from Alplaus to the Mohawk river at Schenectady, from Mechanicsville to Watervliet, and from there to the city of Albany. During the year 1898 the power generated at this plant was delivered to the United Traction Company, running electrical street cars, the Albany Electric Illuminating Company, and the Troy Gas Company, and a few other customers, for the account of the Hudson River Electric Company, which company received all the moneys for all the power mentioned. Its stock was owned by that company, whose officers managed it and its business. This corporation has numerous franchises for its various lines for crossing and passing on public streets and highways. The Albany Electric Illuminating Company furnishes light and power both to the public and private individuals in the city of Albany, and, as stated, the traction company runs street cars in Albany, Troy, Cohoes, and Watervliet. In short, the Hudson River Power Transmission Company is a public service corporation. It made reports to the Public Service Commission. There were no contracts between the Hudson River Electric Company and the Hudson River Power Transmission Company. The said electric company furnished supplies to the said transmission company, but charged up in the accounts no profit—simply the amount it paid for them. The purposes of the organization of the said transmission company were:

"The development, use, sale, and transfer of electrical power, light, and heat, and, for the purpose of producing and generating such power, light, and heat, the construction, operation, and use of a dam or dams in the Hudson river and elsewhere, and also, in connection with such purposes, the construction, operation, and use of power houses, plant, machinery, buildings, mills, factories, and such other structures or means as may be desirable or necessary for the development, use, sale, and transmission of power, light, and heat as aforesaid."

It is about 14 miles from Mechanicsville to Albany by way of Watervliet, and 17 miles from Mechanicsville to Schenectady. The evidence shows that the Hudson River Power Transmission Company was engaged principally in transporting—transmitting—electrical power and delivering it to municipal corporations for power and light and to a railroad or traction company running cars for the accommodation of the public in and between these cities, as well as other places. I hold that it was not engaged principally in manufacturing, trading, or mercantile pursuits, within the meaning of the bankruptcy act quoted from.

It is urged that the petition cannot be maintained, for the reason it is not filed by three creditors of the Hudson River Power Transmission Company. I think this contention is sustained by the evidence. The petition was filed November 4, 1908, by the Ludlow Valve Manufacturing Company, claiming to be a creditor to the amount of \$270 for goods, wares, and merchandise alleged to have been furnished in 1908, the Knowlson & Kelley Company, claiming to be a creditor to the amount of \$235 for goods claimed to have been furnished the same

year, and Charles E. Hurd, claiming to be a creditor to the amount of \$90.40 for goods, wares, and merchandise sold the same year. Notice was duly given to these alleged creditors to produce their books, etc., showing their dealings with the transmission company, if any, and showing their sales, etc., of the goods mentioned in their claims. They failed and declined to produce them, and gave no valid or satisfactory reason for not producing them. The claim is that the goods, etc., were ordered by, sold, and delivered to the Hudson River Electric Power Company, the managing and controlling company, and on its credit, and not to the transmission company, although used for the running of the business at the plant of that company.

The petitioners claim that the goods, wares, and merchandise were ordered and purchased, in fact, by the Hudson River Electric Power Company as a mere "purchasing agent" of the transmission company, and for it, and that the transaction was actually between the vendors, the petitioners, and the transmission company acting through its "purchasing agent." If this is true, the petitioners have a claim, undoubtedly, against the transmission company. The only foundation of this claim is that the goods were ordered and the purchases were made as follows: First, at the station or plant where the supplies or goods were required for use, the servant, employé, or officer of the Hudson River Electric Company, the controlling company, having the matter in charge for that company, and under its control and direction, would make out a requisition, stating what was wanted and where, and sign same. This would be marked "O. K." by another employé, and thereupon an order would be sent to the person or firm or company from whom the purchase was to be made. These orders read as follows, omitting unnecessary language:

"Purchasing Department, Hudson River Electric Power Company,
Albany, N. Y.

"Glens Falls, N. Y., [date].

"[Address]: Send us for (plant or place and description of property).

"Yours truly, Hudson River Electric Power Co., Purchasing Agent."

There was no direction to send the goods ordered for or on account of the Hudson River Power Transmission Company. On receipt of the order, the petitioner the Ludlow Valve Manufacturing Company answered to the Hudson River Electric Power Company, in the case of the item claimed, \$253.88, of July 13, 1908, as follows:

"Troy, N. Y., May 27, 1908.

"Gentlemen: We acknowledge receipt of your order No. B-5781, and will make complete shipment on or before June 20th. Our shop order No. 306.

"Sturgess Engineering Dept.

"The Ludlow Valve Mfg. Co.

"Hans Schwartz."

The said goods were sent about July 13th, with the following bill:

"Sturgess Engineering Dept., Trade-Mark Ludlow.

"The Ludlow Valve Mfg. Co.: [Description of goods dealt in, and directions as to receipt, etc.] Office and Works, Foot of Adams St.,

"Troy, N. Y., U. S. A., July 13, 1908.

"Sold to Hudson River Elec. Pr. Co., Glens Falls, N. Y.

[Description of goods and value].....\$253.88."

The same form of order and the same bills in form, etc., were sent in case of the two other items. There had been many other purchases of this company made in the same way, and payment had been made by checks of the Hudson River Electric Power Company, not by the check of the transmission company. There is no evidence that the Hudson River Electric Power Company was the agent of the transmission company. It owned the stock of that company, and by its officers ran its business, as it did that of the six other corporations, having gained control by ownership of stock. So far as appears, the directors and officers of the transmission company had nothing to do with these purchases. The Ludlow Valve Manufacturing Company, so far as appears, had no knowledge or information of the relation of these corporations. Clearly it gave credit to and charged the goods to the Hudson River Electric Power Company, and clearly that company recognized the transaction as a sale to it and on its account, and acknowledged it had purchased the goods of the valve company, and recognized the valve company as its creditor. The one corporation was not the agent of the other. *Const. Co. v. Richmond, etc.*, R. Co., 68 Fed. 105, 108, 15 C. C. A. 289, 34 L. R. A. 625, cited and approved in *Re Watertown Paper Co.* (C. C. A., 2d Circuit) 169 Fed. 256. In that case it is held:

"Neither does the fact that the one corporation exercised a controlling influence over the other, through the ownership of its stock, or through the identity of stockholders, operate to make either the agent of the other, or to merge the two corporations into one."

Great stress is laid upon the use of the words "Purchasing Agent." The petitioners claim that they necessarily imply a principal for whom the agent was acting, separate and distinct from the agent; that, as a corporation cannot be an agent for itself, the necessary legal inference is that the Hudson River Electric Power Company, in purchasing these goods, was acting as the agent for a principal, the Hudson River Power Transmission Company, inasmuch as the goods were directed to be shipped to that company at Mechanicsville. As all this appeared on the face of the order, it seems strange, if the contention be correct, that the valve company did not so understand and bill and charge the goods to the transmission company. But it did not, and it is evident that the seller did not understand the words "Purchasing Agent" as indicating or connoting any agency of the kind mentioned. It is evident the valve company understood the words correctly, and as implying, as the fact was, that the Hudson River Electric Power Company was the efficient cause, the corporation having the power to act, the acting corporation. See primary meaning of "agent," *Century Dictionary*, "Agent."

Among all the eight corporations this was the only active one. The use of these words properly gave notice to the world which was the acting and active corporation, and did not necessarily imply that it was acting as the agent for the others or for either of them. The same facts substantially obtain regarding the claim of Knowlson & Kelley Company. I must hold, under the evidence, that neither Ludlow Valve Company nor Knowlson & Kelley Company are creditors of the Hudson River Power Transmission Company.

Saratoga Gas, Electric Light & Power Company.

For brevity, this corporation will be referred to as the Saratoga Company. The petition was filed against it on the 4th day of November, 1908, four days after it had passed into the possession and under the control of the receivers appointed in the equity suit before mentioned. On the 2d day of November, two days thereafter, and with the injunction first granted and that contained in the order appointing the receivers in full force, the directors of this corporation held a meeting and adopted a resolution, viz.:

"Meeting of the board of directors of the Saratoga Gas, Electric Light & Power Company, held at the office of the company on the 2d day of November, 1908.

"Mr. Ashley in the chair. Present: Elmer J. West, Patrick F. Roohan, Charles E. Parson, Harry B. Austin.

"On motion, duly made, seconded, and carried, it was resolved, that this company is unable to pay its debts, and for that reason it is willing to be adjudicated a bankrupt upon that ground. It is further resolved, that the secretary be authorized to certify a copy of this resolution for such use as may be required.

"Meeting adjourned.

H. B. Austin, Secretary."

This company is engaged in making gas, and has, or had, an electrical plant, and is engaged in transmitting or transporting and furnishing both gas and electricity for lighting the streets, avenues, public parks, and public and private buildings of the village and town of Saratoga Springs, N. Y., and has laid and erected and constructed suitable wires and conductors, and pipes, gas mains, etc., for conducting and transmitting both gas and electricity in, on, and over the public streets, etc., of such village and town, as specifically authorized by its articles of incorporation to do. We have questions involved here not presented in the cases already considered. This corporation is one of the eight defendants in the equity suit named. Its stock is owned or controlled by the company before named. It has a contract with the village for lighting its streets. The electrical transmission wires are on poles, of which there are 1,400, and cover all the principal streets and alleys of the village. There are some 25 miles of gas mains. Some of the public buildings and places are lighted with gas. The proof shows, and it has been also judicially decided, that this corporation is engaged in the public service, and is amenable to the supervision and authority of the Public Service Commission. *Village of Saratoga Springs v. Saratoga Gas, Light & Power Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713. It obtains its electrical power from the Hudson River Water Power Company, one of the defendants in the equity suit mentioned. In 1907 its electrical earnings were \$68,594.76, while its gas earnings were \$64,111.70. In 1908, up to the receivership, its electrical earnings were \$49,458.84, and its gas earnings \$47,321.91. It also had a supply store of the same description and used for the same purposes as those already mentioned in the case of the Hudson River Electric Company, but includes gas pipe and fixtures. It furnished from this store in 1907 \$15,367.72, and in 1908 \$6,024.89, of electric and gas appliances and supplies to its customers. This, of course, is a

mere incident to its main business, and does not change its general character. Taking the figures, it is evident that the principal business of this corporation has been and is that of transmitting and supplying electricity or electric power. It manufactures gas, and when that gas was transported to the consumers the receipts therefor in 1908 were \$47,321.91.

The corporation (doing business under the management and control of the other company, heretofore named) was organized under and pursuant to the transportation laws of the state of New York. Its articles of incorporation so state, and this fact was admitted. It may be conceded that a corporation engaged solely in the making of gas for illuminating purposes is engaged in manufacturing; that is, that making gas is manufacturing. But when to this we add the transportation thereof, and the business of purchasing, transporting, and supplying electrical energy, which electrical business exceeds in volume and revenue the gas business, it becomes clear that the corporation is not principally engaged in manufacturing. Is it engaged principally in trading or mercantile pursuits, within the meaning of section 4 of the bankruptcy act quoted? I cannot reconcile in my own mind or judgment the idea of such a business being either "trading" or a "mercantile pursuit." A transportation corporation, if transportation be its principal business, is not amenable to the bankruptcy law. In *re New York & Westchester Co.* (D. C.) 98 Fed. 711. That corporation was engaged in gathering, storing, and supplying, through water mains, watersheds, reservoirs, and pipes, water to both the public authorities and private individuals. Water companies, as is well known, may purchase water rights, and even water, for emergencies. Water is not generally regarded as a commodity, commercially speaking. But why is it any less a commodity than gas or electrical power? Illuminating gas and electrical power are found in large quantities in nature; gas in many localities, electricity everywhere. If the generation of electricity is but the gathering of it from earth or air, it is no more manufacturing than the gathering of water. As both are sold to individuals and the public for public uses and to subserve the wants of man, the one is as much an article of trade and commerce as the other. Bouvier thus defines "merchandise":

"Merchandise (Lat. *merx*). A term including all those things which merchants sell, either wholesale or retail, as dry goods, hardware, groceries, drugs, etc. It is usually applied to personal chattels only, and to those which are not required for food or immediate support, but such as remain after having been used, or which are used only by a slow consumption. See *Par-dessus*, n. 8; *Dig.* 13, 3, 1; 19, 4, 1; 50, 16, 66; 8 *Pet.* 277; 6 *Wend.* (N. Y.) 335. Mere evidences of value as bank bills, are not merchandise. 'The fact that a thing is sometimes bought and sold does not make it merchandise.' *Story*, J., 2 *Story*, C. C. 10, 53, 54. See 2 *Mass.* 467; 20 *Pick.* (Mass.) 9; 3 *Metc.* (Mass.) 367; 2 *Parsons*, *Contr.* 331, note 'w.'

The Century Dictionary thus:

"In general, any movable object of trade or traffic; that which is passed from hand to hand by purchase or sale; specifically, the objects of commerce; a commercial commodity or commercial commodities in general; the staple of a mercantile business; commodities, goods, or wares bought and sold for gain."

The Century Dictionary defines "merchant" as:

"One who is engaged in the business of buying commercial commodities and selling them again for the sake of profit, especially one who buys and sells in quantity or by wholesale. One who buys without selling again, or who sells without having bought, as where one sells products of his own labor, or who buys and sells exclusively articles not the subject of ordinary commerce, or who buys and sells commercial articles on salary, and not for profit, is not usually termed a merchant."

So making and selling illuminating gas is not, in my judgment, trading or a mercantile pursuit, especially when made by a gas company and sold, not generally to all the world, but to special customers in a restricted area, and is transported to those users through mains and pipes in such a way that the value of the transportation and cost of transportation is as great or greater than the mere production. The statutes of the state of New York seem to recognize and really define such a corporation as this as one engaged principally in transportation, and not in manufacture. By chapter 566, p. 1136, Laws 1890, known as the "Transportation Corporation Law," special provision is made for the incorporation of gas and electric companies engaged in public and private lighting. Section 60 of article 6 reads:

"Incorporation. Three or more persons may become a corporation for manufacturing and supplying gas for lighting the streets and public and private buildings of cities, villages or towns in this state, or for manufacturing and using electricity for producing light, heat or power and in lighting streets, avenues, public parks and other places and public and private buildings of cities, villages and towns within the state, or for two or more of said purposes, by making, signing, acknowledging and filing a certificate stating the name of the corporation, its objects, the amount of its capital stock, the term of its existence, not to exceed fifty years, the number of shares of which the stock shall consist, the number of directors (not less than three nor more than thirteen), the names and places of residence of the directors for the first year, and the names of the towns, villages, cities and counties in which the operations of the corporation are to be carried on; and thereupon the persons who shall have signed the same, their associates and successors shall be a corporation by the name stated in the certificate."

This fact is not conclusive of course; but it is significant.

The effect of the resolution of the board of directors, relied upon as an act of bankruptcy, has been already considered. Here the board of directors took this action after the actual possession and control of the property had passed into the hands of the Circuit Court under the following additional injunction, viz.:

"And said defendant Saratoga Gas, Electric Light & Power Company, and each and every of its officers, directors, agents, and employes, and all other persons whomsoever, are hereby ordered and directed forthwith to deliver up to said receivers possession of all and every part of the property of the said defendant company, together with all books of account, vouchers, records, correspondence, and documents of the said defendant company.

"And the said defendant, and each and every of its said officers, directors, agents, and employes, and all other persons whomsoever, are hereby enjoined and restrained from disposing of any of the property or moneys of the said defendant company, or from taking possession of, levying upon, or attempting to sell in any manner any of the property of said defendant, or from interfering with the possession of the receivers hereby appointed, or with the discharge of their duties as such receivers. * * *

"That said receivers shall have full power and authority, and are hereby directed, to manage and operate the said several defendant companies and

their respective businesses, so far as possible, and, so far as is consistent with the proper separation of their several respective properties, assets, receipts, accounts, and disbursements, to so operate said several companies as a single unified system, and in such manner as to carry out their several respective public duties, and so far as possible to carry on their said several businesses, to fulfill their said several contracts and obligations in such manner that the several cities and towns which are dependent upon said defendant companies for light, heat, and electrical railway service, and for water supply, shall continue to receive the same, and so that all said public services shall be fully and effectively performed.

"And the said defendant companies, and their several officers, directors, attorneys, agents, and employes, and all other persons, are each and all hereby restrained and enjoined from in any manner interfering with the performance of such public services, and from interfering in any manner with the same, or with the operation of said receivers in the manner hereinbefore set out, whether under this or the previous paragraphs of this decree."

It seems to me clear that the resolution quoted cannot, under such circumstances, be regarded as an act of bankruptcy by the corporation. The reasons have been fully stated.

Madison County Gas & Electric Company.

This is one of the eight defendant corporations in the equity suit referred to, is a public service corporation organized under the said transportation corporation laws, and, after the service of the injunctions mentioned on Mr. West, its treasurer, and the appointment of the receivers, its board of directors passed a resolution acknowledging its inability to pay its debts and signifying its willingness to be adjudged a bankrupt on that ground. It has a plant at Oneida, N. Y., where it makes gas and generates electricity, and under contract furnishes both to the city of Oneida and the villages of Canastota and Oneida Castle, and their citizens, for both public and private use.

In 1907 the total gross earnings of the corporation from its electrical business was.....	\$43,791 50
And first nine months of 1908 was.....	29,117 56

Total electrical earnings.....	\$72,909 06
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In 1907 the total gross earnings of this corporation from its gas business was.....	\$12,216 16
First nine months of 1908 was.....	9,580 05

Total gas earnings.....	\$21,796 21
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In addition it ran two supply stores, of the same character before mentioned, and it supplied to parties other than the company itself in 1907 gas and electric supplies to the amount of \$1,859.61, and during the first nine months of 1908 to the value of \$3,760.49. It is self-evident that the principal business of this corporation was generating, transporting, and delivering electrical power for a consideration. It is clear that this corporation was not engaged principally in manufacturing, trading, or mercantile pursuits, if I am correct in my former conclusions, and is not subject to be adjudicated a bankrupt. If I am correct as to the effect the injunction on the power of the directors, no act of bankruptcy has been committed, as the commencement of the

equity suit and the appointment of the receivers, and their possession of the property, under the case cited, was not such an act.

Public Service Corporations.

Are public service corporations of this class, and engaged in the business described, subject to the bankruptcy law? May they be adjudicated bankrupts? The act itself is silent on the subject. But it does say that those companies, and those only, engaged principally in "manufacturing," in "trading," in "printing," in "publishing," in "mining," and in "mercantile pursuits," may be adjudicated bankrupts. It is difficult to point out a public service corporation, or quasi public service corporation, engaged in trading, printing, publishing, mining, or a mercantile pursuit, and organized under any law authorizing it to do business intended for the service of the public. A corporation organized to make gas, and authorized by law to transport it by gas mains and pipe lines to consumers, and given the right of eminent domain, and to occupy public streets and avenues in a way, and any similar corporation, ought to be held a transportation corporation pure and simple, and its principal business that of transportation, without splitting hairs as to the cost of making the gas and the cost of transporting and delivering it.

There was a serious and wide difference of opinion in the committee on the judiciary and in the Congress itself whether corporations, any corporation, should be brought under the operation of the law. There was a feeling on the part of some that railroad corporations should be included, if any were. But when it was considered that railroads are the arteries of commerce and transportation, state and interstate, created by state laws in the main, and extending with their connecting lines from state to state and Lakes to Gulf under merger and consolidation agreements, it was seen that, to properly administer the property of such corporations in the bankruptcy courts and under a bankruptcy law, it would be necessary to make many special and extraordinary provisions for those cases, if the public service was to be considered and the interests of the public conserved. The idea was abandoned. So of many other corporations.

Let us suppose that these eight public service corporations lay on the border of two judicial districts, some in the one and some in the other, and that they are subject to the bankruptcy law. Who can point out a mode of administration under the present law that would be efficient and preserve and protect the rights of the general public? In this case, if the affairs of the Hudson River Power Company, which generates the main portion of the electrical power used, outside of the Utica and Oneida plants, connection by transmission lines contemplated not having been made when financial difficulties arose, are to be administered by one court, and those of the other companies by another, interminable differences and litigations will intervene, and the public, now served by it and the others operated in harmony as it was intended they should be, will suffer. Must not the rights and interests of private creditors sometimes be subordinated to the public interests? It is not necessary for me to decide this question in these cases, or in any one

of them, as they have all been disposed of on other satisfactory grounds.

However, it may not be amiss to call attention to the authorities on the question, which, to say the least, ought to have weight in these cases. In *re Bay City Irrigation Co.* (D. C.) 135 Fed. 850; In *re H. R. Leighton & Co.* (D. C.) 147 Fed. 311. See language of Collier on Bankruptcy (5th Ed.) 64. His opinion is that:

"All business corporations, as distinguished from public, quasi public, money saving, or lending corporations, shall be amenable to the act."

In *Re Bay City Irrigation Co.*, supra, it was expressly held by the referee, and approved by the judge, that:

"A quasi public corporation, engaged in furnishing water for irrigation purposes, clothed with the right of eminent domain, and subject to statutory restrictions on such power, is not amenable to the federal bankruptcy act, on the ground of public policy."

Of course the case was correctly decided on the ground it was not engaged in manufacturing, trading, or mercantile pursuits.

As to the objection made that the Schenectady Trust Company is not a creditor in those cases where it has interposed an answer, I hold that it is a creditor, and had the right to answer. I do not doubt the right of the receivers representing these corporations, and all the creditors and their interests, to raise and present this question. In fact, it was their duty to do so. Can it be possible that these receivers were powerless to oppose or prevent these adjudications, if not warranted by law, assuming the general creditors preferred an administration of the several corporate properties by the court in bankruptcy? They were officers of the Circuit Court, which had taken jurisdiction and possession, with ample equity power, and they had the right and duty to see that its jurisdiction was not improperly ousted, and the property taken from the custody of that court illegally or without warrant of law. The order of the Circuit Court appointing them, in express terms, commanded them "to operate and manage its plants, and to exercise its authority and franchises, * * * and to preserve the said property, * * * and to protect the title and possession of the same," etc. I do not think this order in conflict with the bankruptcy act, or that any strained construction of that act can or should nullify it. Unless that order of the Circuit Court is a nullity, the receivers had power to oppose the adjudications prayed for. They represent the corporations, and exercise their franchises and functions. For the purpose of opposing adjudication, they were the alleged bankrupt, and acted for it and in its name.

It should further be remarked that the burden was on the petitioners in all the cases to show by a fair preponderance of evidence that the corporation was principally engaged in the business mentioned in the petitions respectively. *Philpot v. O'Brien*, 11 Am. Bankr. Rep. 205, 126 Fed. 167, 61 C. C. A. 111; Collier on Bankruptcy (6th Ed.) 110. This has not been done in either case.

It follows that adjudications are denied, and the petition in each case is dismissed. There will be orders accordingly.

Supplemental Memorandum, Amending Opinion as Applicable to Hudson River Power Transmission Company, Alleged Bankrupt.

Since deciding the above cases and filing opinion therein, my attention has been called to the following evidence, and statement appearing in the evidence given on the hearing as to the Hudson River Power Transmission Company (page 27):

"Q. Have you physical possession of the orders or the requisitions? A. I have copies of the originals here, I guess. Q. Will you produce them?"

"Mr. Todd: We want to show the entire transaction. As I understand it, it was this way: Mr. Tinker or Mr. Morrow was in charge of the Mechanicsville plant, and when they wanted any supplies or materials they made a requisition upon the purchasing agent, Mr. Peddrick, or the Hudson River Electric Power Company, whichever you want to term it, for such things as they wanted. Thereupon Mr. Peddrick ordered these materials or supplies from some concern, and in pursuance of these orders sent out by Mr. Peddrick as purchasing agent they were supplied, and were finally sent to the Hudson River Power Transmission Company. What we want to show is the course of business by which these supplies were asked for by some one in charge of the Hudson River Power Transmission Company's plant, and afterwards were supplied to them.

"Mr. Rose: That is all right. They are all here."

The copies of the orders given have also been presented to me for inspection. These copies were put in evidence, for the reason that the petitioning creditors did not produce the original orders, which they admitted, or did not deny, having. To illustrate: In the printed record the orders appear to show that they were signed, "Hudson River Electric Power Co., Purchasing Agent." See page 44, order of May 26, 1908. Such was not the fact. The original orders, it is evident, were signed, "Hudson River Electric Power Company, C. H. Peddrick, Purchasing Agent." Peddrick was the purchasing agent of the Hudson River Electric Power Company, the controlling company.

It is therefore clear that the orders were given by Peddrick, as purchasing agent of, and for, the Hudson River Electric Power Company, and that such company was the principal in the transaction. The confusion in the mind of the court arose from the fact that the briefs did not call attention to this situation. The copies of the orders themselves were not before the court, and the record was so printed as to mislead.

OREGON R. & NAVIGATION CO. v. CAMPBELL et al.

(Circuit Court, D. Oregon. September 28, 1909.)

No. 3,308.

1. COURTS (§ 289*)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTIONS.

A suit to enjoin the enforcement of railroad rates established by state authority, on the ground that the act and order establishing the same are an interference with interstate commerce and that they are unreasonable and confiscatory, presents federal questions, which give a federal court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

jurisdiction, regardless of whether complainant's position is in fact maintainable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830; Dec. Dig. § 289.*]

Jurisdiction in cases involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.]

2. CONSTITUTIONAL LAW (§§ 60, 80*)—DISTRIBUTION OF GOVERNMENTAL POWERS—VALIDITY OF OREGON STATUTE CREATING RAILROAD COMMISSION.

The railroad commission act of Oregon of February 18, 1907 (Laws 1907, p. 67), which requires every railroad to charge reasonable and just rates, creates a state railroad commission, with power to determine in the first instance the reasonableness of rates charged, and, if found unreasonable, to fix rates which shall be *prima facie* reasonable and just, and shall be conformed to by the railroad company, with the right, however, to bring suit in a court of the state to determine their reasonableness, in which suit it shall have the burden of proof, is not unconstitutional, as conferring legislative, executive, and judicial functions on the commission, in violation of article 3, § 1, of the state Constitution, providing that the powers of government shall be divided into three separate departments, legislative, executive, and judicial, and that, except as provided in the Constitution itself, no person charged with official duties under one of these departments is competent to exercise any function of the other.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 89, 144; Dec. Dig. §§ 60, 80.*]

3. CONSTITUTIONAL LAW (§ 50*)—DISTRIBUTION OF GOVERNMENTAL POWERS—VALIDITY OF STATUTE.

In the constitutional division of the powers of a state into legislative, executive, and judicial departments, there can be no absolute line of demarcation between the functions of such departments, and where it is scarcely ascertainable whether the several powers conferred by a statute belong more properly to one or the other department, and their assignment to one works no practical encroachment on the functions of another, the fact that all such powers are vested in a single body or tribunal for practical reasons will not invalidate the statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 48; Dec. Dig. § 50.*]

4. COMMERCE (§ 61*)—CHARGES BY CARRIERS—STATE REGULATION—CONSTITUTIONALITY OF OREGON STATUTE.

The railroad commission act of Oregon of February 18, 1907 (Laws 1907, p. 67), by its terms is unmistakably limited to the regulation of carriers and rates between points within the state, and an order made by the state railroad commission under its authority is presumptively intended to be subject to the same limitation. The fact that such an order, fixing rates, and limited by its terms to intrastate shipments, may incidentally induce a change in the movement of interstate commerce, or a change in interstate rates, does not render it, nor the statute, unconstitutional as a regulation of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 82; Dec. Dig. § 61.*]

5. CONSTITUTIONAL LAW (§ 24^{7*})—EQUAL PROTECTION OF LAWS.

The railroad commission act of Oregon of February 18, 1907 (Laws 1907, p. 67), which creates a state railroad commission, with power by order to fix reasonable rates to be charged by any railroad company, provides that the company, if dissatisfied with such rates, may bring suit in a state court to set aside the order, on the ground that the rates fixed thereby are unlawful, and may procure an injunction suspending the order by giving a bond conditioned that it "shall answer for all damages

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

caused by the delay in the enforcement of the order * * * and all penalties that would attach against the said railroad and all compensation for whatever sums, for transportation service any person or corporation shall be compelled to pay in excess of the sums such person or corporations would have been compelled to pay if the order * * * had not been suspended." The only penalties to which the company or its officers or agents could in any event be subjected by reason of obtaining such injunction in a suit brought in the prescribed court, or in any other court, state or federal, would be one of from \$100 to \$10,000, imposed on the company by the act for failure or refusal "to obey any lawful * * * order made by the commission." *Held*, that the act was not unconstitutional, as subjecting a railroad company to such excessive penalties for its violation, or in case it resorted to the courts, as to deny it the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 703; Dec. Dig. § 247.*]

6. CARRIERS (§ 12*)—REGULATION OF RATES—REASONABLENESS.

A bill by a railroad company to enjoin the enforcement of an order of a state railroad commission, fixing rates to be charged by it, *held* not to state facts showing that the rates so fixed were unreasonably low or confiscatory.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 11; Dec. L. § 12.*]

In Equity. Suit by the Oregon Railroad & Navigation Company against Thomas K. Campbell, Clyde B. Aitchison, Oswald West, and A. M. Crawford. On demurrer to bill and motion for preliminary injunction. Demurrer sustained, and injunction denied.

This is a suit to restrain the Oregon State Board of Railroad Commissioners from putting into operation and effect a schedule of rates for carrying freight upon and along the complainant's lines of railroad in Oregon. The Attorney General of the state is joined as a party defendant. The complainant is the owner of, and has now in operation, a system of railroad lines in Oregon, Washington, and Idaho, extending from Portland, Or., to Huntington, and from Umatilla and Pendleton, Or., to Spokane, Wash., and Wallace, Idaho, together with numerous branch lines, extending from the main line of the system. This system of railroads has connection with other systems extending elsewhere, in other states than those named, wherewith joint traffic is maintained. The bill of complaint attacks the validity of the act of the Legislative Assembly of the state of Oregon, adopted February 18, 1907 (Laws 1907, p. 67), in pursuance of which the State Railroad Commission was created and its powers were conferred, upon the ground that it is unconstitutional and void, within the limitations of the state Constitution, and that its operation is to deprive the complainant of its property and services without due process of law, contrary to the federal Constitution. The act is, by exhibit, set out in full. Under the act it is made the duty of the Attorney General to enforce the provisions thereof and to prosecute any violation of its mandates.

More specifically, it is alleged that the complainant has physical connection with the Oregon Short Line and the Union Pacific Railways, and these have a like connection with various lines of railroad owned and operated by the Chicago & Northwestern Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company, and that, by reason of these connections, and through tariffs published and established by the various companies concerned, merchandise and commodities of all kinds have moved from Chicago, Milwaukee, Duluth, St. Paul, Minneapolis, St. Louis, and points and places located upon the east of the Missouri river, to Portland, and to places east of The Dalles reached by the lines of the complainant; that the Union Pacific, the Oregon Short Line,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the complainant issued a tariff, designated "U. P. R. R. I. C. C. No. 1,578," covering the transportation of freight between the points named and Missouri river common points to various stations on complainant's line east of The Dalles, other than the station at Pendleton, Or., which was duly filed with the Interstate Commerce Commission, and became operative January 2, 1904, and is in effect and operation, with some amendments, at the present time; that the complainant and various other companies promulgated a tariff, naming class and commodity rates, effective January 18, 1904, from New York and common points, and from Pittsburg, Chicago, and Mississippi and Missouri river common points, to certain North Pacific Coast terminals, including Portland, Or., and designated "Transcontinental Freight Bureau No. 4—C," better known as the "Transcontinental Terminal Tariff"; that the complainant has now in effect and operation upon its lines a freight tariff, naming class and commodity rates, based upon the existing Western Classification, between Portland, East Portland, Albina, and St. Johns, Or., and all stations on its lines in Oregon, Washington, and Idaho, which tariff became effective January 1, 1907, and is designated "No. L—525, I. C. C. No. 1,146"; that complainant and the San Francisco & Portland Steamship Company, which latter company is now engaged in operating a line of steamers between Portland and San Francisco, have heretofore issued, and have now in operation, a joint freight tariff between San Francisco, Cal., and Portland and points on complainant's lines in Oregon east of The Dalles, which is designated "O. R. & N. I. C. C. No. 967"; that the rates so fixed and established are made up by adding certain arbitraries or local rates to the rates fixed and established by tariff No. L—525 from Portland to various points and places in Oregon east of The Dalles; that the Southern Pacific Company, the railway lines of which have physical connection with the lines of complainant, and complainant, have adopted, and have now in operation and effect, a joint tariff covering transportation from San Francisco and other points in California, to Portland, Or., and to all points in Oregon east of The Dalles, which tariff is designated "Southern Pacific I. C. C. No. 2,130"; that the through rates from California to points east of The Dalles in Oregon consist mainly of a combination of the rates fixed by tariff No. L—525 from Portland to such points east of The Dalles and certain arbitraries or local rates; that, under date of April 22, 1908, the Railroad Commission of Oregon made and entered an order, in a proceeding instituted before said commission by the Portland Chamber of Commerce against the complainant, which was served upon complainant on April 23, 1908, and was to become effective 20 days thereafter; that in and by said order it was found and declared, among other things, that the class rates now in effect under tariff No. L—525, with supplements amendatory thereto, over and upon complainant's main, branch, leased, and otherwise controlled lines in Oregon, between the city of Portland and all points in Oregon east of The Dalles, were and are unjust and unreasonably high, and complainant was directed to desist from charging any higher rates for transportation between points designated than the class rates prescribed by said order, and that, in lieu of said class rates established by said tariff No. L—525, the complainant should substitute and adopt the class rates specified in said order, which were and are, as it relates to all points east of The Dalles, greatly less than the rates established by tariff No. L—525 covering the same points; that at least 70 per cent. of the traffic carried, and hereafter to be carried, from Portland to points on complainant's lines east of The Dalles in Oregon, under the rates fixed by tariff No. L—525, originates, and will originate, at points along or east of the Missouri river, or in California, and is and will be first transported to Portland, and from thence under the class rates of L—525, or under the class rates fixed by the order of the Railroad Commission of Oregon, and that large quantities of like kind of goods are transported directly from the East to points in Oregon east of The Dalles, by complainant and allied lines, at and under the rates fixed by Union Pacific tariff No. 1,578, and from points in California to points in Oregon east of The Dalles at rates fixed and established by tariffs in force from California to points in Oregon east of The Dalles, as alleged; that by Union Pacific tariff No. 1,578 it is provided that, where the rate from the point of shipment added to the local rate under L—525 from Portland to points east of The Dalles is lower

than the through rate under said tariff No. 1,578, the combination rate shall govern; that the tariff rates fixed by tariff No. 1,578 applying to points on complainant's lines in Oregon east of The Dalles, and particularly the class rates, are generally higher than the combination rates, and that the commodity rates fixed by such tariff No. 1,578 are generally somewhat less than than the combination of the transcontinental terminal to Portland added to the tariff under L—525, but that such commodity rates so fixed by tariff No. 1,578 are greater than the combination transcontinental and the rates fixed by the Railroad Commission to said points east of The Dalles; that, should the Railroad Commission's order become operative, it would affect, not only the interstate rates specifically mentioned, but each and every other interstate rate now in force and effect from the Missouri river common points and points east thereof to points in Oregon east of The Dalles, and from points in California to like points in Oregon; that the said order of said Railroad Commission necessarily amounts to an attempted regulation of commerce between the several states; that, should complainant attempt to comply with the order, it would be compelled to violate the act of Congress and the regulations promulgated by the Interstate Commerce Commission, and in this particular said order is an attempt to regulate interstate commerce, and is void; that the rates established by tariff L—525 are lower than the rates established for the transportation of similar traffic from any point on complainant's lines other than Portland to any other point on complainant's lines in Oregon, Washington, or Idaho, and the rates established by said tariff No. L—525, from Portland to points east of The Dalles, are lower than the rates charged by any other railroad company in Oregon, Washington, or Idaho, for the transportation of similar traffic for the same distance; that the rates attempted to be established by the said order are lower than the rates fixed and established by said tariff No. L—525, and are unreasonably low, and are unjust to complainant; that, while the immediate effect of such order, if it could be confined strictly to the state of Oregon, might leave complainant a fair income upon its entire business, nevertheless, if the rates attempted to be established by the said order be applied to the interstate business directly affected thereby, and if the percentage of reduction effected by such order be applied to the local business of complainant in the states of Oregon, Washington, and Idaho, which local business is now being transacted upon rates higher than those fixed by tariff L—525, it will operate to confiscate the property of complainant and deprive it of property without due process of law, in violation of the Constitution of the United States, because such reduction will leave complainant without any fair net earnings upon its property; that the rates charged by complainant between Portland and The Dalles, as established by L—525, are unreasonably low, made so by reason of water competition; that by the order of the Railroad Commission the rates to points east of The Dalles are based upon the rates charged by complainant between Portland and The Dalles, and the rate of increase of the rates to points east of The Dalles fixed by said order is unreasonably low and unjust to complainant, and has the effect of making the rate to points east of The Dalles unreasonably low, and to some points east of The Dalles less than the rates to The Dalles, and therefore the order has provided that the rates to points east of The Dalles shall equal the present rates to The Dalles when the application of the formula prescribed would reduce the rates below the present rates between Portland and The Dalles; that the application of the present rates between Portland and The Dalles to points beyond The Dalles renders them unreasonably low and unjust to complainant; that the said order of the Railroad Commission fixes the rates upon complainant's branch lines the same for equal distances as upon its main line, but that the cost of service upon said branch lines, and each of them, is much greater than upon the main line, so that the rates fixed by said order upon complainant's branch lines are unreasonably low; that, by operation of the said order, complainant will be permitted to charge but 2 cents more for hauling from Portland to Baker City than from Portland to La Grande, upon first-class freight, 1 cent more upon second, third, fourth, fifth, A, and B classes, and nothing additional upon C, D, and E classes, but that a difference is made in the rates to La Grande, as compared with the rates to Pendleton, of from 5 to 25 cents

per 100 pounds upon the various classes, and a difference in the rates to Pendleton, as compared with the rates to Umatilla, of from 3 to 15 cents per 100 pounds: that such adjustment of rates is arbitrary and unreasonable, and is founded upon no circumstance and condition affecting the cost and value of service.

It is furthermore charged in the bill that no adequate or proper remedy is afforded for the protection of complainant against the alleged injustice of the tariff fixed by the order of the State Railroad Commission, and that the penalties prescribed for violation of the order are so severe and drastic as to render it confiscatory for complainant to attempt to litigate against an order, or to maintain its rights and have reasonable rates established affecting traffic upon its lines. Further, that the act of the Legislative Assembly of the state of Oregon creating said Railroad Commission is unconstitutional, for that it attempts to accord to said commission all the powers of government, namely, legislative, executive, and judicial. Coupled with all these charges is the usual averment that the commission and the Attorney General are threatening to put the tariff established by the commission into effect, and to prosecute complainant for any disregard of the provisions thereof. A preliminary injunction is sought, and, finally, a decree declaring such state railroad commission act to be unconstitutional and void, in so far as it may affect the complainant.

The order of the Railroad Commission is as follows:

"It is therefore ordered, considered and determined that the defendant company, the Oregon Railroad & Navigation Company, shall cease and desist from charging any higher rates within this state for the transportation of merchandise and other commodities from the city of Portland to points on the defendant company's main, branch, leased, or otherwise controlled railroad lines within the state of Oregon, covered by the class rates in said tariff No. L—525, O. R. C. No. 39, I. C. C. No. 1,146, than the class rates prescribed in this order, and the said railroad company, in lieu of the rates herein ordered discontinued, shall substitute the following maximum rates: Reduce first-class rates from Portland to all points east of The Dalles, except where, under the existing tariff, the rates are now less than prescribed herein, by an amount equal to one-sixth of the difference between twenty-five cents (the existing first-class rate to The Dalles) and the existing first-class rate to such point, and reduce all other class rates between Portland and points east of The Dalles, with the exception above noted, so that it will bear the same relation to the first-class rate as is provided in the distance tariff of the said defendant railroad company, to wit:

Per cent. of first class....	Classes.									
	1	2	3	4	5	A	B	C	D	E
	100	85	70	60	50	50	40	30	25	20

"It is further ordered, considered, and determined, that the rates under the existing tariff shall not be exceeded on any class to any points covered by said tariff, nor to apply to or change any rate now in effect that is lower than the rates prescribed by this order. The rates prescribed by the foregoing order shall be effective on and after the ——— day of ———, 1908, and the defendant company is given until the ——— day of ———, 1908, to prepare and file new tariffs in accordance with the provisions of this order. It is recommended that the defendant railroad company make a similar adjustment of its distance tariff and its tariffs on various staple commodities, such as grain, wool, and other commodities, within the state of Oregon."

The controlling provisions of the state railroad commission act, in so far as they may pertain to this controversy, are in substance as follows:

It creates a Railroad Commission, to be composed of three persons elected by the people, but appointive until an election is held. Section 1.

The commission is given power to adopt and promulgate rules and orders to govern its proceedings, and to amend the same, and to regulate the mode and manner of all investigations and hearings of railroads and other parties before it. Section 9.

The term "railroad" is defined to embrace "all corporations, companies, individuals, associations of individuals," etc., "that now, or may hereafter, own, operate by steam, electric, or other motive power, manage, or control

any railroad or interurban railroad, or part of a railroad or interurban railroad, as a common carrier in this state." And the provisions of the act are made to apply to the transportation of passengers and property, and to all railroad companies, etc., "that shall do business as common carriers upon or over any line of railroad within this state." Section 11.

Every railroad is required to furnish reasonably adequate service, equipment, and facilities, and the charges made for the services rendered are also required to be reasonable and just. Every unjust and unreasonable charge for such services is prohibited and declared to be unlawful. Section 12.

Every railroad is required to print and file with the commission a schedule of its rates and joint rates existing between all points in the state upon its lines, or any line controlled or operated by it. Section 13.

Changes in schedules are to be made only upon notice and filing of copies of new schedules with the commission. Section 14.

"It shall be unlawful for any railroad to charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property or for any service in connection therewith than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, and the rates, fares and charges named therein shall be the lawful rates, fares and charges until the same are changed as herein provided." Section 16.

But one classification of freight shall exist in the state, which shall be uniform on all railroads. Section 20.

Upon complaint that any rates, fares, charges, or classifications are in any respect unreasonable or unjust, the commission may, upon 10 days' notice to the railroad company complained against, proceed to investigate the same. If, upon such investigation, the rates, fares, charges, or classifications shall be found to be unreasonable, the commission is empowered to fix and order substituted therefor such rates, fares, charges, or classifications as it shall have determined to be just and reasonable. The commission may also proceed upon its own initiative as upon complaint by an individual, company, or corporation. Section 28.

Whenever, upon an investigation made under the provisions of the act, the commission shall find any existing rates, fares, charges, or classifications, etc., unreasonable or unjustly discriminatory, it shall determine, and by order fix, reasonable rates, fares, charges, or classifications to be imposed, observed, and followed in the future, in lieu of those found to be unreasonable, and it shall cause a certified copy of such order to be delivered to an officer or station agent of the railroad affected thereby, which order shall, of its own force, take effect and become operative 20 days after the service thereof. All railways to which the order applies shall make such changes in their schedule on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any railroad in any such rates, fares, or charges without the approval of the commission. Section 30.

"All rates, fares, charges, classifications, and joint rates fixed by the commission shall be in force and shall be *prima facie* lawful, and all regulations, practices, and service prescribed by the commission shall be in force and shall be *prima facie* reasonable, until finally found otherwise in an action brought for that purpose pursuant to the provisions of sections 32, 33, 34, and 35 of this act." Section 31.

Any railroad feeling aggrieved by the acts of the commission in fixing or regulating rates and fares may commence suit in the circuit court of Marion county against the commission to vacate and set aside its order relating thereto, on the ground that the rates and charges so fixed are unlawful. The commission is required to answer within 10 days after service of the complaint upon it, and thereupon the cause is deemed at issue, and shall stand ready for trial upon 10 days' notice by either party. All suits brought under this section shall be tried and determined as causes in equity, and shall have precedence over any civil cause of a different nature pending in said court, which court shall always be deemed open for the trial of such controversies. The burden of proof is cast upon the complainant in trials arising under this section and sections 33, 34, and 35, to show, by clear and satisfactory evidence,

that the order of the commission complained of is unlawful or unreasonable. Section 32.

"No injunction shall issue suspending or staying any order of the commission except upon application to the circuit court or presiding judge thereof, notice to the commission, and hearing, and upon the giving of such bond or other security and upon such conditions as the court may require; and if such order of injunction suspends the order or requirement of the commission fixing rates, then the court shall require a bond with good and sufficient surety conditioned that the railroad or railroads applying for such injunction shall answer for all damages caused by the delay in the enforcement of the order of the commission and all penalties that would attach against the said railroad and all compensation for whatever sums for transportation service any person or corporation shall be compelled to pay in excess of the sums such person or corporation would have been compelled to pay if the order of the commission had not been suspended; and such bond shall cover the periods transpiring from time of the issuance of any such injunction until the final determination of the question litigated. The said bond shall be executed in favor of the Railroad Commission of Oregon for the benefit of whom it may concern and shall be enforceable by said commission or any person interested in an appropriate proceeding. Any person paying charges found to be excessive shall have a claim for the excess, whether paid under protest or not, and unless refunded within thirty days after written demand made after final judgment, may recover the same by action against such railroad, or such railroad and the sureties on such bond. Claims of persons for money collected in excess of the amount payable under the rate or rates established by the commission shall be assignable in the same manner as any chose in action. No appeal to the Supreme Court shall stay the operation of any order of the commission unless the circuit or Supreme Court shall so direct, and unless the railroad so appealing shall give a bond with like conditions and terms as that given on granting injunctions suspending an order of the commission fixing rates." Section 33.

"If, upon the trial of such suit, evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission or additional thereto, the court before proceeding to render judgment, unless the parties to such suit stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same, and may alter, modify, amend or rescind its order relating to such rate or rates, fares, charges, classification, joint rate or rates, regulation, practice, service or equipment complained of in said action, and shall report its action thereon to said court within ten days from the receipt of such evidence. If the commission shall rescind its order complained of, the suit shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment or decree shall be rendered thereon, as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order." Section 34.

"Either party to said suit, within sixty days after the entry of the judgment or decree of the circuit court, may appeal to the Supreme Court. Where an appeal is taken the cause shall, on the return of the papers to the Supreme Court, be immediately placed on the calendar of the then pending term, and shall be assigned and brought to a hearing in the same manner as other causes on the calendar, but shall have precedence over civil causes of a different nature pending in said court." Section 35.

"The commission shall have power, and it is hereby made its duty to investigate all freight rates on interstate traffic on railroads in this state, and when the same are, in the opinion of the commission, excessive or discriminatory or are levied or laid in violation of the interstate commerce law, or in conflict with the rulings, orders or regulations of the Interstate Commerce Commission, the commission shall present the facts to the railroad, with a request to make such changes as the commission may advise, and if such

changes are not made within a reasonable time the commission shall apply by petition to the Interstate Commerce Commission for relief. All freight tariffs issued by any such railroad relating to interstate traffic in this State shall be filed in the office of the commission within thirty days after the passage and publication of this act, and all such tariffs thereafter issued shall be filed with the commission when issued." Section 47.

"If any railroad shall do or cause to be done or permit to be done any matter, act or thing in this act prohibited, or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, such railroad shall be liable to the person, firm or corporation injured thereby in treble the amount of damages sustained in consequence of such violation, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case: Provided, that any recovery as in this section provided, shall in no manner affect a recovery by the state of the penalty prescribed for such violation." Section 51.

"Any officer, agent or employé of any railroad who shall fail or willfully refuse to fill out and return any blanks as required by this act, or shall fail or refuse to answer any questions therein propounded, or shall knowingly or willfully give a false answer to any such question, or shall evade the answer to any such question, where the fact inquired of is within his knowledge, or who shall, upon proper demand, fail or willfully refuse to exhibit to the commission or any commissioner, or any person authorized to examine the same, any book, paper or account of such railroad, which is in his possession or under his control, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars for each such offense; and a penalty of not less than five hundred dollars nor more than one thousand dollars, shall be recovered from the railroad for each such offense when such officer, agent or employé acted in obedience to the direction, instruction or request of such railroad or any general officer thereof." Section 52.

"If any railroad shall violate any provision of this Act, or shall do any act herein prohibited, or shall fail or refuse to perform any duty enjoined upon it, for which a penalty has not been provided, or shall fail, neglect or refuse to obey any lawful requirement, order made by the commission, or any judgment or decree made by any court upon its application, for every such violation, failure or refusal, such railroad shall forfeit and pay into the state treasury a sum of not less than one hundred dollars, nor more than ten thousand dollars for such offense. In construing and enforcing the provisions of this section, the act, omission or failure of any officer, agent, or other person acting for or employed by any railroad, acting within the scope of his employment, shall in every case be deemed to be the act, omission or failure of such railroad." Section 53.

"The commission shall have power when deemed by it necessary to prevent injury to the business or interests of the people or railroads of this state in consequence of interstate rate wars, or in case of any other emergency to be judged of by the commission, to temporarily alter, amend, or, with the consent of the railroad company concerned, suspend any existing passenger rates, freight rates, schedules and orders of any railroad or part of railroad in this state. Such rates so made by the commission shall apply on one or more of the railroads in this state or any portion thereof as may be directed by the commission, and shall take effect at such time and remain in force for such length of time as may be prescribed by the commission." Section 54.

"The commission shall inquire into any neglect or violation of the laws of this state by any railroad corporation doing business therein, or by the officers, agent, or employés thereof, or by any person operating a railroad, and shall have the power, and it shall be its duty, to enforce the provisions of this act as well as all other laws relating to railroads and report all violations thereof to the Attorney General; upon the request of the commission it shall be the duty of the Attorney General or the prosecuting attorney of the proper county to aid in any investigation, hearing, or trial had under the provisions of this act, and to institute and prosecute all necessary actions or proceedings for the enforcement of this act or the recovery of penalties payable

to the state, and of all other laws of this state relating to railroads, and for the punishment of all violations thereof." Section 57.

"This act shall not have the effect to release or waive any right of action by the state or by any person for any right, penalty or forfeiture which may have arisen or which may hereafter arise under any law of this state; and all penalties and forfeiture accruing under this act shall be cumulative and a suit for, and recovery of one, shall not be a bar to the recovery of any other penalty." Section 60.

A restraining order was issued upon application of the complainant, and subsequently the defendants demurred to the bill.

W. W. Cotton, for complainant.

A. M. Crawford and Teal & Minor, for defendants.

WOLVERTON, District Judge (after stating the facts as above). This case has been submitted both upon the demurrer to the bill and upon application for a preliminary injunction. Logically the demurrer should be first considered. The allegations of the bill to the effect that the railroad commission act of Oregon and the order of the commission, made in pursuance thereof, fixing the rates complained of, are an invasion of the exclusive right of Congress to regulate interstate commerce, that the rates so fixed and established are unreasonable and unjust, and that complainant is practically inhibited from having the question as to whether they are in fact unreasonable and unjust adjudicated by a tribunal of justice by reason of the supposed drastic penalties imposed for an attempt to obtain such an adjudication, beyond dispute present federal questions for decision, and this court has jurisdiction of the controversy. This would be true, whether complainant's position were maintainable or not in fact; for that is not to the purpose. The federal questions remain, and afford basis for interposition by the federal courts. It is unnecessary to cite authorities in support of this position.

Three questions are urged as arising under the federal Constitution, all of which challenge the validity of the order of the Railroad Commission. They are as follows: First, that the order, if effective, regulates interstate commerce; second, that by reason of the exorbitant and drastic penalties imposed by the act for the violation of any order adopted by the Railroad Commission, such act in practical effect deprives the complainant of the equal protection of the laws, and subjects its property to be taken without due process of law; and, third, that the ultimate effect of the order, if operative, will be to prevent the complainant from making fair net earnings, and will thus deprive the complainant of its property without due process of law.

Two other questions, not federal, are also urged, namely: First, whether the rates established by the order of the commission are reasonable; and, second, whether the Oregon Legislative Assembly, by such act, conferred upon the Railroad Commission legislative, executive, and judicial functions, in violation of the provisions of the state Constitution.

If any of these questions be answered in the affirmative, the work of the Railroad Commission must fail of its purpose. They will be examined, beginning with the last, and the others in the order of their statement. We are to determine the validity of the act from its pro-

visions. Does the act combine, in a legal and constitutional sense, legislative, executive, and judicial functions of government, and empower the Railroad Commission to exercise the same?

Under the state Constitution the powers of government are divided into three separate departments, namely, the legislative, the executive (including the administrative), and the judicial; and no person charged with the official duties under one of these departments is competent to exercise any function of the other, except as provided in the Constitution itself. Section 1, art. 3, Const. Or. This is an express declaration of the segregation of the powers of government. The Constitution of the United States as effectively segregates such powers of government, but without an express declaration to that effect. That instrument provides (section 1, art. 1) that "all legislative powers herein granted shall be vested in a Congress of the United States"; (section 1, art. 2) that "executive power shall be vested in a President of the United States"; and (section 1, art. 3) that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Thus it is that, while the powers of government under the national Constitution are actually apportioned to or divided into three departments, there is no express declaration that they shall be so apportioned or divided. The thing is done by establishing, severally, each of the three departments of government, and they are as effectually separate departments as if the Constitution had in so many words so declared, as does the state Constitution. In legal effect, therefore, there is no difference between the division of governmental functions under the one Constitution as compared with the other, save that the administrative powers are included with the executive in the state government.

The principle of the segregation of the three functions of government was not a concept incident to Revolutionary times, leading to the adoption of the American Constitution, but a maxim having its outgrowth from the British Constitution, the meaning of which is, as interpreted by Mr. Madison in one of his notable contributions to *The Federalist*, that:

"Where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted." *The Federalist*, p. 375.

The concept is the more readily discernible through the works of Montesquieu. He says:

"There can be no liberty, where the legislative and executive powers are united in the same person, or body of magistrates," or "if the power of judging be not separated from the legislative and executive powers."

Under the British Constitution, while there is a separation of these distinctive departments of government, there remains a blending more or less of the powers. As, for instance, the executive retains the prerogative of making treaties, which, under certain limitations, have the force of legislative acts. The members of the judiciary are appointed by the executive. One branch of the legislative department acts as constitutional adviser to the executive, while, on the other hand, it has

the sole power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. So, also, the judiciary is so far connected with the legislative department as to participate in its deliberations, although not entitled to a legislative vote.

In the colonial times of the seventeenth century, the Legislatures were chosen by the people, the executives, with two exceptions, were appointed by the Crown, and the judges were named by the executive, and usually with the assent of the council, so that there was a conformation to the idea of a three-fold division of government; but the lines of division were not cast upon fixed principles. Experience under a republican form of government has strengthened the concept of holding separate and distinct the three estates of governmental function, and in some measure marked more distinctly the lines of cleavage. Neither the national Constitution nor the Constitution of any state under the Union has eliminated entirely the blending, to a greater or less extent, of these co-ordinate powers; nor does it seem possible that such a thing can be accomplished in practical operation.

Without allusion to the blending of these co-ordinate powers under the federal Constitution, which is somewhat greater than under the state Constitution, I may make reference shortly to the provisions under the state Constitution which, to an extent at least, are a trenching of one branch of the government upon the powers and functions of the other. The legislative may regulate the practice in the courts of justice, and it does in practice fix the salaries of the executive and the members of the courts of justice, and it may sit in judgment of removal of the judges from office. The executive is invested with the veto power upon acts of the Legislature, it may grant pardons, and may remove from office a judge of the Supreme Court upon the joint resolution of the Legislative Assembly. The judiciary may determine the constitutionality of any law adopted by the Legislative Assembly. These things are permissible, it is true, under the direct provisions of the fundamental law; but the necessity of their adoption demonstrates the impossible condition of fixing absolute lines of cleavage, so that there will be no trenching, in any degree or measure, of the functions of one department upon those of another. Indeed, there must be some latitude in this direction in order to the greatest practical exercise of the co-ordinate powers conferred. In other words, there is no absolute line of cleavage in governmental range, under this concept of a republic, that will leave the one department absolutely free from the domination in some way or measure of the other. Further than this, the very concept itself, or the maxim, as our forefathers were wont to call it, carried with it the idea that the powers of one department should be adaptable in their exercise to operate as a check and balance upon the appropriate powers of the other. There can never be established in practice, I apprehend, an exact line of division in the exercise of these powers. Mr. Thorpe might well remark, as he does in his work entitled the Constitutional History of the United States (volume 1, p. 14), speaking of the colonial conditions of the seventeenth century, that:

"The so-called three political estates, the legislative, the executive, and the judiciary, seem ever to have been, as they are with us to-day, in a state of flux."

The course of development in the concept of the three estates in government in colonial usage has been to curtail the original powers of the legislative and to increase the powers of the other two departments. For instance, the governor of the colonies could not veto bills, nor grant pardons or reprieves. The Governor can now do so under most, if not all, of the state Constitutions; and the Legislatures are shorn of their authority in most, if not all, instances to sit as courts of appeal in judicial controversies. The state Constitutions, as well as the federal Constitution, are creative of these checks and balances which have been deemed most advantageous to the beneficial operation of good government, and as securing the broadest liberty to the people. The idea of a three-department government is, therefore, common to all the state Constitutions, as well as to the federal Constitution; but provisions vary appreciably as to the delegation of powers that may be exercised by the one department or the other. None of them, however, break on a strict line of legislative, executive, and judicial functions. Nor in the exercise of these powers has it been possible, or found expedient, to observe with exactness absolute lines of cleavage. In support of these observations, Mr. Justice Story, in his work on the Constitution, has this to say:

"But when we speak of the separation of the three great powers of government, and maintain that the separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, and that such exercise of the whole power would subvert the principles of a free constitution."

These observations are sufficient to indicate the scope and meaning of the maxim. Let us now inquire what the judicial construction has been as it pertains to a measure of the sort here under consideration. As the division of the three departments of government is framed upon essentially the same lines under the federal Constitution as under the Constitution of the state of Oregon, we should look first to the adjudications in these jurisdictions.

There has been but one case decided in the state court that has relation to the subject. *State v. Southern Pacific Company*, 23 Or. 424, 31 Pac. 960. The suit was instituted to enforce the schedule of rates fixed by a Railroad Commission constituted by act of the Legislature. The commission, it seems, was empowered to fix rates for transportation of freight, and if a compliance with its order in this respect was refused then to institute a suit in the name of the state for the purpose of enforcing obedience thereto. The commission prevailed in the suit, and the railroad company was required, at the hands of the court, to conform to the order of the commission fixing the rates; but no question was raised as to the constitutional authority or power of the commission to fix such rates, or as to whether, in fixing such rates, it exercised a legislative, judicial, or administrative function—it being apparently conceded that its powers were adequate in respect of making rates, in so far as they were reasonable.

Advancing, now, to the federal adjudications, it may be observed that the railroad commission act of the state contains many features and regulations quite in common with the interstate commerce act of Congress (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) and its amendments (1 Supp. Rev. St. pp. 529, 684, 891); the signal difference between the two acts being that in the former the commission is empowered to fix the rates, which, when fixed, are made *prima facie* reasonable and just, and, if controverted by an interested party, the burden is cast upon such party to institute the proper proceedings or suit, and to overcome the *prima facie* case by proof to the contrary, while in the latter the commission orders and directs changes to be made in rates, if found to be unreasonable and unjust, and the rates named by the commission are deemed to be *prima facie* reasonable and just, and if the interested party refuses to obey the orders of the commission naming the rates the commission is authorized to enforce obedience by a suit in the federal court. In such a suit the party contesting has the burden of overcoming the *prima facie* case of the reasonableness of the rates directed by the commission for adoption, and must do so in its defense, or the commission's order will stand.

The difference in the procedure consists chiefly in this: That in the one case the carrier must sue to overcome a *prima facie* case, while in the other the commission must sue to enforce its order, and the carrier must overcome the *prima facie* case by its defense. This further difference may be noted in the policy of the two acts: The former enforces its behests and the findings and orders of the commission by the imposition of fines and penalties, while the latter must resort, more generally, to the Circuit Court, by remedial action or suit, for an enforcement of the law's mandate and its own recommendations and orders. As to the constitutionality of the interstate commerce act, there seems to be no question. At least, so far as I am aware, there has been no case declaring it unconstitutional or invalid in any particular, while many cases have been determined under its provisions; so that the act stands as a perfectly valid and legitimate regulation for the control and conduct of interstate transportation lines and facilities.

Keeping in mind, therefore, the chief distinctions specified between the two acts, we shall be enabled to determine more readily whether the state statute is unconstitutional or invalid in the particulars complained of. Remarking upon the general subject of legislation in relation to the regulation of interstate commerce, in the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 474, 14 Sup. Ct. 1125, 1132, 38 L. Ed. 1047, Mr. Justice Harlan has this to say:

"All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty, not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules."

In Mississippi a railroad commission act was adopted intrusting a commission with supervision over tariff charges, with authority to con-

tinue such charges from time to time, and to increase or reduce any of said rates according as experience and business operation might justify, and to fix tariffs of charges for those railroads failing to furnish schedules as required. This act was sustained by the Supreme Court of the state, wherein was made the contention that the statute was repugnant to the Constitution of the state, because it created a commission and charged it with the duty of supervising railroads. The Supreme Court of the United States concurred in the view, in a cause involving the same controversy, being one among those known as the "Railroad Commission Cases." See *Stone et al. v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636. The Constitution of the state of Mississippi is in purport the same as the Oregon Constitution as it respects the division of departments of government, and it contains no special authorization for the establishment of a railroad commission with special powers. The federal case would seem, therefore, to be strongly authoritative of the validity of the Oregon act, although there is but little discussion of the principle involved.

In 1888 the question came up in Iowa, under an act of the Legislature of that state providing a railroad commission and defining its duties. The commission was empowered to make schedules of reasonable and maximum rates, and a penalty was annexed for disobedience on the part of railroad companies in the charging and collecting of tolls and compensation which were unreasonable and unjust. The validity of this act was called in question by a suit instituted in the federal Circuit Court (*Chicago & N. W. Ry. Co. v. Dey*, 35 Fed. 866, 1 L. R. A. 744), Mr. Justice Brewer presiding. The proposition was advanced that the law was unconstitutional, because it seemed to delegate legislative power. After stating the settled rule of law, as determined by what are known as the "Granger Cases," and others following them (*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Chicago, etc., R. R. Co. v. Iowa*, 94 U. S. 155, 24 L. Ed. 94; *Peik v. Chicago, etc., Railway Co.*, 94 U. S. 164, 24 L. Ed. 97), that the power of fixing rates is purely legislative, the court says:

"There is no inherent vice in such a delegation of power; nothing in the nature of things which would prevent the state, by constitutional enactment at least, from intrusting these powers to such a board; and nothing in such constitutional action which would invade any rights guaranteed by the federal Constitution. So that, after all, the question is one more of form than of substance. The vital question with both shipper and carrier is that the rates shall be just and reasonable, and not by what body they shall be put in force."

As a third reason he continues:

"While, in a general sense, following the language of the Supreme Court, it must be conceded that the power to fix rates is legislative, yet the line of demarkation between legislative and administrative functions is not always easily discerned. The one runs into the other. The law books are full of statutes unquestionably valid, in which the Legislature has been content to simply establish rules and principles, leaving execution and details to other officers."

And he concludes as follows:

"While, of course, the argument from inconvenience cannot be pushed too far, yet it is certainly a matter of inquiry whether, in the increasing com-

plexity of our civilization, our social and business relations, the power of the Legislature to give increased extent to administrative functions must not be recognized."

After an examination of the few authorities then extant bearing upon the subject, among which he cites *Stone v. Trust Co.*, supra, he sums up that:

"All the authorities that have been cited, or that I have been able to find, bearing upon this precise question, are in favor of the constitutionality of such a delegation of power."

The Iowa Constitution provides for a distribution of powers in almost the identical terms of the Oregon Constitution, save that the executive is not made to include the administrative functions, and no special provision is made otherwise for the establishment of a railroad commission.

Subsequently a case arising in Texas, which challenged the constitutionality of a railroad commission created by the Legislature of that state, was determined in the Supreme Court of the United States. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. The distinguished jurist who wrote the opinion in the last case above cited wrote the opinion in this. The constitutional provision in Texas as to the distribution of powers is as follows:

"The powers of the government of the state of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

No special provision is otherwise made in the Constitution for creating a railroad commission. The commission, under the act called in question, was empowered to classify and fix rates of compensation for carriage of freight, upon giving appropriate notice to the railroad company affected; it being further provided that, when a railroad company or party in interest was dissatisfied with the decision of any rate, classification, rule, etc., such company or party might file a petition in a court of competent jurisdiction, in Travis county, Tex., against said commission as defendant, and that the reasonableness of the rate, or charge, or classification might there be determined. Note the similarity of these provisions to those of the Oregon act. Stringent penalties are provided for failure on the part of the railroad company affected to comply with the order and directions of the commission. The act was first called in question because of the drastic penalties imposed for any violation of its provisions. As to this it was decided that the clauses providing punishment might be stricken out, and the act stand as valid law for the regulation of the rates of traffic. As to the question here under discussion, Mr. Justice Brewer says:

"Passing from the question of jurisdiction to the act itself, there can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such a commission

is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation. Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636. No valid objection, therefore, can be made on account of the general features of this act—those by which the state has created the Railroad Commission and intrusted it with the duty of prescribing rates of fares and freights, as well as other regulations for the management of the railroads of the state."

Thus is approved the general policy of the act, as well as every provision thereof save the clauses pertaining to penalties for violation. It is worthy of note that the law had now advanced to such a state of development and certainty that the learned justice was no longer in doubt as to the propriety and constitutionality of such an act. His language is now positive and unequivocal. This is now without question the settled doctrine of the federal courts.

A late case upon the subject is *Atlantic Coast Line v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933. At page 19 of 206 U. S., and page 591 of 27 Sup. Ct. (51 L. Ed. 933), the court, speaking through Mr. Justice White, has this to say:

"The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

Mr. Noyes, in his work on *American Railroad Rates*, lays down the following as the law in the premises:

"The Legislature cannot delegate its power to make laws. Statutes can be enacted only by the agency created by the Constitution for the purpose. But when the Legislature has adopted general rules, it may delegate the power to apply them to specific facts, and to exercise discretion in respect thereto. A commission may be created to perform legislative functions of a quasi administrative character. When the Legislature has declared that railroad rates shall be reasonable and just, it may authorize a commission to fix the specific charges. Any other conclusion would practically prevent the Legislature from exercising its power to make rates. The country is so large, the railroads so numerous, and conditions so variable and changeable, that direct rate making by the Legislature, with annual or biennial sessions, would be wholly out of the question. Moreover, Legislatures are not adapted to pass upon the matters of detail necessary in making rates. * * * When a commission, in the exercise of power delegated by the Legislature, makes a rate, the result is the same as if the Legislature directly acted. The act of the commission supplements and makes effective the act of the Legislature. The rate resulting from the joint action of the Legislature and its agent is the law. Making a rate in legal effect is making a law that such shall be the rate."

So it is said in a very recent case that has just come to my notice

"It is true that the function of fixing rates is legislative in its nature, yet it seems well settled now that the creation of a commission, with power to fix rates, is not an unconstitutional delegation of legislative power." *Railroad Commission v. Central of Georgia Ry. Co.* (C. C. A.) 170 Fed. 225, 238.

These authorities render it unnecessary to examine specifically the various state adjudications bearing upon the subject, especially as the three federal cases, namely, *Stone v. Trust Co.*, *Chicago & N. W. Ry. Co. v. Dey*, and *Reagan v. Farmers' Loan & Trust Co.*, arose under

state Constitutions very similar in the arrangement of the departments of government to the Oregon Constitution, and thus, being federal cases, they have peculiar force and applicability here. I may cite, however, the case of *State v. Missouri Pac. Ry. Co.*, 76 Kan. 467, 92 Pac. 606, which is very instructive, and is in full accord with the federal adjudications.

Just when an act is the exercise of a legislative, when of a judicial, and when of an executive, function is often difficult to determine. Mr. Justice Marshall says:

"The difference between the departments undoubtedly is that the Legislature makes, the executive executes, and the judiciary construes the law." *Wayman v. Southard*, 10 Wheat. 1, 46, 6 L. Ed. 253.

By this general definition we have not gotten very far in the way of submitting a rule for determining nice distinctions as to what of these functions are being exercised in all cases. "And it is said," observes Mr. Cooley, in his work on *Constitutional Limitations* (7th Ed.) p. 132, "that that which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions."

Mr. Justice Holmes adopts this distinction with equal clearness in *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 226, 29 Sup. Ct. 67, 71, 53 L. Ed. 150, and makes the deduction therefrom that:

"The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind."

In *Chicago & Grand Trunk Railway Company v. Wellman*, 143 U. S. 339, 344, 12 Sup. Ct. 400, 402, 36 L. Ed. 176, the court says:

"The Legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

And in *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota*, 134 U. S. 418, 458, 10 Sup. Ct. 462, 467, 33 L. Ed. 970, that:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."

And so it was said in *Interstate Commerce Commission v. Railway Co.*, 167 U. S. 479, 499, 17 Sup. Ct. 896, 900, 42 L. Ed. 243, putting the two principles into juxtaposition:

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

With these two principles established, we may now determine whether the railroad commission act transcends the constitutional mandate of the state of Oregon in segregating the three departments of government. The commission is empowered, upon complaint, or upon its own initiative, and upon notice to the railroad company, to proceed to

an investigation as to whether the rates charged are unreasonable or unjust, and, if found to be so, to thereupon fix and order substituted for the original rates such rates as the commission shall determine to be reasonable and just. The order becomes effective 20 days after the service thereof upon the company. The act makes the rates and charges thus fixed *prima facie* lawful and reasonable only until finally found otherwise in an action instituted as subsequently provided.

Now, it is urged that the act of the commission, determining what rates are reasonable and fixing them for the future regulation of the railroad company, is a judicial act. Not so within the intendment of the law. It is first prescribed that all rates shall be reasonable. The railroad is subject to this injunction, as well as the commission. When it transpires that the railroad company is not observing the law, then the commission is charged with the duty of fixing a rate for the company. This, the authorities say, is a legislative function; but it may be done through the instrumentality of a railroad commission. The order of the commission being *prima facie* lawful, and the rates fixed *prima facie* reasonable, it is provided that it shall become operative in due course, unless the company is dissatisfied with the rates fixed by the commission. If so dissatisfied, the company is given a remedy for having judicially determined the reasonableness of such rates. There is language defining the duty of the commission in this relation, and delineating its procedure, that impresses one at first blush that it was designed that the commission should act judicially in determining this. But the fact that it is not made the final arbiter, that its order is only *prima facie* lawful, and the rates thereby fixed only *prima facie* reasonable, and that a court of constitutional judicatory is made the final forum in which to determine the reasonableness of such rates, demonstrates the true intendment of the commission act.

The Legislature can fix rates upon traffic, but in their establishment they must be reasonable. If unreasonable, the courts will declare them so. In fixing such rates, an investigation must necessarily precede the legislative action; but the law declares that the Legislature may fix rates through a functionary called a commission, and, when the commission acts, it is as if the Legislature had fixed the rates. But, like the rates established by the Legislature, if unreasonable, such rates are not binding upon the transportation companies affected. Recognizing this condition, the act in question has provided a remedy whereby the rates fixed may be judicially determined as it respects their reasonableness. The act of the commission being valid *prima facie*, the rates fixed become a law unto the carrier until a competent court declares them to be unreasonable. Just so with an act of the Legislature fixing rates, because no law fixing unreasonable rates can bind the carrier. I see no legal or constitutional objection to the legislation proceeding in this way to a regulation of rates and tariffs upon transportation lines within the state.

That the burden is cast upon the carrier of first resorting to a court of justice for a determination of the reasonableness of the rate, if he desires to contest the action of the commission, rather than upon the commission to sue if resistance to the rate ordered to be observed is made, as provided in the interstate commerce act, is not a distinction

that differentiates the two acts in principle. In either case the carrier is given his day in a court of justice upon the question of the reasonableness of the rate prescribed, with the identical presumptions of law attending the controversy. So that if the interstate commerce act of Congress is valid and constitutional in this respect, the state act ought to be also. And, furthermore, that the circuit court of Marion county is named in the act as the forum to which the aggrieved carrier must resort for relief does not detract from the validity of the law, as the fact remains that a judicial tribunal is afforded in which to have the question of reasonableness determined. The Texas act contained just such a provision, which act was approved in *Reagan v. Farmers' Loan & Trust Co.*, supra. In reality, the resort to the circuit court of Marion county is part of the procedure by which the final test of the reasonableness of the rates might be determined, if challenged by the carrier. It might be that the complainant would have no remedy in a court of equity here until it had exhausted its remedy in that particular court for determining the reasonableness of the rates contended for. See *Prentiss v. Atlantic Coast Line*, supra. Mr. Justice Holmes there says:

"No rate is irrevocably fixed by the state until the matter has been laid before the body having the last word."

But see *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

I do not presume to decide this question, however, as applied to the present controversy. It should be remarked that the court provided for acts judicially in determining the matter finally, not in a legislative capacity, so that there is not a combination of legislative and judicial functions in one person or body. The intentment of the act is that the Railroad Commission shall exercise the administrative power necessary to make the legislative act of fixing rates effective, and attend to the administration of the law, while the judiciary shall exercise the judicial power by passing upon the reasonableness of the rates fixed by the commission, when questioned.

Reliance is placed upon the case of *Chicago, etc., Ry. Co. v. Minnesota*, supra, as opposed to this view. Such, however, is not the doctrine of that case. The case came up by writ of error to the Supreme Court of Minnesota. The commission act of the state regulating the fixing of rates and charges was considered valid by that court, and it was declared that:

"The expressed intention of the Legislature is that the rates recommended and published by the commission (assuming that they have proceeded in the manner pointed out by the act) should be not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission."

Under this interpretation of the act, the Supreme Court of the United States declared the act to be in derogation of the right to a judicial investigation by due process of law. The question of the delegation of power was not discussed or determined. Nor was the supposed encroachment of one department of government upon another brought into dispute or controversy. The simple fundamental question was decided that such an act in its operation, as interpreted by the Supreme Court of Minnesota, deprived the transportation company of its right and property without due process of law.

Along with the contention that the Railroad Commission is empowered to exercise judicial functions is another: That it is also empowered under the act to exercise executive functions. It will be noted that the executive department of government includes also the administrative. This widens very largely the scope of the functions of that department. By a reading of the railroad commission act, it will be seen that the commission is charged with supervising and doing many things which are merely administrative. Some are possibly executive upon a strict division of powers. But this alone ought not to condemn the law. As I have previously observed, it is impossible to find an exact boundary line dividing these constitutional powers; that is to say, in providing for the innumerable exigencies arising for governmental supervision and control, it is not always possible to place the authority in every detail with the appropriate department of government. So that, as to the minor matters, it ought not to be considered inimical to the Constitution if given into the charge of one department when they appropriately belong to another. The essential thing is that there shall not be a usurpation of the functions of one department by another department, so as practically to destroy or seriously to endanger the polity of a tripartite division of powers. Of course, there are many things that belong absolutely to the one department or the other. Where these are plain and important, they should be assigned to the appropriate department for administration, and, if not so assigned, the law should not stand, because of the hurtful encroachment upon the proper domain of a department. But, where the assignment of power is scarcely distinguishable, or where it works no practical encroachment upon the functions of another department, it is difficult to see why such law should not stand.

Now, the commission is charged with many duties that are not executive, but purely administrative or ministerial. It must inquire into the management of the business of railroads, and shall keep itself informed as to the manner and method in which the same is conducted. Section 39 of the act. It shall require annual reports. Section 40. It may require a uniform system of accounting. Section 43. It may require a list of passes to be furnished. Section 45. And it shall make report to the Governor annually, and recommend such legislation as may be deemed important. Section 46. All these things would seem to be merely administrative. Others would seem to be more nearly executive, as, for instance, the commission is empowered to make complaint before the Interstate Commerce Commission, with a view to rectifying excessive or discriminatory rates and charges. Section 47.

And it shall inquire into any neglect or violation of the laws of the state by any railroad corporation doing business therein. It is also made its duty to enforce the provisions of the act here in question, as well as all other laws relating to railroads. Section 57.

But this commission is no exception to the creation of administrative officers and boards of commission, charged with like and kindred duties. The Legislature has created a Board of Canal Commissioners, a Board of Fish Commissioners, a Board of Agriculture, an Insurance Commissioner, the Secretary of State being made, *ex officio*, such commissioner, a Food and Dairy Commissioner, and a Commissioner of the Bureau of Labor Statistics and Inspection of Factories and Workshops. It is especially made the duty of this latter officer to cause to be enforced all the laws regulating the employment of children, minors, and women—a function executive in character, for the executive department is charged with the duty to see that the laws are faithfully executed. But all these boards and officers, in the general scope of their powers, are charged with administrative, rather than executive, duties. Such is the character of the railroad commission act, so that the situation comes to this: The Legislature has delegated to the commission the duty of fixing rates, which it does in aid of legislative action, or as an auxiliary to the exercise of the legislative functions. This the authorities all sanction as falling within the legislative power. There can exist no valid objection to conferring such authority upon an administrative board. The board thereafter administers the law as devised. Certainly such a regulation does not clothe an officer or officers in one department with official duties appertaining to those of another. Nor does it commingle the appropriate functions of the several departments of government.

I conclude, therefore, that the first objection urged against the constitutionality of the act is not maintainable.

The next objection urged to the act is that it is an encroachment upon the constitutional authority of Congress, in that, in practical operation, it interferes with interstate commerce. It is one thing to determine whether the act itself attempts to regulate interstate commerce, and another to determine whether in its practical operation it is effective to that end. I assume that, if an affirmative answer is given to either of these questions, the law cannot stand. Congress is accorded, under the federal Constitution, power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." Section 8, art. 1. By the ninth article of amendment to the Constitution it is declared that:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

And by the tenth article:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Thus is indicated, as strongly as could be, that the Constitution of the United States is but a delegation of powers, which powers, together with the implied powers that attend those that are express,

necessary to a practical and efficient exercise thereof, constitute all that the general government has, or can presume to exercise. All other powers are reserved to the states, and to the people thereof—primarily to the people, as they are the repository of all power, political and civil. The whole lawmaking power out of this repository of power is committed to the several state Legislatures, except such as has been delegated to the federal government or is withheld by express or implied reservation in the state Constitutions. Says Denio, Chief Justice, in *People v. Draper*, 15 N. Y. 532, 543:

"Plenary power in the Legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who questioned its validity to show that it is forbidden. I do not mean that the power must be expressly inhibited; for there are but few positive restraints upon the legislative power contained in the instrument. The first article lays down the ancient limitations which have always been considered essential in a constitutional government, whether monarchical or popular; and there are scattered through the instrument a few other provisions in restraint of legislative authority. But the affirmative prescriptions and the general arrangements of the Constitution are far more fruitful of restraints upon the Legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the lawmaking authority as strong as though a negative was expressed in each instance; but independently of these restraints, express or implied, every subject within the scope of civil government is liable to be dealt with by the Legislature."

So says Redfield, Chief Justice, in *Thorpe v. Rutland & Burlington Railroad Co.*, 27 Vt. 140, 142, 62 Am. Dec. 625:

"It has never been questioned, so far as I know, that the American Legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written Constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American states. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several state legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular state in question."

So it is that the national Constitution is wholly a delegation of power, and the state Constitution a restriction or limitation of power; and the state Legislatures may exercise all the reserved powers, save those which the people have withheld. It follows, very naturally and logically, from these premises, that the national government is without power and authority to legislate or to supervise or control in any manner the movement of commerce which is entirely within a state, or that which is appropriately termed intrastate, as distinguished from interstate, commerce. This arises simply from the want of power, the lack of delegation of power, to legislate touching that class of commerce. Upon the other hand, the sole power for the regulation of intrastate commerce rests with the state Legislatures. Congress has expressly recognized this distinction of powers in the passage of the act to regulate commerce of February 4, 1887. 1 Supp. Rev. St. p. 529. The act declares that the provisions thereof "shall not apply to the trans-

portation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state." So it has been pertinently observed by Mr. Justice Harlan, in *Interstate Commerce Commission v. Brimson*, *supra*, to the same effect.

The express purpose of the railroad commission act is to regulate transportation and commerce, and common carriers thereof, within the state. This is apparent, both from the title of the act and from the provisions thereof. The title runs:

"To regulate transportation and commerce, and common carriers thereof in this state, and, for that purpose, to create a Railroad Commission of Oregon," etc.

By the eleventh section the term "railroad" is defined to embrace all corporations that now, or may hereafter, operate, manage, or control "any railroad or interurban railroad * * * as a common carrier in this state." And it is further declared that:

"The provisions of this act shall apply to the transportation of passengers and property * * * and to all charges connected therewith, and shall apply to all railroad companies," etc., "that shall do business as common carriers upon or over any line of railroad within this state."

By section 13 it is required that every railroad shall file with the commission schedules showing all rates, fares, and charges for the transportation of passengers and property, "which it has established and which are in force at the time between all points in this state upon its line"; by section 18, that "whenever passengers or property are transported over two or more connecting lines of railroad between points in this state," the joint rates of charge therefor shall be reasonable and just. These general provisions indicate an undoubted purpose to limit the scope of the exercise of the commission's powers within the state. But by section 47 it is made the duty of the commission to investigate freight rates on interstate traffic on railroads in the state, and when, in the opinion of such commission, the rates are excessive or discriminatory, to present the facts thereof to the offending railroad company, and, if without avail, then to apply to the Interstate Commerce Commission for relief. From this one provision of the act, if from none other, the deduction is absolute that there was no intention on the part of the Legislature of the state to enter the domain of interstate regulation of railroad traffic. The commission is a state commission, designed to render state service, and no intentment should be deduced that it is empowered to execute a broader or an unlawful service, unless the language is explicit, unmistakably leading to such conclusion. No such language is found in the act, and upon its face it is not inimical to the commerce clause of the national Constitution.

The order of the commission enjoining upon the complainant the adoption of the classification therein prescribed is not so specific, but the purpose is reasonably deducible. The mandate of the order is that complainant "shall cease and desist from charging any higher rates within this state for the transportation of merchandise and other commodities between the city of Portland and points on the defendant's main, branch, leased, or otherwise controlled railroad lines with-

in the state of Oregon, covered by the class rates in said tariff No. L—525, O. R. C. No. 39, I. C. C. No. 1,146, than the class rates prescribed in this order.” Then follows the basis of the rates prescribed, or rather the formula by which they may be readily ascertained. The order, therefore, can be effective only within the state of Oregon. In this there is no ambiguity. That the Western Classification was taken upon which to base the formula for ascertaining the rates ordered to be substituted cannot change the purpose of the order. The result would have been the same if the commission had fixed the same rates without using tariff L—525 as a basis for its formula. The order is not specific, however, in this: That it does not, in direct terms, say that the rates so fixed shall apply to the transportation of intrastate commerce only; but, considering that the commission is a state organism, imbued with authority to fix rates within the state and not beyond its confines, it is but a legitimate deduction that its purpose in promulgating the order was to prescribe rates effective as relating to intrastate, and not interstate, commerce. Presumptions are always in favor of the lawful exercise of a power—not that it was unlawfully exercised, or that a functionary has exceeded the authority delegated or bestowed. So that, as matter of law, neither in the intendment of the act, nor in the draft of the order, has there been an invasion of the right and power of Congress to regulate commerce between the states. I regret that the state court has not first construed this statute, as its judgment would constitute a rule of action for the federal courts; but, in the absence of such construction, the duty is devolved upon this court.

The next inquiry is: Has there been such an invasion by the practical operation of the act, under the order of the commission, if effective? At the time the order complained of was made by the State Railroad Commission, Union Pacific tariff No. 1,578, with supplements, was in force and effect, having been duly filed with the Interstate Commerce Commission. Briefly, this tariff covers transportation between Missouri river and common points to various stations on the Oregon Railroad & Navigation lines in Oregon east of The Dalles, other than the station of Pendleton. So, also, was in force and effect transcontinental terminal tariff No. 4—C, covering transportation between Mississippi and Missouri river common points and certain North Coast terminals, including Portland, Or. Tariff L—525, with supplements thereto, which is known as the “Western Classification,” was likewise in force and effect, and fixes the class and commodity rates between Portland and all points in Oregon, Washington, and Idaho on the line of the complainant’s railroad. Another tariff, designated “O. R. & N. I. C. C. No. 967,” which is joint between the San Francisco & Portland Steamship Company and the complainant, covers transportation between San Francisco and points and places on complainant’s lines in Oregon east of The Dalles. And still another joint tariff was in force between the Southern Pacific lines and the complainant’s, covering transportation between points in California and Portland, Oregon, and all points in Oregon east of The Dalles. This is designated “S. P. I. C. C. No. 2,130.” It is further made to appear by the bill that the through rates from California, both by way of the San Fran-

cisco & Portland Steamship Company's line and that of the Southern Pacific to points east of The Dalles, consist mainly of a combination of the rates fixed by tariff No. L—525 from Portland to such points east of The Dalles and certain arbitraries or local rates. The arbitraries are not given, nor the basis upon which they are estimated or ascertained. Where, also, the rates by tariff U. P. No. 1,578 are higher for transportation from points of shipment from Missouri river common points to points in Oregon east of The Dalles on complainant's lines than the combined rates from such Missouri river common points to Portland, under said tariff No. 1,578, and the rates from Portland out under tariff No. L—525, the regulations require that the shipments shall take the combined rates.

As to class rates, the combination is generally somewhat lower than the through rate from Missouri River common points to points in Oregon east of The Dalles; but as to commodity rates the combination is somewhat higher. If, however, the rates sought to be established by the State Railroad Commission be put in force, the combination rates on commodities will be less than the through rates from Missouri river common points to points on complainant's lines east of The Dalles. This is designed to indicate how the established rates for interstate transportation will be disturbed and affected by an adoption of the proposed state rates. In further demonstration of the situation, it is alleged that at least 70 per cent. of the freight carried from Portland to points east of The Dalles, under the class rates established under Western Classification No. L—525, originates at points along or east of the Missouri river or in California, and is transported from said Eastern points and California to Portland, and thence to points east of The Dalles, while large quantities of freight are transported directly from Eastern and California points to points east of The Dalles, in Oregon, under the through rate.

It seems to be premised by counsel for complainant that the commission's order does not relate to purely internal commerce originating within the state of Oregon, or such commerce as may be appropriately designated "intrastate commerce." If this premise be admitted, it must be at once conceded that the state commission has attempted to act beyond the scope of its authority. Counsel's premise is at fault, however. As has been previously shown, the commission presumptively has acted within the scope of its authority, which was to prescribe rates applicable to the transportation of intrastate commerce only. But, beyond this, it seems to be thought that, if a state tariff affects an interstate tariff in the slightest measure, though incidentally, it must give way to the latter, and hence is void and inoperative. For instance, it is alleged that, if the state commission's rate becomes effective, many persons will ship their commerce from without the state to Portland, and then reship to points east of The Dalles, or, in another way, wool will be shipped to Portland from points east of The Dalles, and thence east by the transcontinental rates, and thus the complainant will be compelled to re-establish its rates in order to retain its through haul from eastern Oregon points. In other words, interstate traffic will thereby be interfered with, disturbed, and disarranged.

It is, and always will be, a difficult question to determine as to

when and what commerce should be classified as interstate, and when and what should be classified as intrastate. The question depends largely upon the facts and circumstances attending each case as it arises. There can be no doubt that commerce originating within the state and carried to some other point within the state is intrastate commerce. So it is of commerce originating within the state and transported, by continuous carriage, from within to some point without the state, or originating without the state and carried within. That is to be classified as interstate commerce. But when intrastate becomes interstate commerce, and vice versa, is an inquiry involving nice distinctions, perhaps. But we are not concerned with that at the present time. We are dealing with the distinct question of the supposed conflict between the regulation of interstate and intrastate commerce. Let us take a commodity, for instance, manufactured in Portland. Let it be agricultural implements. The state has a perfect and undoubted right to regulate the tariff for transportation of such commodity by rail to any part of the state from Portland, so that the tariff be reasonable; and I may say to any point on complainant's lines, within the state, east of The Dalles. If that regulation interferes with present tariffs for interstate transportation of the same commodity from common points east of the Mississippi or Missouri river to points on complainant's lines east of The Dalles, who can say nay?

But to go a step farther: The same commodity may be shipped to Portland from without the state, and put in common stock. When the commodity thus comes to rest in the state, and is sold by the dealer for transportation from Portland to some other point within the state, it is as much intrastate commerce as the case just put, and the state may, with equal authority, regulate the freight tariff. This is a condition of which complaint is made, lest it be that dealers will take advantage of the local rate, and, selling to customers within the state, ship first to Portland at the transcontinental rate, and thence out to the interior at the local rate. A shipment from the East, via Portland, to a point within the interior of the state, would be interstate commerce; but whether such a shipment could be made to take the classification of interstate commerce by shipment to Portland in the name of the dealer, and then of intrastate classification by the dealer billing it out of Portland again to his patron in the interior, is another question, which we need not decide. It remains clear that, whenever the commodity partakes of the characteristic of intrastate commerce, the state has the right to fix the rates of tariff for its transportation wholly within the state. Take the case of wool again, purchased in eastern Oregon. If that be shipped to a buyer in Portland, why is it not intrastate commerce? That same wool, after being thus shipped to Portland, if it be that such buyer subsequently sells to a buyer in Boston and ships to him at that place, would become interstate commerce. If bought in eastern Oregon for transportation to Boston by way of Portland, the local state rate could not apply, because that would partake of the character of interstate commerce.

The Baker City situation is relied upon as a demonstration that the local or state rates, if approved, will unsettle interstate regulation, or rather will disturb the situation as it now stands. That city is

engaged in a jobbing business, and is importing merchandise from points east of the Missouri river and in California, which it sells to customers within a certain radius of territory in job lots. Under tariff U. P. I. C. C. No. 1,578 and No. L—525, the Baker City jobbers pay a freight rate from point of origin in the East or in California generally equal to the car load rate to Portland plus the car load rate from Portland to Baker City, and are required to pay the less than car load rate from Baker City to points of distribution. Now, the Portland jobber is required to pay the car load rate from point of origin in the East and in California to Portland and the less than car load rate from Portland to point of distribution. So it is, says the complainant, that the profit of the Baker City jobber and his ability to sell merchandise depend upon the difference between the car load rate out of Portland and the less than car load rate from Portland to the point of distribution. It is further claimed that the rates established by the commission's order in comparison with those fixed by L—525 greatly decrease the difference between the car load rates and the less than car load rates from Portland, "so that interstate traffic originating in the East and in California, and so in the past distributed from Portland and from Baker City, respectively, can only be distributed advantageously and with profit from Portland to all points in eastern Oregon," and, therefore, that the commission's order attempts to regulate the movement of, as well as the rate charged upon, interstate commerce.

This is only an illustration of how rate making may destroy and build up jobbing centers, considering the facts stated to be true, and the deduction legitimate. But transportation companies do not have, nor can they longer claim, a monopoly upon rate making. Suppose, however, Portland was able to supply from home production all the different kinds of merchandise that the Baker City jobber wanted in his trade. A reasonable freight rate made by the state for the transportation of the merchandise to Baker City and interior points would be perfectly legitimate. If that rate enabled Portland, through its home-produced merchandise, to displace the business of the jobber in Baker City, dealing in like merchandise imported from other states, how could it be said that the state freight tariff was unconstitutional, and therefore unlawful? The state rate does not apply to interstate commerce; nor was it designed so to apply. But if the Portland merchant imports his goods, and then jobs them from Portland, the result will be the same as if he were dealing in home products, because the importations will have become domesticated. If that method of dealing constitutes or induces a change in the movement of interstate commerce, it is the thing that the merchant will or will not do as his profits in business may impel him. The movement of his merchandise when it goes out of Portland to the interior of the state is intrastate. I am not speaking now of goods imported to Portland in original packages, and then shipped out to points in the interior of the state in like packages as shipped to Portland, because I am not now called upon to determine whether such character of movement would constitute interstate traffic. It will be time enough to decide such a

case when it arises. I have reference to such merchandise as may be first imported to Portland, and then, going into a wholesale dealer's common stock, is wholesaled or jobbed out to customers in the interior of the state—such a movement of merchandise from Portland to the interior of the state as would constitute intrastate shipment pure and simple. If this kind of traffic, with the freight rate imposed upon it by the state, is of such proportions and such percentage as to affect trade in interstate merchandise, and therefore render it advantageous to interstate lines to change their rates, so as to control the trade in certain channels, that is not a trenching upon the exclusive authority of Congress to regulate interstate commerce. The interference is but incidental, and flows from a perfectly legitimate regulation of freight rates by the state, and an altogether natural movement of trade; and the condition is absolutely beyond the control of Congress.

That I may be fully understood, I will allude to another incident. Counsel for complainant says:

"If the Northern Pacific Railway should receive at Tacoma freight destined to a point in the state of Oregon east of The Dalles, such merchandise would be moved from Portland to the points east of The Dalles over the lines of the complainant, and the rates charged therefor would be the class rates fixed by tariff No. L—525 filed with the Interstate Commerce Commission as required by the interstate commerce act. By the order sought to be set aside the complainant would be required to charge, not the rates fixed by tariff L—525, but the rates established by the order of the commission."

In this statement counsel is mistaken. The shipment would constitute an interstate shipment, and L—525 would prevail as against the state rate. So, if it be that the local state rates, as fixed and regulated by the State Railroad Commission on these commodities, unsettle in some way previously fixed transcontinental or interstate rates, that circumstance does not render the state rates invalid as an interference with interstate commerce. Let it be supposed that the state was the precursor in making rates for the transportation of purely intrastate commerce, there could, then, at that juncture, be no conflict. Could it be contended that the state rate was invalid, because connecting railroads might desire to establish a transcontinental rate in combination with a local rate, also of their own making, which would conflict with the state rate? If so, the fixing of a state rate would be a precarious and evanescent thing, to be dissipated at the caprice of the transportation companies, and the general government would usurp, in practical effect, the functions of the state government in the regulation of intrastate commerce. Such was not the purpose of the framers of the federal Constitution. Nor was it the purpose of Congress itself in the adoption of the interstate commerce act, wherein was recognized, as has been noted before, the right of the state to regulate commerce wholly within its borders. The bill, therefore, in my opinion, states nothing that renders either the state railroad commission act or the order of the commission in conflict with the commerce clause of the federal Constitution. This conclusion is borne out by the decisions of the Supreme Court.

In *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, the court says:

"For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the state, and is not commerce among the states, or interstate commerce, but is exclusively commerce within the state. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the states. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the state which is not subject to the constitutional provision, and the distinction between commerce among the states and the other class of commerce between the citizens of a single state, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other."

So in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, the court says:

"It cannot be doubted that the making of rates for transportation by railroad companies along public highways, between points wholly within the limits of a state, is a subject primarily within the control of that state."

The case of *Gulf, Colorado & Santa Fé Railway Company v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540, is highly instructive, and is indicative of how the Supreme Court maintains the prerogative of the state government to regulate commerce within its borders. In this case a quantity of corn had been purchased in Hudson, S. D., for delivery at Goldthwaite, Tex. However, in course of the dealings between the parties concerned, the corn was billed to Texarkana, Tex. It remained in that place some five or six days, and was reconsigned from Texarkana to Goldthwaite, Tex. The court says:

"The single question in the case is whether, as between Texarkana and Goldthwaite, this was an interstate shipment."

And it was determined that it was not. The shipment was, therefore, as between the points named, intrastate, and subject to state regulations. There previously existed a through interstate rate from Hudson, S. D., to Goldthwaite, Tex.; but this did not deter the court from adjudging the carriage, under the circumstances recited, to be of intrastate commerce. See, also, *The Daniel Ball*, 10 Wall. 557, 565, 19 L. Ed. 999, *Sands v. Manistee River Improvement Co.*, 123 U. S. 288, 295, 8 Sup. Ct. 113, 31 L. Ed. 149; and *General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. Ed. 751. This last case is further instructive as to when an interstate shipment ceases to be interstate commerce. These authorities I deem to be decisive of the controversy.

Nor does the case of *Louisville & Nashville Railroad Co. v. Eubank*, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416, hold to a different view. It is rather illustrative of the same principle. The railroad had established a rate for transportation of tobacco from Nashville, Tenn., to Louisville, Ky., at 12 cents per 100 pounds. The rate was so fixed, presumably, on account of water competition between the same points. It had also established a rate from Franklin, Ky., to Louisville, of

25 cents per 100 pounds. The road from Nashville to Louisville ran through Franklin. Eubank shipped large quantities of tobacco from Franklin to Louisville, and paid the established rate, but subsequently sued the railroad company to recover back the excess between 12 cents and 25 cents per 100 pounds. This is the case that came to the Supreme Court. The theory upon which the suit was instituted was that the alleged overcharge was unlawful because the state of Kentucky, by its Constitution, had declared it so to charge more for a shorter than for a longer haul over the same line, under substantially similar circumstances and conditions. The circuit court of the state, from the judgment of which error was prosecuted to the Supreme Court, held, construing this Constitution, that it applied as well to carriage from without the state to points within. Thus construed, the Supreme Court held that the effect of the clause in question in the Kentucky Constitution was to regulate interstate commerce, and hence the judgment of the Kentucky court was reversed. In deciding the case, the court says:

"The vice of the provision lies in the regulation of the rates between points wholly within the state, by the rates which obtain between points outside of and those which are within the state. * * * But the fact which vitiates the provision is that it compels the carrier to regulate, adjust, or fix his interstate rates with some reference at least to his rates within the state, thus enabling the state by constitutional provision or by legislation to directly affect, and in that way to regulate, to some extent the interstate commerce of the carrier, which power of regulation the Constitution of the United States gives to the federal Congress."

Elsewhere the court says:

"We fully recognize the rule that the effect of a state constitutional provision or of any state legislation upon interstate commerce must be direct, and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the state to a point within it, or from a point within to a point without the state, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important, and not a mere incident."

It should be noted that this same clause in the Kentucky Constitution had been previously held by the Supreme Court of the United States (*Louisville & Nashville Railroad Company v. Kentucky*, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298), as applied to places all of which are wholly within the state, to violate no provision of the federal Constitution, and it was only because an inferior court of Kentucky had put the construction upon the Kentucky Constitution as above indicated, that the clause was here held to be inimical to the commerce clause of the federal Constitution.

Neither does the case of *Hall v. DeCuir*, 95 U. S. 485, 24 L. Ed. 547, militate against the principle here applicable. The controversy there was concerning a statute of the state of Louisiana which required common carriers of passengers to extend to all persons, without regard to race or color, equal accommodations, rights, and privileges, and the decision of the court proceeded upon the hypothesis that the

statute necessarily and directly affected interstate traffic. Mr. Chief Justice Waite says:

"But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within."

The cases of *Swift & Co. v. United States*, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, and *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, are concerning unlawful combinations in restraint of trade, which affected, not only trade relations within a single state, but such relations also between the states, and hence lack applicability here.

Let us now proceed to the question whether the penalties imposed by the act are of such a nature as practically to deprive the complainant of the equal protection of the law. A way for ascertaining whether the rates fixed by the Railroad Commission are reasonable, by judicial determination, is afforded the carrier by the provisions of the act. The complainant complains, however, that to avail itself of such provisions it must either obey the order of the Railroad Commission pending legislation, or resort to the court for an injunction suspending or staying the order in the meanwhile; but that, if resort be had to the injunction, the act requires the giving of a bond incurring such heavy liabilities in case of failure to sustain the contention that no company could well afford the experiment. The conditions of the bond required are that the company shall answer for all damages caused by the delay in the enforcement of the order of the commission, for all penalties that would attach against the company, and for all compensation for whatsoever sums for transportation services any person or corporation shall be compelled to pay in excess of the sum such persons or corporation would have been compelled to pay if the order of the commission had not been suspended.

Here are three conditions. The last of the three we must dismiss at once, as being perfectly reasonable and just; for if the order of the commission was reasonable, and so adjudged to be by the court, it should be obeyed from the first. As to the first condition, touching what damages would ensue by reason of delay in enforcing the order, none have been suggested that would be at all burdensome, nor do I now think of any of that character.

The second condition, at first blush, would seem onerous, and a drastic thing to require of a litigant. But what are the penalties that would attach against the railroad so circumstanced? By the fifty-first section of the act, if any railroad company shall omit to do any act, matter, or thing required to be done by it, such railroad is rendered liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of such violation, together with reasonable attorney's fees. These damages may partake of the nature of a penalty. But what damages would ensue to any person, corporation, or the state for a refusal to obey an order fixing rates? It

might be said that a shipper was damaged by the difference between the rates established by the commission and those charged by the company; but that item is expressly provided for by the third condition, which, by implication, excludes it from the operation of the second. There may be in some way damage to somebody attending the failure of the railroad company to obey the order of the commission and to adopt certain rates; but, whatever it may be, it cannot be large or oppressive, even if trebled.

Now, what other penalties are provided? By section 52 it is declared that, if any officer, agent, or employé shall fail or refuse to do any of the following things, he shall be deemed guilty of an offense, and be subject to a fine of from \$100 to \$1,000, and a penalty of from \$500 to \$1,000 is recoverable from the railroad company for each such offense when the officer, agent, or employé acts in obedience to its direction. These are the things enumerated: Shall refuse to fill out and return any blanks required by the act, or refuse to answer any questions therein propounded, or shall give false answers to any such questions, or shall, upon proper demand, refuse to exhibit any book, paper, account, etc., in his possession or under his control. It is plain that none of these things are covered by the second condition of the bond. The fifty-third section provides that if the railroad shall violate any provision of the act, or shall fail or refuse to obey any lawful requirement of the commission or judgment or decree of the court, for every such offense such railroad shall forfeit to the state from \$100 to \$10,000.

It is probable that the penalties here provided for would not be covered by the bond, because the injunction is provided by law. The company would be availing itself of a lawful right, and, while so doing, it would seem that it could not at the same time be held for a violation of section 53 by a refusal to obey an order of the commission or a judgment or decree of the court. But, however this may be, the penalty condition of the bond has been eliminated by an amendment of section 33, adopted February 23, 1909. See Sess. Laws 1909, p. 163. So that the bond exacted can be no impediment of substantial moment standing in the way of the complainant obtaining a speedy and complete adjudication touching the reasonableness of the rates fixed by the commission.

But the railroad company is entitled to sue for relief against any unlawful order of the Railroad Commission in any court, state or federal, having jurisdiction, and it is said the penalties imposed by section 53 are so enormous as to deter the company from seeking relief in any court but that named in the act, and in the way prescribed. From a reading of the section, it will be seen that it is the railroad only that is amenable to the penalty prescribed, not its officers, agents, or employés. These functionaries of the railroad are made the representatives thereof for the purpose of fixing responsibility upon the railroads, so that in a case like the present the railroad would be chargeable with a violation of the act in failing to obey the order of the Railroad Commission requiring the revision of local rates within the state—one offense, not a repetition of offenses from day to day, or at

intervals, as long as the railroad continued in the refusal to obey the order. It would seem that such is the reasonable construction of the section. Being penal, it should receive a strict construction, and no accumulation of offenses should be carved out of it, unless they are created by the strict letter of the law.

Section 52, as I have shown, penalizes special acts only, which are enumerated in the section, none of which are involved by this controversy. Section 51 relates to the recovery of damages in treble the amount of loss suffered; but the railroad company is not penalized, except by the provisions of sections 52 and 53, and this latter section does not affect its agents and employés.

Now, it is urged that the case of *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, is decisive of the particular point here presented. The statutes under consideration in that case, however, were most severe and drastic. For a violation of the act, if by a natural person, a fine of from \$2,500 to \$5,000 was imposed for the first offense, and double that for each subsequent offense; and a like fine was imposed if the carrier was a corporation. Another section of the act fixed passenger rates at two cents per mile, and provided that any railroad company, or any officer or representative thereof, violating any of the provisions of the act, should be guilty of a felony, and subject to a fine not exceeding \$5,000, or imprisonment in the state prison not exceeding five years, or both. Another section provided for the regulation of freight traffic, and made any violation of such regulation a misdemeanor, punishable by imprisonment in the county jail. It will be seen at once that there is no comparison between the penalties imposed by the Oregon statute and that of Minnesota, and the difference is so wide as to render the *Young Case* not authoritative here.

Nor do I think that the penalties imposed are exorbitant or burdensome for willful violations of the provisions of the act. They were designed to secure an enforcement of the law, and I discover no intentment to prevent the railroad companies concerned having ample recourse to any court having jurisdiction for relief.

The third of the federal questions urged, namely, that the effect of the commission's order will be to deprive the complainant of its property without due process of law, is consequential only depending upon the result of the other questions presented. If, having found against complainant's contention as to the questions discussed, it further appears that the rates established by the commission are not unreasonable, then there can be no taking of the complainant's property without due process of law.

This brings us to the ultimate question whether, under the allegations of the bill, it appears that the rates imposed by the Railroad Commission are unreasonable and unjust to the complainant company. There is a statement in paragraph 20 of the bill which is very significant. The allegation referred to is as follows:

"While the immediate effect of such order, Exhibit I, if it could be confined strictly to the state of Oregon, might leave your orator a fair income upon its entire business, nevertheless, if the rates attempted to be established by the said order, Exhibit I, be applied to the interstate business directly af-

fectured thereby, and if the percentage of reduction effected by such order be applied to the local business of your orator in the states of Oregon, Washington, and Idaho, which local business is now being transacted upon rates higher than those fixed by tariff L—525, it would operate to confiscate the property of your orator and deprive it of property without due process of law, in violation of the Constitution of the United States, because such reductions would leave your orator without any fair net earnings upon its property.”

This signalizes the particular theory upon which this suit is instituted. But the order has or can have no effect beyond the limits of the state of Oregon. It was not so designed, nor is such its operative force, except as it may affect interstate commerce incidentally merely. It is no purpose of the railroad commission act, nor of the order of the commission, that the rate fixed by the commission should be applied to interstate business, or any part or parcel thereof, nor to the business of complainant in Washington or Idaho, or elsewhere than in Oregon. That it may operate to affect incidentally interstate rates established, or the rates on complainant's lines in Washington and Idaho, is, as I have endeavored to show heretofore, not to the purpose. The question is: Are the rates established by the commission in Oregon, and for Oregon, and not beyond its confines, reasonable? That they are is practically admitted by the averment quoted, that the effect of the order, if confined to the state, might leave a fair income upon complainant's entire business. In other words, the pleader is not willing to negative the fact of reasonableness that attends the order by legal presumption. Tested by the demurrer, the averment is to be construed most strongly against the pleader.

By paragraph 25 of the complaint it is averred that the rates fixed between Portland and The Dalles by L—525 are unreasonably low; that all the rates attempted to be established by the commission's order to points east of The Dalles are based upon the rates charged by L—525 between Portland and The Dalles, and the rate of increase in the rates to points east of The Dalles as fixed by the commission's order is unreasonably low, and has the effect of making the rates to points east of The Dalles unreasonably low, and unjust to complainant. This is merely argumentative, and sets forth no facts from which it might be deduced that the rates fixed by the commission were even unremunerative to the company. So of the further averments of the bill, as they pertain to the application of the commission's rates to the branch lines of the complainant. “It is a fact,” says the pleader, “that such attempted adjustment of rates is arbitrary and unreasonable, and is founded upon no circumstance and condition affecting the cost of service to your orator or the value of the service to the public, and is unjust to your orator.”

But the fault with the bill is that no facts are stated as to the cost of the service, or in any way indicating what it is worth to transport freight over the lines of the complainant between the points designated, and the court is, therefore, unable to say from the bill that the rate fixed by the commission is unreasonably low. Especially are these and similar averments insufficient, when read in view of the particular theory upon which the suit is instituted.

Based upon the foregoing considerations, the demurrer to the bill should be sustained, and the preliminary restraining order should, consequently, be dissolved.

It is proper to say further, however, that I have carefully examined the affidavits and showing made for a continuance of the injunction, and I am of the firm opinion that the proofs are wholly insufficient to overcome the prima facie case that attends the order of the commission, supported by the ample showing of the defendants.

THE KINGSTON.

(District Court, W. D. New York. August 28, 1909.)

1. COLLISION (§ 107*)—RULES FOR PREVENTING COLLISIONS—STARBOARD HAND RULE.

The fact that each of two vessels approaching on converging courses knows the destination of the other, and that their courses do not cross, does not affect the application of the starboard hand rule, which, as prescribed by rules 18 and 20 of the navigation rules for the Great Lakes (Act Feb. 8, 1895, c. 64, 28 Stat. 648, 649 [U. S. Comp. St. 1901, p. 2891]), requires the vessel having the other on her own starboard side to keep out of the way, and the other, as the privileged vessel, to keep her course and speed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 224; Dec. Dig. § 107.*]

2. COLLISION (§ 107*)—RULES FOR PREVENTING COLLISIONS—CONSTRUCTION.

Rule 20 of the navigation rules for the Great Lakes (Act Feb. 8, 1895, c. 64, 28 Stat. 649 [U. S. Comp. St. 1901, p. 2891]), which requires the privileged of two vessels to keep her course and speed, is subject to exception, by the terms of rules 27 and 28, where special circumstances render a departure from it necessary, in the exercise of good seamanship, to avoid immediate danger, and in such case the observance of it is a fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 224; Dec. Dig. § 107.*]

3. COLLISION (§ 40*)—STEAM VESSELS—FAULT—VIOLATION OF RULES.

The steamers Kingston and Titania approached the entrance to the mouth of the Genesee river in the evening, at about the same time, the Kingston from the north and the Titania from an easterly direction, and a collision occurred shortly after they entered the channel. *Held*, under the evidence, that the Kingston entered first, and that the initial fault was that of the Titania, which, under the starboard hand rule, as the burdened vessel, was bound to keep out of the way, but which approached at a speed of 8 miles an hour, and in rounding into the channel negligently ran into the Kingston; that the Kingston was chargeable with contributory fault in maintaining an excessive speed of 10 miles, and in not giving alarm signals, or sooner stopping and reversing, when it became apparent that the Titania was being negligently navigated.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 40; Dec. Dig. § 40.*]

In Admiralty. Suit for collision by Frank Fix and Charles Fix, as owners of the steamer Titania, against the steamer Kingston. Decree for division of damages.

White & Stanley and Frank S. Masten, for libelants.
Brown, Ely & Richards, for respondent.

HAZEL, District Judge. The Canadian passenger steamer Kingston, 300 feet over all, bound from Kingston, Ontario, to the port of Charlotte, N. Y., came in collision with the steamer Titania, 106 feet long, with passengers on board, on August 11, 1908, at about 10:30 o'clock p. m., between the piers at the entrance to the Genesee river, near Charlotte. The starboard side of the Titania was crushed, and, rapidly filling with water, she sank. She had been engaged in making two or three trips daily during the summer season from Sea Breeze, to Charlotte, N. Y. The Kingston was proceeding up the river to her landing. It was a clear, moonlight night, and each vessel was seen by the other, when out in the open lake, approaching the entrance to the river on convergent courses. Each vessel knew the destination and proper and usual course of the other. The east pier light and west pier light, which projected about 500 feet farther out into the lake than the former, could be plainly seen by persons on the decks of the vessels. There was careless seamanship on the part of one or both of the steamers. Neither signaled the other.

The libelants claim, and testimony has been given in support thereof, that when the Titania was about 1,000 feet distant from the east pier, and heading so that she would pass outside of the light on the west pier, she turned into the channel, which was not less than 500 feet wide, and straightened in her course parallel with the piers. Her master testified that at this time the Kingston was 100 or 150 feet astern, overtaking him, at the rate of 16 miles per hour, a rate of speed twice that of the Titania; that without blowing any signal, or giving any warning of her movements, she overtook the Titania, passed ahead, and, while passing, her suction or swells deflected the course of the Titania, forcing her bow laterally into the paddle box of the Kingston, with the result that, after drifting a short distance, she rapidly filled with water, and without loss of life sank to the bottom of the river. It is uncontroverted that she sank about 467 feet south of the east pier light and 115 feet to the westward of the east pier, which is located 105 feet east of the middle of the river.

The position of the respondent, briefly stated, is that the collision occurred before the Titania had straightened in the channel; that she was not moving in a straight course, parallel with the piers or with the Kingston, but, on the contrary, that she came in contact with the paddle box of the Kingston, which was the ahead steamer, on an oblique or diagonal course. It is also claimed that the Titania, by reason of her greater speed just prior to the collision, and her proximity to the east pier when making the necessary detour into the channel, overtook the Kingston, which had then checked her speed, and then negligently sheered four points out of her course to westward and into the Kingston. It is shown that immediately after the impact the Kingston stopped her engines, whistled to the lifeboats, and then backed to stop her headway.

The libelants specifically charge that the collision was occasioned by the sole fault of the Kingston, first, for attempting to overtake the

Titania in a harbor of less than 500 feet without first signaling for permission to do so; second, for steering her course so close to the Titania; and, third, for navigating up the channel at an excessive rate of speed. The Kingston alleges that the collision was occasioned by the primary fault of the Titania, in that, first, her navigators had no lookout; second, that she proceeded at a high and dangerous rate of speed; third, in not checking, when rounding the east pier; fourth, in not straightening up and keeping out of the way of the Kingston. There is testimony tending to show that each vessel had been overtaken by the other.

The libelants invoke rule 25 of the White law, approved February 8, 1895 (Act Feb. 8, 1895, c. 64, 28 Stat. 649 [U. S. Comp. St. 1901, p. 2891]), which prohibits a steam vessel passing another going in the same direction in rivers less than 500 feet wide, unless the overtaken vessel has signified her willingness to such a movement, or unless she is disabled. There is much conflict in the testimony as to whether the Titania entered the channel between the piers before the Kingston. It is insisted that she did enter the channel first, and had straightened in her course. If this claim has been established by the libelants, it follows that the Kingston clearly and flagrantly violated the statutory rule just mentioned.

On the other hand, the respondent alleges that, as the vessels were approaching the entrance to the river on convergent courses, rules 18, 20, and 21 of the White law govern the disposition of this controversy. The eighteenth rule provides that, when two vessels are crossing, so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other; while rule 20 requires the vessel on the starboard side to keep her course and speed, and the twenty-first rule provides as follows:

"Every steam vessel, which is directed by these rules to keep out of the way of another vessel, shall on approaching her, if necessary, slacken her speed or stop or reverse."

If these statutory provisions apply to the facts under inquiry, it is manifest that the Titania violated them. At the oral argument both sides practically claimed that the starboard hand rule did not apply, inasmuch as each vessel knew the destination of the other, and that their courses were not crossing. In the brief of respondent, however, filed after the oral argument, it is contended that, as the courses of the steamers were convergent, the Kingston became the privileged vessel, and the Titania was obliged to navigate in obedience to the eighteenth rule. After carefully considering the evidence in relation to the movements of the vessels and their position at the time of collision, I conclude that the contention of the Kingston in this respect must be sustained. It makes no difference that each vessel presumably or actually knew the destination and course of the other and that neither vessel would cross the other's bow. The Kingston was coming from the north, and heading nearly straight for the channel, and she was perceived by the master of the Titania when the latter vessel was 1,000 feet to the eastward. The Titania was making for the channel from the east, steering on a N. W. $\frac{1}{2}$ N. course. After making the turns, she steered in a southwesterly direction.

Irrespective of whether such detour was made at the point claimed by the libelants, or much closer to the east pier, as is contended by the Kingston, I think the courses of the steamers to the entrance of the river were slanting or oblique when they became factors in each other's navigation, and therefore that they approached each other on crossing courses. The Titania, being the burdened vessel, was obliged to keep out of the way of the Kingston, which was approaching the river from the north on her right side. The *John McCullough*, 145 Fed. 501, 76 C. C. A. 261; The *Deveaux Powell* and the *Lackawanna*, 165 Fed. 635, 92 C. C. A. 54.

The weight of the evidence establishes that the *Titania* was not in the channel ahead of the Kingston, and that rule 25, regulating the manner of passing a vessel in a channel less than 500 feet wide, did not apply. On the other hand, the testimony of the Kingston preponderatingly shows that the *Titania* turned into the channel much closer to the east pier than 300 feet. Indeed, when the bow of the Kingston was abreast of the east pier light, the *Titania* was on a diagonal course, proceeding at the rate of 8 miles an hour, close to the east pier light. Such maneuvering at the specified rate of speed, in view of the proximity of the Kingston, a much larger vessel, was a fault, and the *Titania* must be condemned for not keeping out of the way of the Kingston, and for failing to slacken her speed, or seasonably stopping or backing to avoid collision.

Did the Kingston contribute to the collision to such an extent as to warrant a division of the damages? She was properly manned and equipped, with master and lookout on deck. Capt. Esford testified that, when the Kingston was abreast of the west pier light, the *Titania* was about 200 feet off the east pier light; that he first noticed the *Titania* when he went on the bridge to relieve the second officer about a half hour before the collision. He says that, when about three boat lengths from the west pier, he checked the Kingston's speed, which was then about 16 miles an hour. He further testified that, when abreast of the west pier, the Kingston was moving at the rate of 10 miles per hour. He observed the *Titania* going faster than the Kingston, and when the latter vessel was abreast of the east pier light the *Titania* was "coming at him at right angles." The libelants contend that the speed of the Kingston was 16 miles an hour at the time of the collision; but giving consideration to all the evidence on this point, pro et contra, prompts the belief that she was proceeding at not much less than 10 miles an hour, which, in view of the circumstances, I deem to have been excessive.

It is true, as claimed by counsel for respondent, that ordinarily the privileged vessel is not required to reduce her speed, except in extremis; but I think the situation here demanded more than ordinary precaution by the Kingston, and a departure from rule 20 of the laws relating to navigation of vessels on the Great Lakes and their connecting and tributary waters should have been made. The experienced master of the Kingston must have been aware that the *Titania* was not approaching the channel in the usual and ordinary way. It seemed clear to him that she was rounding the east pier light altogether too close, in view of the proximity of the Kingston. In that relation he

was required to apply good sense to the navigation of his vessel. He should not have ignored rules 27 and 28 of the White law, which substantially provide that due regard shall be had to all dangers of navigation and collision, and to any special circumstances which, to avoid danger, may demand a departure from rules 18, 20, and 21. Accordingly it became the duty of the Kingston, even though in the first instance she had the right to rely upon the presumption that the Titania would perform her full duty, to either signal an alarm, or to stop and reverse her engine, if good seamanship so required. Her excessive speed and middle course in the river, in view of the Titania turning into the channel too near the east pier at an excessive speed, were reasonably clear indications that the latter vessel would in all probability omit conforming to her full duty. The faulty maneuvering of the Titania obligated the Kingston to careful and skillful seamanship to avoid injuring her, notwithstanding the failure of the burdened vessel to keep out of the way. The master of the Kingston, according to his own version of the collision, as I interpret it, had sufficient reason to believe the Titania, because of the position she was in, would be unable to properly and safely straighten in the channel while she was passing her. Upon this point the principles of the following cases are thought applicable: *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; *The Chicago*, 125 Fed. 712, 60 C. C. A. 480; *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771.

If the Kingston had promptly stopped or reversed, or seasonably signaled the Titania, it is quite probable that the latter vessel would have maneuvered to avoid the collision. Such error on the part of the Kingston was not in extremis, as the presence of the Titania at that point and her close turn to the east pier was in no sense a surprise to her. Hence, in view of the circumstances, both vessels must be held at fault for the collision.

A decree may be entered, dividing the damages, but without costs.

BOTIS v. DAVIES et al., Immigrant Inspectors.

(District Court, N. D. Illinois, E. D. November 10, 1909.)

No. 10,326.

1. ALIENS (§ 50*)—IMMIGRANTS SUBJECT TO DEPORTATION—CONTRACT LABORERS.

Neither Immigration Act March 3, 1903, c. 1012, 32 Stat. 1213, nor Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 448), authorizes the deportation as a contract laborer of an alien who entered the United States before the later act took effect; the former containing no provision whatever in that regard, and the latter, while making such provision, also expressly providing, in section 28, that it shall not be construed to affect "any act, thing or matter * * * done or existing" at the time of its taking effect, but that the same shall be governed by prior laws, which are continued in force for that purpose.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 50.*]

Importation of contract labor, see note to *United States v. Persons*, 66 C. C. A. 133.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. ALIENS (§ 50*)—IMMIGRANTS SUBJECT TO DEPORTATION—"CONTRACT LABORER."

Petitioner, who was a Greek boy then 16 years old, wrote to a distant relative in Chicago to know if the latter would give him employment if he came to the United States, and, receiving an affirmative answer, he came; his father paying his passage. On his arrival the relative gave him work at \$15 per month and board, where he remained for 14 months, and then bought a horse and wagon and started in business for himself as a fruit peddler. He had no contract for employment before he came, and no wages were mentioned, and he would have come merely on the relative's promise to give him a home until he found employment. *Held*, that he did not come as a "contract laborer," within the meaning of Act Feb. 26, 1885, c. 164, 23 Stat. 332 (U. S. Comp. St. 1901, p. 1290), which makes it a criminal offense to solicit or encourage the immigration of any alien under contract to perform labor, and makes such contracts void.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 108-110; Dec. Dig. § 50.*]

3. ALIENS (§ 54*)—PROCEEDINGS FOR DEPORTATION OF IMMIGRANT—REVIEW BY COURTS.

There is no provision in Immigration Act March 3, 1903, c. 1012, 32 Stat. 1213, nor Act Feb. 20, 1907, c. 1134, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 447), making the decision of the immigration officers conclusive as to the right of an alien domiciled in this country to remain, and where such decision involves a question of law, as well as of fact, it will be reviewed by the courts.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

4. ALIENS (§ 54*)—PROCEEDINGS FOR "DEPORTATION" OF IMMIGRANT—LIMITATION.

Under Immigration Act March 3, 1903, c. 1012, 32 Stat. 1213, which provides in section 20 that any alien who shall come into the United States "in violation of law" may be deported at any time within two years after arrival, and in section 21 that the Secretary of Commerce and Labor shall deport aliens found in the United States "in violation of this act" within three years after landing, a "deportation" for entering in violation of any prior law can only be made within two years, which means the actual deportation, and not merely the commencement of proceedings.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

For other definitions, see Words and Phrases, vol. 2, p. 1994.]

Habeas corpus by Johannis J. Botis against Daniel D. Davies and A. A. Seraphic, Immigration Inspectors. Petitioner discharged.

Knight, Reid & Goodman, for petitioner.

Edwin W. Sims, U. S. Dist. Atty., for respondents.

SANBORN, District Judge. The return to the writ of habeas corpus shows the reason for the detention complained of, and the evidence upon which an order for the deportation of petitioner was based. He is a Greek, 18 years of age, held for deportation under the contract labor statutes. He came to this country April 3, 1907, when Immigration Act March 3, 1903, c. 1012, 32 Stat. 1213, was in force. On November 11, 1908, a warrant for his arrest was issued to the respondent Seraphic, setting forth that Botis was a contract laborer and a member of the excluded classes, in that he migrated to this country pursuant to an offer, solicitation, promise or agreement, made previous

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to such migration, to perform labor herein, and directing the inspector to take the alien into custody and enable him to show cause why he should not be deported. He was arrested, and a hearing had; a copy of the evidence being attached to the return. The evidence was submitted to the Secretary of Commerce and Labor, and, being satisfied that Botis was a member of the excluded classes in that he is a contract laborer, the Secretary issued his warrant directing his return to his native country. He then sued out habeas corpus, and the case was heard on the petition and return.

The evidence taken by the inspector is clear and undisputed, and consists of an affidavit and sworn testimony of petitioner. It shows that before emigration he wrote to one Alexios Delyannis, of Chicago, whose wife and petitioner's mother are second cousins, asking whether he could receive him and give him work in his place of business if he came to the United States. Delyannis answered by letter, saying he could do so. Petitioner's father mortgaged some property owned by him in Greece in order to pay the passage money. If Delyannis had written him that he could not give him a job, but that he might stay at his house until he could get one, he would have come just the same. When young Botis got to Chicago, Delyannis received him at his house, and gave him work in a bootblacking establishment conducted by him at \$180 a year and his board. He worked at this for 14 months, saving all his wages, and then left the work and Delyannis' house, bought a horse and wagon, and went into the business of peddling fruit. At the time of giving his testimony he was earning at this business \$3 to \$4 a day, and has his horse and wagon and about \$100 held for him by his uncle, George Malliris.

Upon the evidence the Department of Labor has reached the conclusion that Botis is a contract laborer, subject to deportation, and is in this country in violation of the acts of Congress of March 3, 1903, and February 20, 1907 (34 Stat. 898, c. 1134 [U. S. Comp. St. Supp. 1909, p. 447]). Turning to those statutes it is found that neither one of them seems to apply to the case. The statute of 1903 makes no provision for the exclusion of contract laborers. It describes 11 classes of undesirables who are to be excluded, but entirely omits all mention of contract laborers. This act was in force in April, 1907, when Botis was admitted to this country; but, as it does not cover the case of contract laborers, it need not be further noticed on this point. 32 Stat. 1214 (U. S. Comp. St. Supp. 1905, p. 284). The other statute, relied on by the immigrant inspectors, and cited by the Secretary of Commerce and Labor as authorizing the deportation, does, indeed, cover contract laborers, including those who have been induced or solicited to emigrate by offers or promises of employment. 34 Stat. 898. But it contains a section making it entirely inapplicable to this case, reading as follows:

"Nothing contained in this act shall be construed to affect any prosecution, suit, action or proceedings brought, or any act, thing or matter, civil or criminal, done or existing at the time of the taking effect of this act; but as to all such prosecutions, suits, actions, proceedings, acts, things or matters, the laws or parts of laws repealed or amended by this act are hereby continued in force and effect." Act Feb. 20, 1907, c. 1134, § 28, 34 Stat. 907 (U. S. Comp. St. Supp. 1909, p. 464).

The act of 1907, therefore, is wholly prospective in its operation. The language used in the quoted section could hardly be made more comprehensive or explicit. All acts, things, and matters done or existing when the statute took effect are governed by earlier laws. The date of taking effect was July 1, 1907, several months after Botis landed. So there can be no question that the act of 1907 has no bearing or effect on Botis' status, which is governed entirely by pre-existing laws. The act of 1903, as has been seen, has no application, and prior legislation must be examined. It may be said however, that a warrant of exclusion based entirely on inapplicable laws does not commend itself to the judgment, or occupy a very favorable position, in a case involving personal liberty. A proceeding so peremptory and harsh as deportation, savoring so much of punishment, should have a better basis than statutes which are applicable wholly to different conditions of immigration.

Looking, then, to the earlier laws, it is found that the only one which may apply is Act Feb. 26, 1885, c. 164, 23 Stat. 332 (1 U. S. Comp. St. 1901, p. 1290), and upon examination of its provisions it is also found inapplicable. It is a penal statute, and denounces the prepayment by any person or corporation of the transportation of an emigrant under contract to perform labor in the United States, as well as the assisting or encouraging of his importation or migration. It also makes such a contract void. It falls far short of reaching the facts of this case. Botis emigrated on his own initiative, without being solicited to do so by Delyannis, and also without being induced to come by the promise of employment. Nor was there any contract or agreement to perform labor in this country; no wages being agreed on, nor definite time, and Botis being under age. What Botis and Delyannis did was most usual and proper. The boy wished to come, so he simply wrote to a distant relative about it, and was promised work and a temporary home. Neither could have understood that he was doing anything unlawful or improper. If Delyannis in any way assisted or encouraged Botis to come, pursuant to any offer, solicitation, promise, or agreement, he was liable to a penalty of \$1,000. Act March 3, 1903, c. 1012, §§ 4, 5, 32 Stat. 1214 (U. S. Comp. St. Supp. 1905, p. 277). It is clear that the act of Delyannis, in answering Botis' letter, and saying he would receive him and give him employment, had nothing intentionally criminal in it. On the contrary, it was a worthy and laudable act. He was not trying to hurt the labor market, reduce American labor to the level of assisted emigrants, or lower the character of foreign immigration, but was simply responding to a reasonable and proper appeal to considerations of country and relationship. The immigration officers have inadvertently extended the statute so as to cover a case neither within the letter nor spirit of the law, and have done so without even mentioning the only statute which can possibly apply to the case. They have applied a rigorous rule to a worthy alien, industrious, prudent, and self-supporting, who has every prospect of becoming a good and desirable citizen; and they now insist that their finding of facts, that Botis was a contract laborer under the acts of 1903 and 1907, although those laws are most clearly inap-

plicable, is final and conclusive, and must be accepted in this proceeding without question.

Before examining this question, a word in regard to the object of the exclusion statute may not be out of place. In several cases persons plainly within the letter of the contract labor statutes, but not within their spirit or purpose, have been held not to be within such statutes. It had been the practice for capitalists to import in large numbers an ignorant and servile class of foreign laborers, under contracts by which the employer agreed, on the one hand, to prepay their passage, while, on the other, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect was to break down the labor market, and reduce other laborers in like occupations to the level of the assisted emigrants.

"The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage." *U. S. v. Laws*, 163 U. S. 258, 263, 16 Sup. Ct. 998, 1000, 41 L. Ed. 151.

"We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap, unskilled labor." *Church of the Holy Trinity v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 227.

It seems needless to say that \$15 a month and board for a 16-year old boy is not cheap labor, nor calculated to injure the domestic supply. Botis was neither solicited nor induced to migrate. He had made no contract. He expected to obtain no cheap labor. He is in business for himself, earning his own living and more, and is fully within that liberal and enlightened policy which has always dominated our naturalization laws, and accomplished so much for our own nation and for those accepting its benefits. America means something to the emigrant, whether he is from England or Sweden, Little Russia, or Armenia. Many a man now representing the best American manhood was, when he came to this country, though then perhaps of full age and stature, utterly unable to read or write. No industrious and self-supporting emigrant should be cast out because of a technical infraction only of a loosely drawn statute, which has often been interpreted not to mean what it says. Botis has long ceased to be in a position where he could by any possibility be classed as a contract laborer; much less should he be excluded when he does not come within the statute at all. Banishment, as Justice Brewer has well said, is a punishment of the severest sort, and should not be inflicted in a case like this, unless the law positively and unequivocally demands it.

But it is said that these questions are wholly reserved to the political department, with which the courts have nothing to do; and this is often a question of considerable difficulty. There is nothing in the law which expressly makes the decisions of those officers conclusive. Sections 25 of the acts of 1903 and 1907 both provide that, when an alien is refused admission (never being allowed to land, or only pending further examination) "the decision of the appropriate immigration officers, if

adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor." Such appeal is provided for in the same section. But in case of aliens who have been permitted to land, and have become in all respects subject to our jurisdiction and part of our population, but who are found within a limited time to fall within an excluded class, there is no express provision that the decisions of the department shall be final. No appeal is provided, but simply a warrant of deportation of the Secretary of Commerce and Labor, when he shall be satisfied that the alien is here in violation of law. The effect of such decisions by immigration officers has been often discussed by the courts, with a general disposition to hold them final within certain limits. Many of these cases are those involving the right to land, not to stay after landing. In such cases the statute expressly gives an appeal, and makes the decision conclusive. By such express provision a presumption arises that the official decisions in other cases was not to be a finality. In *Gonzales v. Williams*, 192 U. S. 1, 24 Sup. Ct. 171, 48 L. Ed. 317, the immigration officers decided that petitioner was an alien, when in fact she was an inhabitant of Porto Rico, and entitled to enter the United States by the Treaty of Paris. She was discharged from custody. The case of *U. S. v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, is the strongest one on the point of the finality of executive decisions. It dealt, however, with a statute expressly making such decisions final, which is not the case here; and the ruling was that, where the judgment of exclusion is affirmed by the Secretary of Commerce and Labor on appeal, such decision is final and conclusive on the courts, unless it affirmatively appears that such officers, in the case submitted to them, abused the discretion vested in them, or in some other way, in hearing and determining the same, committed prejudicial error. And in *Chin Yow v. U. S.*, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, a writ of habeas corpus was directed by the Supreme Court, on the ground that the petitioner had been denied a fair hearing by the immigration officers. In a case not covered by the statute the decision is not conclusive. *Ex parte Petterson* (D. C.) 166 Fed. 537. To exclude aliens, prescribe conditions and regulations of immigration and deportation, and commit the enforcement of such conditions and regulations exclusively to executive officers, without judicial intervention, Congress has undoubted power. *Yamataya v. Fisher*, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721, similar to the *Ju Toy* Case, and passing upon the same positive provision that adverse decisions should be final.

But the present case is governed by another provision, being section 20 of the act of 1903, providing that any alien who shall come into the United States in violation of law shall be deported, but without expressly making the executive decision final. In no case, I think, has a departmental decision not expressly made conclusive ever been held to be so, as appears by Justice Brewer's dissenting opinion in the *Ju Toy* Case, except that mere questions of fact will not be judicially reviewed. Mistakes of law by executive officers are freely re-examined by the courts, like the question whether fraud is established by certain facts. *Hill v. McCord*, 195 U. S. 395, 25 Sup. Ct. 96, 49 L. Ed. 251. Here the immigration inspectors have found the facts, but those facts

do not bring the petitioner within any act of Congress. No statute expressly says that their finding shall be final, and without that it is not so. Finality was given by the other provisions, and an appeal and hearing provided for, differing from the one here applicable, which gives no appeal, not even a hearing. That had to be read into the law by the courts. *Yamataya v. Fisher*, *supra*. Good and sufficient reason appears for the difference. In one case the alien is stopped at our borders, and his entry arrested. He is simply turned back, after appeal and hearing, by an order which wholly concludes his rights. But in the other he enters the country, becomes part of our population, perhaps acquires a domicile, pays taxes, and establishes himself in business. He is then apprehended, given a hearing, but no appeal, and then excluded, but without express provision concluding his rights. The reason of this omission lies in the distinction between the two cases. To the immigrant who never enters it may be, indeed, a great disappointment to be turned back; but to the one who has earned a place here, who is supporting himself, possibly his family, with perhaps a home here, deportation is a punishment most drastic and severe. One may be rejected by peremptory order, final in its nature; the other is entitled to judicial investigation. The executive order for which, in this case, the rule of finality is invoked, does not even refer to any law authorizing deportation. How such a document could be placed beyond judicial question is, indeed, difficult to understand.

But there is another reason, which seems equally persuasive, why the deportation cannot be upheld, and that is the time limit prescribed by the act of 1903. *Botis* landed April 3, 1907, and the deportation warrant was made July 12, 1909. Section 20 of the statute provides as follows:

"That any alien who shall come into the United States in violation of law, or who shall be found a public charge therein, from causes existing prior to landing, shall be deported, as hereinafter provided, to the country whence he came at any time within two years after arrival at the expense, including one-half of the cost of inland transportation to the port of deportation, of the person bringing such alien into the United States, or if that cannot be done, then at the expense of the immigrant fund referred to in section 1 of this act."

Section 21 of the same act provides that the Secretary of Commerce and Labor shall deport aliens found in the United States in violation of this act within three years after landing. Now, since contract laborers are not referred to in the act of 1903, as has been already seen, it seems plain that the two-year provision applies to deportation under pre-existing statutes, and the three-year section to cases under the Act of 1903; otherwise, the two sections would be repugnant. As has also been seen, *Botis'* case can only fall within the penal act of 1885, if within any act whatever, and he is thus brought within the two-year provision. The statute says he shall be deported within two years, not that deportation proceedings shall be brought or commenced, or that he shall be held or arrested for deportation, within that period. Even if he were within the provisions of the statute of 1885, the warrant of deportation was nearly three months too late.

It has been assumed that the statute of 1885 was not repealed by that of 1903, as held in the *Ellis Case* (C. C.) 124 Fed. 637. In view

of the conclusion reached, it is not necessary to examine that question.

I am convinced that in this case the officers have unwittingly gone outside the law, that great injustice would result from carrying out their decision, and that the court is not bound thereby. No criticism of immigration officers as a class is intended, or would be justified. They have been "loyal to the interests of their country," and have on the whole discharged their onerous and difficult duties "humanely, justly, and without prejudice, with men of every kindred and tongue and people and nation."

The petitioner should be discharged.

GAY et al. v. HUDSON RIVER ELECTRIC POWER CO. et al. (two cases).

(Circuit Court, N. D. New York. November 26, 1909.)

1. RECEIVERS (§ 110*)—MANAGEMENT OF PROPERTY—POWER OF COURT TO AUTHORIZE CONTRACTS BY RECEIVERS.

A court, which has appointed receivers for a corporation and has directed them to continue its business to keep it a going concern, has power to authorize them to enter into such contracts as are usual and customary in such business, even though they may extend beyond the probable term of the receivership.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 110.*]

2. RECEIVERS (§ 110*) — CONTINUANCE OF BUSINESS — CONTRACTS FOR FUTURE PERFORMANCE.

Receivers were appointed in a creditors' suit for eight associated corporations, whose business had been conducted under a single management and was so continued by the receivers by direction of the court. Such business was principally the generation and production of electrical power and gas and its transmission and sale to both public and private consumers, and the business of the several companies was more or less interdependent. Each corporation had both secured and unsecured creditors, and on the filing of ancillary bills in foreclosure by the mortgage trustees the receiverships were extended to them, and as a whole the business under the management of the receivers was profitable and enhanced the market value of the properties. *Held*, that it was not only within the power of the court to authorize the receivers to make a contract to supply electrical power to a customer for a five-year term, but that court, in its discretion, should exercise such power where necessary to retain such customer, and where the contract was a valuable one for the company and to the advantage of its creditors as a whole.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 110.*]

In Equity. Suits by Eben H. Gay and another against Hudson River Electric Power Company. On motion by the New York Trust Company, as trustee of certain mortgage bonds, to vacate an order of this court, made October 22, 1909, authorizing the receivers herein of the defendant Empire State Power Company to enter into a contract with A. V. Morris & Son, of Amsterdam, N. Y., for furnishing said firm with electrical power for a period of five years from July 1, 1909. Denied.

See, also, 166 Fed. 771.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

Hornblower, Miller & Potter (Morgan M. Mann, of counsel), for New York Trust Co.

Noble, Jackson & Hubbard, for bondholders of said company.

Abram J. Rose and George B. Curtiss, for receivers.

RAY, District Judge. The order was accompanied with a copy of the proposed contract, and, while made ex parte, contained a provision for service thereof on all interested parties, and that it was to become effective and be carried out unless an appeal should be taken or a motion made to vacate, modify, or change same. In effect it was an order to show cause. This motion is made accordingly.

This is a creditors' suit, seeking to wind up the affairs of the eight defendant corporations on allegations of insolvency, waste, mismanagement, etc., and asking the appointment of receivers to conduct and manage the affairs of the corporations and continue the business. George W. Dunn, Milton Delano, and Charles W. Andrews were appointed receivers accordingly, and since about November 1, 1908, have been managing the affairs and continuing the business of these corporations as officers of this court. By ancillary bills in foreclosure the receiverships have been extended to the foreclosures, with the additional powers incidental thereto. One of the main allegations of the bill is that these eight corporations, including the Empire State Power Company, were, and for a long time had been, engaged in the generation and production of electrical power and gas and the transportation, sale, and supply of same to the public and to private persons, and were quasi public service corporations, and had been and were being managed and run, and should continue to be run and managed, as one corporation. These corporations had no other business, except that, incidentally, two or three had a supply store in addition to their generating plants, where they kept gas and electrical supplies, mainly for the convenience of themselves and of their customers, and which were so conducted as to supply and serve the convenience of all the eight corporations and their customers.

The order appointing the receivers provides that they shall continue the business, operating the several corporations and exercising their corporate rights and franchises as one whole. It then was, and now more than ever is, evident that these corporations must be run and the business conducted as one whole. Contracts had been made, electric power generating and gas plants arranged, and transmission and pipe lines arranged and constructed, with this in view. As a whole these corporations generate more electrical power and make more gas, and have facilities for so doing, than is required in any one place at all times or seasons of the year. When water is low, greater pressure is placed on the gas plants or steam electrical plants, etc. Certain proposed and purchased water rights had not been fully developed when the receivers were appointed, and certain transmission lines had not been constructed or completed as proposed, in order to equalize matters and make all these properties available to their full capacity, etc. It is evident that one plant was to an extent dependent on another or on others. It is also evident from the very nature of things, and fully appears from the record, that contracts for the supply of gas, or

electrical power, or of both gas and electrical power, should be renewed from time to time on proper terms, and new or additional contracts made, if the plants are capable of doing the work, or will be with small outlay, and thereby surplus power now going to waste utilized and saved, with profit to the companies or corporations concerned.

The court is not only to protect and preserve the physical properties as such, but the business, and keep them running as a "going concern" or business, or as "going concerns or businesses." In a field where competition exists, as it does here, it is evident that power to authorize the making and extension and renewal of contracts for the making and supply of gas and the generation and supply of electrical power or energy must reside in this court, or it has no power to continue and protect the business of these corporations, or of any one of them. Let go the business, let it pass to competitors, and the value of these properties of these corporations is substantially destroyed—largely depreciated, in any event. It is also a self-evident proposition that the court cannot continue this business on any "hand to mouth" basis. Business of this kind is not done, and cannot be done, in that way. It is a business, generally speaking, of producing, transporting, and selling—here the production, transportation, and delivery and sale of electrical power and gas. The business of the one company cannot be dropped, even if not immediately of much profit, without injury to that company and to all the others. Again, this particular corporation, and each of the corporations has many general creditors, as well as secured creditors (bondholders), and it is the province and duty of the court to protect and preserve the rights and interests of all, those of both classes. Here there is an equity for the general creditors, as fully and plainly appears. Hence this court is not to consult the wishes of the bondholders alone. A court of equity would act unjustly, unwisely, and show favoritism, should it do so. Still the court has no right to sacrifice the interests of either class, or to subordinate the rights of one to those of the other.

In contracting for the supply of either electrical power or gas, or of both, time contracts must be made. Takers and users, in the nature of things, must know with some definiteness when their supply is to end. Such a contract as this is one within the general scope and nature of the business being carried on by the corporations and continued by the receivers, and which they have been authorized to carry on and continue, and is within their general powers necessarily. *Northern Pac. R. Co. v. American Tr. Co.*, 195 U. S. 439, 461, 462, 25 Sup. Ct. 84, 49 L. Ed. 269. It is not an extraordinary or unusual contract for corporations engaged in such business. *A. V. Morris & Son* are, and when the order was made were, taking power from this corporation in its own field of operations. *A. V. Morris & Son* are enlarging their plant and extending their business. They are engaged in running knitting mills, and there are electric plants in that vicinity competing with these receivers. Shall this business now held by the receivers be dropped, and its extension abandoned? The evidence before the court is overwhelming that the contract is a desirable and a profitable one. Under the businesslike management of Mr. Dunn, Mr. Delano, and Mr. Andrews, and under adverse circumstances, the general business

has grown, and, as a whole, is being conducted at a profit; due allowance being made for wear and tear and repairs. Confidence in the value of these properties and of the business, once shaken, is being restored, has been restored largely, and, barring a general financial depression, the ultimate value of the properties and success of the business are assured.

As I am satisfied and find (1) that the proposed contract is fair, and a desirable and valuable one for the company, (2) that it cannot under ordinary conditions prove detrimental to the interests of either secured creditors (bondholders) or unsecured creditors, and (3) is not unusual or extraordinary or improvident, but within the power of this court to authorize, and of the receivers by authority of this court to make, it becomes a matter of discretion whether the order made shall be vacated or modified. *Farmers' Loan & Trust Company v. Eaton*, 114 Fed. 14, 16, 51 C. C. A. 640; *Mercantile Trust Co. v. Missouri, etc. (C. C.)* 41 Fed. 8, 11; *Northern Pac. Ry. Co. v. American Tr. Co.*, 195 U. S. 439, 461, 462, 25 Sup. Ct. 84, 49 L. Ed. 269; *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 562, 563, 14 Sup. Ct. 915, 38 L. Ed. 819. In *Northern Pac. R. Co. v. American Tr. Co.*, supra, the court, per Mr. Justice Peckham, plainly points out that the court may authorize, is presumed to authorize, where it directs a business to be continued, the making of such contracts as are usual and customary in conducting the business. The duration of a receivership is uncertain, and in such a business as this to hold that a court is without power to authorize contracts which will probably extend beyond the term of the receivership would be to so cripple such a business as to virtually destroy it. Clearly the business cannot be continued if the power is denied. I find no suggestion in the decision of the Supreme Court of the United States that the powers of the court are so limited. On the other hand, the contrary is plainly indicated. In the case of leasing real estate, leases may be for a definite term, provided they be the customary commercial or businesslike leases. They are not limited in time to the duration of the receivership. This is necessarily so, if the property is to be rented at all. Who would rent real estate for any purpose, if his lease was to terminate with the life of the receivership? So here, who will contract for his light or electric power for an indefinite period, terminating with a legal proceeding uncertain in its duration from the very nature of things?

These receivers have done the best they could, and made the best terms, including time, possible. It is a question of accepting and authorizing this contract, or letting the desirable business of *A. V. Morris & Son* go to a competitor. If this court refuses to approve and authorize the usual contracts in such a business, this business will pass entirely from these companies to its competitors, who then will probably absorb these properties on a sale thereof. If this court refuses to authorize contracts which are to extend, probably, beyond the termination of the receiverships, and only such as are to terminate with it, or those contracts which may be ended with the receivership by order of the court, without the consent of the party taking the gas or electrical power, the business of these corporations may as well stop. Business conditions and demands must be recognized, and courts are power-

less to fully regulate them. Courts cannot compel business houses and corporations to make such contracts as they may think most advantageous to those under their immediate care and supervision, but must accept such as they can get, if they accept any. When a proposed contract is shown to be desirable and profitable to the interests a court has in charge, it is its duty to authorize it, if within its power so to do.

The motion to vacate the order is denied.

LANTZ v. FRETTS et al. MINOR v. SAME. STEPHENS v. SAME.

(Circuit Court, N. D. West Virginia. November 19, 1909.)

REMOVAL OF CAUSES (§ 79*)—TIME FOR FILING PETITION—SUBMITTING TO JURISDICTION OF STATE COURT.

A defendant cannot remove a cause after the hearing and determination of a demurrer by the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 135-160; Dec. Dig. § 79.*]

In Equity. Suits by John W. Lantz, Jacob Minor, and Ruth E. Stephens, respectively, against A. E. Fretts and another. On motions to remand to state court. Motions sustained.

The several plaintiffs in these causes filed their bills against the defendants Fretts and Allison—the first two at September rules, 1902; the last one named at January rules, 1903—in the circuit court of Monongalia county, seeking to have certain recorded contracts touching the coal underlying their respective farms, executed by them to defendants, declared null and void, and the clouds thereof removed from their titles. Process was returned not found, the nonresidence of the defendants was shown, order of publication was taken, posted, and matured, and at the February term, 1903, of this state court, decrees were entered in the causes granting to plaintiff in each the relief prayed for. At the October term, 1907, the defendants filed their petitions, under sections 3816 and 3560, Code W. Va. 1906, providing for a rehearing, at the instance of a nonresident not served with process, within five years from the date of the decree or judgment against him, praying such rehearing of the causes, and leave to file demurrers to the bills, for the sole purpose of denying the court's jurisdiction to entertain the said several bills. By orders then entered the prayers of these petitions were granted, upon condition that bonds to secure costs as required by the statute be filed, which were so filed. At January rules, 1908, the defendants filed demurrers to the bills, alleging them to be insufficient in law, for that at the time of the institution of the causes the defendants were nonresidents and without the jurisdiction of the court. At the May term, 1908, of the state court, these demurrers were overruled, and leave was given defendants to answer. At the October term, 1908, petitions were filed by defendants to remove these causes to this court, and an order was entered by the circuit court of Monongalia county directing their removal. Motions to remand have been made, argued, and submitted.

S. F. Glascock and Donley & Hatfield, for plaintiffs.

W. G. Bennett and Goodwin & Reay, for defendants.

DAYTON, District Judge (after stating the facts as above). Did these defendants, by entering their demurrers to the bills for the purpose of questioning the jurisdiction taken over them, and by permitting the state court to pass thereon, submit to the state court's jurisdiction and lose their right to removal?

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Prior to Act March 3, 1875, c. 137, 18 Stat. 470 (U. S. Comp. St. 1901, p. 508), a cause could be removed from a state court to a Circuit Court of the United States, by reason of diversity of citizenship, at any time prior to final trial had. This act of 1875 restricted such removal to "before or at the term at which said cause could be first tried and before the trial thereof." Act March 3, 1887, c. 373, 24 Stat. 552, as corrected and re-enacted by Act August 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), carried the restriction upon such removal to "the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which suit is brought to answer or plead to the declaration or complaint." The present statute, having for its purpose to abridge the right of removal previously existing, ought to be so construed and enforced as to effectuate rather than to defeat its obvious purpose. *Daugherty v. Western Union Tel. Co.* (C. C.) 61 Fed. 139.

It is true that in the case of *Tennessee Coal, Lumber & Tan Bark Co. v. Waller* (C. C.) 37 Fed. 545, decided shortly after the passage of our present act, it was held that it was "not too late to make the application after a motion to take the bill from the files and a demurrer to the bill have been disposed of"; and in *Whiteley Malleable Castings Co. v. Sterlingworth R. Supply Co.* (C. C.) 83 Fed. 853, it is held that "appearing in the state court, filing a demurrer to the complaint, and procuring an order discharging an attachment by giving the necessary bond therefor, all before the time at which the defendant is required by the state practice to answer or plead, is not a waiver of the defendant's right to remove, when no action was taken on the demurrer in the state court." And this ruling is supported by a number of cases, such as *Duncan v. Associated Press* (C. C.) 81 Fed. 417; *Conner v. Skagit Cumberland Coal Co.* (C. C.) 45 Fed. 802.

But in contravention of the *Tennessee C., L. & T. B. Co. Case* (possibly, also, of the others), and substantially overruling it, are a large number of others holding that the words of the statute, "to answer or plead to the declaration or complaint," make no distinction between different kinds of answers or pleas; and all pleas or answers of the defendant, whether in matter of law by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said to "oppose or answer" the declaration or complaint. *Martin's Adm'r v. B. & O. R. R. Co.*, 151 U. S. 673, 686, 14 Sup. Ct. 533, 38 L. Ed. 311, 316; *Powers v. C. & O. R. R. Co.*, 169 U. S. 92, 98, 18 Sup. Ct. 264, 42 L. Ed. 673, 675; *Wabash W. Ry. v. Brow*, 164 U. S. 271, 277, 17 Sup. Ct. 126, 41 L. Ed. 431, 434; *First L. B. Corp. v. Conn. River L. Co.* (C. C.) 71 Fed. 225; *Frink v. Blackinton* (C. C.) 80 Fed. 306; *Gregory v. Boston, etc., Trust Co.* (C. C.) 88 Fed. 3; *Maher v. Tower Hotel Co.* (C. C.) 94 Fed. 225; *Hobart v. Illinois Central R. Co.* (C. C.) 81 Fed. 5.

In *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, it is said:

"As the defendant's rights of removal into the Circuit Court of the United States can only be exercised by filing petition for removal in the state court before or at the time when he is required to plead in that court to the juris-

diction or in abatement, it necessarily follows that, whether the petition for removal and such a plea are filed together at that time in the state court, or the petition for removal is filed before that time in the state court and the plea is seasonably filed in the Circuit Court of the United States after the removal, the plea to the jurisdiction or in abatement can only be tried and determined in the Circuit Court of the United States."

From which it would seem that the plea in abatement or to jurisdiction and the petition for removal may be filed in the state court simultaneously at or within the proper time for removal. Whether this would be true as to a demurrer in the nature of a plea to jurisdiction, or whether a question of jurisdiction can be raised by demurrer under federal practice, and, if so, under what conditions, it is not necessary to consider; for it has been expressly determined that, after a hearing and determination of a demurrer, a petition for removal comes too late. *Rosenthal v. Coates*, 148 U. S. 142, 13 Sup. Ct. 576, 37 L. Ed. 399; *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080, 1083; *Laidly v. Huntington*, 121 U. S. 179, 7 Sup. Ct. 855, 30 L. Ed. 883; *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. Ed. 491.

The motions to remand these causes must be sustained.

LEWIS v. NEW YORK LIFE INS. CO.

(Circuit Court, E. D. Pennsylvania. November 15, 1909.)

No. 632, April Sess. 1909.

INSURANCE (§ 198*)—RESCISSION OF LIFE INSURANCE CONTRACT—RIGHT OF INSURED—REPUDIATION BY INSURER.

Plaintiff held a policy of life insurance from defendant, by the terms of which he was entitled to borrow from defendant from time to time specified sums on the sole security of the policy. After having secured one loan, he became dissatisfied with the policy, and applied to defendant's agent to know how much more he was entitled to borrow, stating his intention to then allow the policy to lapse. He was given the information and applied for a loan of the amount, and his application was forwarded to the defendant; but he was told by the agent that no further loan would be made him. *Held*, that he was not entitled to treat such statement as a repudiation of the contract and recover the premiums paid, both because he had first himself announced his intention of abandoning the contract, and because the provision for loans was only an incidental and collateral term of the contract, not necessarily connected with the contract to insure, and a breach of which was not a repudiation of the principal contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 459; Dec. Dig. § 198.*]

Action by Daniel C. Lewis against the New York Life Insurance Company. Plaintiff moves for new trial. Motion denied.

Burr, Brown & Lloyd, for plaintiff.

Dickson, Beitler & McCouch, for defendant.

J. B. McPHERSON, District Judge. For present purposes the facts of this case may be stated as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The plaintiff was insured in the defendant company for \$30,800, and his policy also contained a separable provision that after payment of a certain number of premiums he should have the right to borrow specified sums of money on the sole security of the policy. In the spring of 1908 he exercised this right and borrowed \$1,300, pledging the policy as security. Toward the end of May, 1909, being dissatisfied with the nonparticipating feature of his contract, he was disposed to abandon it; but before taking that step he wished to borrow all the rest of the money to which he was entitled. He wished to borrow it, because he was not bound to repay the so-called "loans" made under the policy, and in effect, therefore, they were sums at which the company was willing to buy the policy from time to time. It had no technical "surrender value"; but the loan feature gave it a real value of substantially the same character. He therefore inquired at the company's Philadelphia office how much more money he could borrow, saying that he wanted "to borrow that amount of money and just let the policy lapse." Naturally the company were reluctant to lose a policy holder if the loss could be prevented, and accordingly a direct answer to his inquiry was evaded, while other forms of policy were suggested that might meet his objections. He declared his willingness to consider these suggestions, and some negotiation followed along this line during the month of June; but nothing came of the effort. His policy was in the company's possession, in pledge for the \$1,300 transaction; but a copy was furnished to him on June 29th, and from this it appeared plainly that he was entitled to borrow \$640 more. The annual premium of \$960 was payable on July 12th, and he was informed that if he made this payment he would be entitled to borrow a total of \$2,556—less, of course, the \$1,300 that he had already received. The company's letter conveying this information said nothing about the amount of "loan" to which the plaintiff was entitled on June 29th, and it is clear that the company was still endeavoring, either to persuade him to remain a policy holder in some form or other, or at least to secure one more premium before the policy was permitted to lapse. The company's evasions and lack of frankness deserve reprobation; but they did not deceive the plaintiff. He is more than usually intelligent, and he knew from his policy exactly how much more money he was entitled to borrow; and, moreover, he had consulted counsel on June 23d and was fully informed about his legal rights. On July 7th, after an interview in which the company's cashier informed him that he was not entitled to borrow any more money, the plaintiff wrote a letter making a formal demand for an immediate loan of \$640, and delivered the letter at the Philadelphia office on the same day. He knew that the demand must go to New York to be acted on at the home office, and on July 9th he inquired at the cashier's office in Philadelphia whether a reply had been received. He was informed that nothing had yet been heard, whereupon he reported to his counsel, and together they paid a second visit to the office of the cashier. Being informed again that he could get nothing more upon the policy, he brought suit upon the same day, without waiting longer for the answer from New York.

Obviously, in one aspect of the case, there was a question for the jury whether the suit had not been prematurely brought—whether the plaintiff had waited a reasonable time to allow the home office to reply to his demand. He could have safely delayed suit for two more days, and it did not appear that the cashier was authorized to speak for the company and to refuse the loan. Moreover, there was a dispute in the evidence about the statements that were made by the cashier, and this, also, would have required submission to the jury, if the company had not admitted its liability for \$640, and if the court had not been of opinion that no more could be recovered. Upon the present motion, therefore, I have assumed the plaintiff's version of the facts to be true, and have also treated the cashier as the company's representative. In this situation the question to be considered is whether the plaintiff was entitled to rescind the contract and recover the premiums previously paid, less the credit of \$1,300. To support his contention he relies upon the case of *Supreme Council v. Black*, 123 Fed. 650, 59 C. C. A. 414; but for reasons that were stated in the charge, and need not be repeated now, I am of opinion that the case referred to does not govern the present controversy. In addition to the foregoing facts it is material to observe that on July 9th, when the plaintiff had his final interview with the cashier, he had himself abandoned his connection with the company, as will appear by the following extract from his cross-examination:

"Q. You had already taken out a policy of a similar amount in another company?

"A. Yes.

"Q. And you were intending to give up this policy, were you not?

"A. Yes, sir."

It is therefore evident, I think, that the two cases are materially different. In *Black's Case* the company were attempting to compel a policy holder to submit to a vital change in his contract, while he desired to go on with the agreement in its original form. In the present case the policy holder himself intended, not merely to change, but to sever, his relation with the company; his reason being that the policy was too onerous to maintain. He not only did not wish to go on with the agreement, but he had taken the decisive step of giving it up. Being properly desirous, however, to realize out of the abandoned policy as much as possible, he asked for a "loan" to the full extent authorized by the contract, intending to take the money, as he had a perfect right to do, without either purpose or obligation to repay it. If it had not been for what I now assume to be the needless obstructions that were put in his way by the superserviceable agent of the company, the transaction would have been closed with the utmost simplicity, and he would have received, and been satisfied with, the sum of \$640, which was the amount still available upon the policy, and was all he expected or was entitled to obtain. Being unexpectedly forced, however, into a situation where a possible opportunity to rescind seemed practically thrust upon him, he not unnaturally shifted his ground, and now seeks to put on the character of a policy holder who has been denied a material right under a contract which he was anxious to continue, but was reluctantly compelled to give up. The real

condition of affairs was so distinctly different that, as it seems to me, *Supreme Council v. Black*, supra, cannot properly be applied. The injury he suffered was the loss of the remaining loan value of his policy, and this he has been allowed to recover. I may, perhaps, refer again to the charge delivered at the trial for a somewhat fuller statement of the reasons that led me to direct a verdict for the sum admitted to be due, and not for the full amount of the claim.

It is also urged on behalf of the defendant that the principal contract between the parties was the agreement to pay \$30,800 upon the plaintiff's death, or at the expiration of the stated period, and that this contract was in no respect interfered with by the defendant; whereas, in *Black's Case*, the company's interference with the sum insured is the only ground of the decision. It is argued that the defendant's agreement to lend specified sums from time to time was incidental and collateral, and that an action for its breach would lie, although the principal contract had not been disturbed. I think this position is sound, and that the agreement to lend is in effect an independent undertaking, not necessarily connected with the contract to insure. The case of *New York Life Ins. Co. v. Pope*, 68 S. W. 851, 24 Ky. Law Rep. 485, decided by the Court of Appeals of Kentucky, inferentially supports this contention, although the measure of damages there laid down does not seem to be applicable to the facts now in proof. But the right to rescind was denied, although the insured applied for a loan and was refused.

A new trial is refused.

In re BERKOWITZ.

(District Court, D. New Jersey. January, 1908.)

BANKRUPTCY (§ 237*)—POWERS OF COURT—WRIT OF NE EXEAT.

Bankr. Act July 1, 1898, c. 541, § 2, subd. 15, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), which confers on courts of bankruptcy general powers to make such orders and issue such process as may be necessary for the enforcement of the provisions of the act, in connection with Rev. St. § 716 (U. S. Comp. St. 1901, p. 580), vests a court of bankruptcy with power to issue a writ in the nature of a writ of ne exeat to restrain the bankrupt within the district, where it is shown that he intends to leave and not to appear for examination at an adjourned date, as required by an order of the referee; and such writ should be granted, where it appears that his presence is necessary to the proper administration of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 237.*]

In the matter of Leon M. Berkowitz, bankrupt. On motion to vacate order in the nature of a writ of ne exeat. Motion denied.

Julius Henry Cohen and Henry F. Wolff, for trustee.
Louis Hood, for bankrupt.

LANNING, District Judge. On the petition of creditors of the bankrupt, duly supported by the certificate of the referee to whom this cause has been referred, showing that at the conclusion of the proceedings before him on December 31, 1907, the bankrupt stated that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

he would not appear before the referee for further examination on January 10, 1908, the day to which the examination had been adjourned, and that he intended to go West, and supported, also, by the affidavits of witnesses to the same effect, an order in the nature of a writ of ne exeat was issued, commanding the marshal of this district to take the bankrupt into his custody and cause him to give sufficient bail or security in the sum of \$5,000 that he would not depart from the state of New Jersey or go beyond said state without leave of the court, and that he would at all times and in all matters respect, obey, and comply with the lawful orders and decrees of this court which might be made in behalf of the petitioners or other creditors, or the trustee, of the bankrupt. The writ was dated January 3, 1908. The bankrupt gave bail. He now moves by his counsel:

"That the order in the nature of a writ of ne exeat issued against him [Leon M. Berkowitz] on the 3d day of January, 1908, be vacated and discharged, with costs, and that the bond given by the said Leon M. Berkowitz, with sureties, to the United States marshal for the district of New Jersey, pursuant to the said order, may be delivered up to be canceled."

It will be observed that the motion is simply one for the vacation of the order in the nature of a writ of ne exeat, and not in any sense for its modification. The only question before the court, therefore, is as to whether the order should be vacated and set aside. Upon the authority of Bankr. Act July 1, 1898, c. 541, § 2, subd. 15, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), section 716, Rev. St. U. S. (U. S. Comp. St. 1901, p. 580), *In re Lipke* (D. C.) 3 Am. Bankr. Rep. 569, 98 Fed. 970, *In re Cohen* (D. C.) 14 Am. Bankr. Rep. 355, 136 Fed. 999, and *In re Fleischer* (D. C.) 18 Am. Bankr. Rep. 194, 151 Fed. 81, I have concluded that the order ought not to be vacated. It appears that, upon the presentation of the petition on which the order in the nature of a writ of ne exeat was issued, no formal order authorizing the issue of any writ was entered. If there be an irregularity in this respect, I will at any time sign an order nunc pro tunc, notwithstanding the fact that the writ, which on both sides has been designated as an order in the nature of a writ of ne exeat, was itself signed by me as judge of the court and the seal of the court thereto affixed.

The motion to vacate the writ is denied.

IN RE BERKOWITZ.

(District Court, D. New Jersey. April, 1908.)

1. BANKRUPTCY (§ 175*)—RIGHT OF TRUSTEE AS TO PROPERTY FRAUDULENTLY TRANSFERRED.

Where it is shown that a bankrupt, while insolvent, with relatives organized a corporation to which he conveyed his property, and which he conducted solely for his own benefit, for the evident purpose of placing such property beyond the reach of his creditors, his trustee may properly be ordered to seize such property as assets of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 247; Dec. Dig. § 175.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 104*)—ADMINISTRATION OF ESTATES—JURISDICTION OF COURTS—RESTRAINING SALE OF PROPERTY IN DISPUTE.

An order of a referee, restraining a bankrupt and a corporation of which he was manager and to which he had transferred his property from selling its property pending a determination of its ownership, confirmed, where it appeared that the parties agreed to the hearing of the motion therefor before the referee in substantial compliance with bankruptcy rule 21 of the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 156, 157; Dec. Dig. § 104.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

In the matter of Leon M. Berkowitz, bankrupt. On review of orders of referee. Orders confirmed.

Julius Henry Cohen and Henry F. Wolff, for creditors.
Louis Hood, for bankrupt.

LANNING, District Judge. The Berkowitz Tailoring Company was incorporated shortly before the petition in bankruptcy was filed. The bankrupt was then insolvent, and conveyed all his assets to the company for an alleged consideration of \$1,500. The incorporators were the bankrupt and three of his brothers-in-law. These brothers-in-law seem to have paid into the corporation, for its capital stock, the sum of \$2,000, and the bankrupt \$25. The brothers-in-law made no inquiry concerning the quantity or value of the property transferred to the company by the bankrupt, and have nothing whatever to do with the business of the company. If they did in fact pay \$2,000 into the treasury of the corporation, it is clear that their purpose was not to invest that sum in the business on their own account, but to aid the bankrupt in business that was to be treated by him as his own, and not as a business in which they had any interest whatever. The corporation was intended to operate as a cloak to shield the property from seizure by the bankrupt's creditors. Obviously it was a fraud upon the creditors of the bankrupt. The referee's orders of September 26 and 27, 1907, directing the receiver to seize the property in possession of the company, were amply sustained by the proofs, and will be confirmed.

The order of February 13, 1908, will also be confirmed. After the taking of much testimony subsequent to the orders of September 26 and 27, 1907, the referee, on the petition of the trustee, granted a rule, dated January 18, and returnable January 27, 1908, requiring the bankrupt to show cause why he should not turn over to the trustee moneys and property not accounted for by the bankrupt. For some reason which I do not find disclosed in the record the bankrupt secured an extension of two weeks after January 27th in which to file his answer to the petition. He filed such answer on February 11th. The petition of the trustee, filed as above stated on January 18th, showed amongst other things that the bankrupt mailed to Julius Magnus a statement of the assets and liabilities of the Berkowitz Tailoring Company, showing its assets to be \$32,837.30 (including over \$18,000 of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

merchandise and over \$4,600 of accounts receivable), and liabilities for capital stock to the amount of \$25,000. This statement was dated April 5, 1907, only about three weeks after the company was incorporated. The proofs seem to show that payments for capital stock had amounted only to \$2,025, and that the pretended consideration for merchandise conveyed by the bankrupt to the company was only \$1,500. Where the company got its immense amount of assets is not satisfactorily explained. The transaction bears the earmarks of palpable fraud. The strong probability is that these assets belonged to the bankrupt. In this condition of affairs, and while the rule granted on January 18th was still pending, the Berkowitz Tailoring Company advertised for sale at public auction "the entire stock of imported woollens, slightly damaged by water, together with all the fine fixtures in mission," of the company on February 6th. On February 5th the trustee filed his petition with the referee, setting forth these facts and praying for a rule requiring the bankrupt, the company, and the auctioneer to show cause why the proposed sale should not be restrained "until the final determination of the questions raised in the petitions aforesaid." A rule was thereupon granted, with an ad interim stay of sale by auction, returnable on February 11th. On February 13th the referee made his order restraining the sale, which is now the subject of review.

The purpose of this order was to prevent a sale of the property in possession of the company until its ownership could be determined. The company has the option, under the order, of giving its indemnifying bond, and thus being free to sell the property. It is true that bankruptcy rule 21 of this court, set forth in the Siebert Case (D. C.) 13 Am. Bankr. Rep. 348, 133 Fed. 781, gives to a referee power only, in the first instance, to grant, upon an application for an injunction, a rule to show cause with an ad interim stay, and that the rule seems to contemplate, in the absence of an agreement by the parties in interest to argue the rule before the referee, that the argument shall be before a judge of the court. But in this case an agreement to argue the rule before the referee was in effect made. The order of February 13, 1908, recites that counsel for all parties in interest appeared before the referee and argued the rule. Whether they filed with the referee a written stipulation to that effect, as provided by rule 21, I am not informed. If they did not, it is too late now to object on that ground. I am satisfied that the order was properly made, and it will be confirmed.

A writ of ne exeat was issued against the bankrupt on January 3, 1908. See 173 Fed. 1012. It provides that the bankrupt shall not depart from New Jersey without leave of court. Temporary leave has heretofore been given on two separate occasions for him to go to the city of New York on business trips. Similar orders may be given in the future, if deemed proper. The present motion to vacate or modify the writ will be denied. The examination into the bankrupt's affairs is not yet completed, and the bankrupt must remain subject to the jurisdiction and power of this court, at least for the present.

THE P. J. T. CO. NO. 7.

THE NATHAN HALE.

(District Court, S. D. New York. November 16, 1909.)

COLLISION (§ 95*)—TOWS MEETING—NAVIGATING WITHOUT LOOKOUT.

Tug No. 7, proceeding to the eastward in Long Island Sound, at night, with five barges in tow, held solely in fault for a collision near Hart's Island with the barge Rhode Island, in tow of the tug Nathan Hale on a hawser, proceeding eastward, for navigating on the wrong side of the channel without a lookout.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 95.*]

In Admiralty. Suit for collision by the Philadelphia & Reading Railway Company, as owner of the barge Rhode Island, against the tug P. J. T. Co. No. 7 and the tug Nathan Hale. Decree against tug No. 7.

Armstrong, Brown & Boland, for libellant.

James J. Macklin, for the P. J. T. Co. No. 7.

Harrington, Perkins & Englar, for the Nathan Hale.

ADAMS, District Judge. This action was brought by the Philadelphia & Reading Railway Company against the tugs P. J. T. Co. No. 7 and the Nathan Hale to recover the damages suffered by reason of a collision between the No. 7 and the light barge Rhode Island in tow on a hawser of the Nathan Hale. The No. 7 had a tow of five barges on a long hawser, and was proceeding east through Long Island Sound. The Nathan Hale with a tow of four barges, the Meade, Ray, Rhode Island and Rupert, was proceeding through the sound to the westward. The No. 7 struck, near Hart's Island, inflicting damages to the Rhode Island, estimated at \$3,000, and causing loss of personal effects of her master amounting, it is claimed, to \$26.85.

The libel alleges that when the tow was off the island, with all lights properly set and burning, the collision occurred by the No. 7 striking the Rhode Island on the port side. The libellant further states that the collision was not caused by any fault on the part of the Rhode Island, was due to the negligence of No. 7, in that: (1) She did not have a competent master in charge; (2) she did not have a sufficient lookout; (3) she saw, or ought to have seen, the barge, and having abundant room to navigate to the south, continued on a course which resulted in the collision; (4) she failed to port her wheel and pass the Hale and barge to port, and (5) she did not stop and reverse in time.

The libel further alleges that the Hale was also in fault in that: (1) She failed to port her wheel and change her course sufficiently to enable her barges in following her to keep out of the way of the No. 7; (2) having the Rhode Island in tow she failed to prevent a collision, and (3) she failed to maintain a proper lookout.

The No. 7 in her answer, after some admissions and denials, alleges:

"Eighth. And for further answer to said libel and upon information and belief claimant alleges: That at about 10:30 p. m. of the first day of Novem-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ber, 1906, the said Steamtug P. J. T. Co. No. 7 having in tow five barges in tandem fashion astern, was proceeding through Long Island Sound, it being about slack water at the time, and barges being laden with coal, and said Steamtug proceeding very slowly therewith, she being bound at the time for various points East, and while said tug was about abreast of the upper end of City Island, it was observed that a steamer bound down the said sound, showing both her side lights, well on the starboard bow of the said Steamtug No. 7; whereupon a signal of two whistles was sounded by said Steamtug No. 7 to which no reply was made, and shortly thereafter another signal of two whistles was sounded by the said Steamtug No. 7, which also remained unanswered, and that a little while thereafter the said Steamtug which afterwards proved to be the Nathan Hale shut out her green light and showed only her red light whereupon alarm whistles were sounded by the said Steamtug No. 7 and her engines slowed and said alarm whistles were again sounded by said tug to which no response was made, whereupon the engines of said Steamtug No. 7 were stopped, but that said Steamtug Nathan Hale came on, continuing to show her red light, and passed said Steamtug No. 7 on her port side, but that her tow which consisted of four barges was trailing across the channel, and said Barge Rhode Island which was the third barge in tow of the Steamtug Nathan Hale came into collision with the stem of the said Steamtug No. 7, the port bow of said barge striking the said tug.

Claimant also alleges upon information and belief that the said Barge Rhode Island had no lights burning at or previous to said collision, nor did the barge astern of the Rhode Island have any lights set or burning, and that there was nobody attending the wheels of either of said last mentioned barges. That the wind was blowing very violently at and previous to the collision from the North Northwest. Said collision occurred about abreast of Hewlett's Point.

Ninth. Claimant of said Steamtug No. 7 alleges as charges of fault against said Steamtug Nathan Hale

(1) That owing to the force and direction of the wind and her barges being light, that she should have passed on the starboard side of said Steamtug No. 7 and her tow. (2) In that she should have answered the signals of said Steamtug No. 7. (3) In that she was proceeding at a high rate of speed and did nothing to prevent said collision. (4) In that she permitted the said Barge Rhode Island together with the barge astern to be towed without having any lights burning, as required by law. (5) In that she permitted her said tow to trail across the channel.

As to the Barge Rhode Island claimant avers upon information and belief,

(1) That she did not keep a proper lookout, (2) that no one was attending to her steering, and (3) in not having proper lights set and burning."

The Hale in her answer, after some admissions and denials, alleges:

"Seventh. That at about 10:30 p. m. the 1st day of November, 1906, the steamtug Nathan Hale, having in tow four barges tandem fashion, was proceeding through Long Island Sound bound to the westward. Both the tug and all the barges had all regulation lights properly set and burning brightly. When said tug was about off Hart Island, she made out a long distance ahead both side lights and staff-lights of a tug which afterwards proved to be the P. J. T. No. 7 bound to the eastward. The weather was clear. Immediately upon making out No. 7, Nathan Hale blew one whistle and ported her helm to pass port to port in accordance with the rule. No. 7 blew no whistles and gave no answering signal whatever, but the tugs continued on and passed each other a substantial distance apart, there being apparently no danger of collision. After passing abreast of the Nathan Hale, however, No. 7 negligently and carelessly brought herself into collision with the barge Rhode Island, doing the damage complained of.

Eighth. That said collision and consequent damage were not caused nor contributed to by any fault or neglect on the part of the Nathan Hale or those in charge of her, but were caused wholly by and through the fault, neglect and

want of care on the part of the steamtug P. J. T. No. 7 and barge Rhode Island in the following, among other respects:

As to No. 7—

1. In that she did not have a competent master in command. 2. In that she did not maintain a sufficient lookout. 3. In that she saw or ought to have seen the barge Rhode Island and, having abundant room to navigate to the southward, continued on a course which resulted in the collision herein. 4. In that she failed to port her wheel sufficiently to pass the Nathan Hale and her barges port to port as required by the rule and that she did not stop or change her course in time to avoid a collision.

As to Rhode Island—

1. In that she did not keep a proper lookout. 2. In that her helmsman was incompetent or inattentive to his duties."

The testimony of the different parties, in a general way, sustains their allegations.

The facts appear to be that the tugs were approaching each other head and head on the northerly side of the channel. The No. 7 was proceeding without a lookout. She at first endeavored, by signals of two blasts, to secure the Hale's consent to pass starboard to starboard. Failing that she kept a port to port course and passed the Hale and her first and second barges but struck the Rhode Island a severe blow. Whether this was brought about by a change of course to the port by the No. 7 or by the position of the tow of the Hale angling across the No. 7's bow, is not clear, but in either case the No. 7 was plainly in fault because she was navigating on the wrong side of the channel and collided with a properly lighted barge, which she should have seen and avoided. It is quite probable that the Hale's barges were more to the southward than she was. She had shortly before ported her wheel and gone to the starboard. This would naturally leave her barges somewhat to the southward, but not much, as they were on short hawsers, and it may be that the barges were also forced over to the southward slightly by the prevailing wind. That situation, however, would scarcely account for a change of the No. 7's red light at first visible to the barge, to her green, which she showed just before the collision. She must have changed to her port to have brought that about. But whatever the facts may be in this connection, I think the No. 7's plain faults in navigating without a lookout and in being on the wrong side of the channel, sufficiently account for the collision.

Decree for the libellant against the No. 7, with an order of reference. The libel against the Hale is dismissed.

MEMORANDUM DECISIONS.

BAGLIN v. CUSENIER CO. (Circuit Court of Appeals, Second Circuit. November 8, 1909.) No. 205. Appeal from and Writ of Error to the Circuit Court of the United States for the Southern District of New York. See, also, 156 Fed. 1015; 164 Fed. 25, 90 C. C. A. 499. A. L. Pincoffs and Roger Foster, for plaintiff in error and appellant. Philip Mauro, C. A. L. Massie, and Ralph L. Scott, for defendant in error and appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. We are satisfied it was error to hold defendant in contempt for translating the whole or any part of the label which the court said it might use; the court having expressly stated that such label might be translated into any language. No mistranslation is proved. Order reversed.

BASS et al. v. FOREST PRODUCTS & MFG. CO. (Circuit Court of Appeals, Fifth Circuit. October 4, 1909.) No. 1,897. Appeal from the Circuit Court of the United States for the Southern District of Mississippi. For opinion below, see 161 Fed. 1004. R. V. Fletcher and R. V. Willing, for appellants. Garner Wynn Green and Marcellus Green (Marlin E. Olmsted, of counsel), for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The legal questions involved in this case are conceded by the counsel for both parties to be identical with those involved in *Simpson County v. Wisner-Cox Lumber & Mfg. Co.* (decided by this court May 10, 1909) 170 Fed. 52. The only difference between this case and the one cited is that here the appellee, which claimed to own the lease for 99 years described in its bill, took the initiative and appeared in the court below as complainant. Demurrers were filed to the bill, which raised the same questions we decided in *Simpson County v. Wisner-Cox Lumber & Mfg. Co.*, supra. The Circuit Court overruled the demurrers, and, after defendants had answered, sustained exceptions to the answer, and rendered final decree for the complainant, the appellee here. On the authority of *Simpson County v. Wisner-Cox Lumber & Mfg. Co.*, supra, and the opinions of the Supreme Court of Mississippi there cited, the decree of the Circuit Court is reversed, and the cause remanded for further proceedings in conformity with the said opinion of this court.

BETHLEHEM STEEL CO. v. NILES-BEMENT-POND CO. (Circuit Court of Appeals, Third Circuit. July 21, 1909.) No. 40. Appeal from the Circuit Court of the United States for the District of New Jersey. Thomas W. Bake-well and Francis T. Chaubers, for appellant. Charles H. Duell and F. P. Warfield, for appellee. Before GRAY, Circuit Judge, and BRADFORD and YOUNG, District Judges.

PER CURIAM. The opinion filed in this case by the learned judge of the court below (see 166 Fed. 880) has so clearly stated the reasons upon which our own determination of this case is founded that further and independent discussion of them on our part is rendered unnecessary. Therefore, adopting the opinion of the court below as the opinion of this court, its decree is hereby affirmed.

BROD v. J. K. ORR SHOE CO. et al. (Circuit Court of Appeals, Fifth Circuit. October 25, 1909.) No. 1,914. Appeal from the District Court of the United States for the Northern District of Georgia. Harry Dodd, and Thos. F. Rawls, for appellant. W. G. Post, for appellees.

PER CURIAM. In this case we reach the same conclusion as that reached by the District Judge, and the judgment of the District Court is affirmed. See 166 Fed. 1011.

THE CHARLES E. MATTHEWS. THE EUGENE F. MORAN. THE SCOWS 15D AND 18D. (Circuit Court of Appeals, Second Circuit. November 29, 1909.) Appeals from the District Court of the United States for the Southern District of New York. Motion to amend mandate. For opinion below, see 170 Fed. 928. Before LACOMBE and NOYES, Circuit Judges.

PER CURIAM. The decision in *The Express*, 59 Fed. 476, 8 C. C. A. 182, applies. In the first of the above causes the interest to which libelant is entitled should be paid by the interests which, by appealing, tied up the litigation. In the second cause no interest should be allowed upon that part of the decree payable by the Matthews. We are not inclined to allow the claim for premiums paid on account of the stipulations for value. The decrees may be amended accordingly.

COMMONWEALTH NAT. BANK v. FIDELITY & DEPOSIT CO. OF MARYLAND et al. (Circuit Court of Appeals, Fifth Circuit. December 7, 1909.) No. 2,008. Appeal from the Circuit Court of the United States for the Eastern District of Texas. Nelson Phillips and Yancey Lewis, for appellant. A. P. Wozencraft, Joseph A. L. Wolfe, and D. A. Frank, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Without committing this court to the propositions that the letter of the Stevenson Contract Company to the disbursing agent constituted, under the evidence, an assignment of the contractor's claim against the government for the money then due on final estimate, and that as an assignment it was absolutely void or only voidable under sections 3477 and 3737, Rev. St. (U. S. Comp. St. 1901, pp. 2320, 2507), we hold that the Circuit Court had jurisdiction, and that the case was well ruled and correctly decided in regard to the equities involved. The decree of the Circuit Court is affirmed.

CONTINENTAL OIL & COTTON CO. v. ARMOUR & CO. (Circuit Court of Appeals, Fifth Circuit. November 30, 1909.) No. 1,982. In Error to the Circuit Court of the United States, for the Northern District of Texas. S. P. Hardwicke, for plaintiff in error. H. M. Chapman, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In this case trial by jury was waived, and a trial was had before the court. Our examination of the transcript results in finding that the general verdict found by the court is supported by the findings of fact and evidence incorporated in the bill of exceptions, and the judgment rendered on the verdict is consonant with the pleadings. Judgment affirmed.

HOGUE v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. December 7, 1909.) No. 1,919. In Error to the District Court of the United States for the Northern District of Texas. Israel Dreehen, for plaintiff in error. Wm. H. Atwell, for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A trial was had on two counts in the indictment. On the first the plaintiff in error was acquitted, and on the second convicted. The second count is good in form and substance, and the assignments of error in relation thereto are not well taken. The verdict thereon is fully supported by the evidence, all of which has been submitted to this court by the plaintiff in error in support of his motion in the court below to direct a verdict. On the entire record we find no reversible error, and the judgment of the Circuit Court is affirmed.

HOUSTON OIL CO. OF TEXAS et al. v. POLLARD et al. (Circuit Court of Appeals, Fifth Circuit. December 7, 1909.) No. 1,997. Appeal and Cross-Appeal from the Circuit Court of the United States, for the Southern District of Texas. H. O. Head and T. M. Kennerly, for appellants. Presley K. Ewing, Sam Streetman, and Frank Andrews, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The decree in favor of Ellen Lee Mason is affirmed, for the reasons given in the master's report; and the decree in favor of the Houston Oil Company against Uriah A. Pollard and others is affirmed, for the reasons given in the master's report, to wit: "The special master finds the title to the land claimed by them to be in the Houston Oil Company of Texas, and recommends judgment accordingly, because it is not shown that they have evidenced or set up any claim whatever to the land until November 17, 1908—more than 60 years after the execution of the deeds under which they hold—beyond the filing of their deeds for record in the deed records of a county, whose name is not given"—and because the evidence shows that the Houston Oil Company deraigned title through duly recorded deeds from the sovereign to the present time, under which deeds it and its predecessor have constantly asserted title to and exercised ownership since 1882 of the land in question, by returning the same for taxes, paying some taxes, appropriating timber thereon, and by frequent actual possession through agents and tenants. The costs of this court to be divided.

McCORMICK, Circuit Judge, concurs as to the decree in favor of Ellen Lee Mason, but dissents as to the appeal of Uriah A. Pollard and others.

PHILIPS v. FABER SULKY CO. (Circuit Court of Appeals, Second Circuit. November 17, 1909.) No. 27. Appeal from the Circuit Court of the United States for the Western District of New York. This is an appeal from an interlocutory decree of the Circuit Court, Western District of New York, holding certain claims of letters patent 611,438, issued Sept. 27, 1898, to Philips, for a speed wagon, to be valid and infringed. The opinion of the Circuit Court is reported in 160 Fed. 966. Osgood & Davis, for appellant. L. H. Groat, for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. We concur in the reasoning and conclusions of the judge who heard the cause at circuit, and do not find it necessary further to discuss the patent or the proofs. It is contended that the claims should be so narrowly construed that defendant's structure will not infringe. The defendant's truss frame does not extend upward "perpendicularly from the spindles," nor "between two vertical planes from said spindles"; the quoted phrases being taken from claims 1 and 2, respectively. But the deflection from the perpendicular is slight, and effects no new result; and we are of the opinion that a truss substantially perpendicular to the spindles is fairly within the claim, concurring with Judge Hazel in his conclusions as to infringement. It is contended, however, that the words "perpendicular" and "vertical" are to be strictly construed, for the reason that they were inserted while the application was pending in the Patent Office, after rejection of original claims upon a reference to patent to Wells, No. 577,339, for a sulky. The theory is that the Patent Office required applicant to make an election, either to be rejected on this reference or to avoid the reference by confining himself strictly to an absolutely perpendicular truss. But we are not satisfied that this theory is correct, or that it was the insertion of the words "perpendicular" and "vertical" that saved the claims. The proposed amended claims were inclosed in a letter to the examiner, which discussed the Wells sulky and pointed out that it did not have the inclined brace, which was referred to in applicant's specification as "particularly effective." Presumably this argument convinced the examiner—the Wells sulky was quite a different contrivance—and induced allowance of the claims. It is difficult to see how the mere restriction of them to perpendicular trusses would have avoided the reference, because in the

Wells sulky the "main or central bow, 4," on which alone the driver's seat is mounted, extends up perpendicularly from the spindles, so that "its top portion [is] directly over the axles of the wheels." Decree affirmed, with costs.

RICE et al. v. MCGREW. (Circuit Court of Appeals, Fifth Circuit. November 16, 1909.) No. 1,946. Appeal from the Circuit Court of the United States for the Southern District of Texas. Clarence R. Wharton, for appellants. John W. Parker, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This case is one for damages on behalf of a minor, a deaf mute, to recover damages from the receivers, operating a sawmill under the appointment and orders of the Circuit Court in the case of Maryland Trust Company v. Kirby Lumber Company, and it is appealed here by the said receivers, complaining of the finding of facts made by the special master. The report of the special master on law and facts seems to have been well considered, and, as it was approved and confirmed by the Circuit Court, we are not disposed to go behind it. The decree of the Circuit Court is therefore affirmed.

SANGER v. ROVELLO et al. (Circuit Court of Appeals, Fifth Circuit. December 7, 1909.) No. 2,010. In Error to the Circuit Court of the United States for the Western District of Texas. H. C. Lindsey, for plaintiff in error. Richard I. Munroe and J. R. Downs, for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The plaintiff in error took no better title to the property purchased at execution sale than Peter McClellan had; and said Peter McClellan, as appears by the record, had no title subject to execution, as settled in the courts of the state of Texas long prior to plaintiff in error's purchase. See McClelland v. McClelland (Tex. Civ. App.) 37 S. W. 350; Wood v. McClelland (Tex. Civ. App.) 53 S. W. 381; McClelland v. McClelland, 46 Tex. Civ. App. 26, 101 S. W. 1171. The judgment of the Circuit Court is affirmed.

TEXAS CANNEL COAL CO. v. CONSUMERS' LIGNITE CO. (Circuit Court of Appeals, Fifth Circuit. November 30, 1909.) No. 1,986. Appeal from the Circuit Court of the United States for the Northern District of Texas. Bennett Hill, for appellant. J. M. McCormick, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The controversy in this case is over the amount of damages to be recovered for lignite unlawfully removed by the appellant from appellee's land: the question being whether the trespass was inadvertent or willful. We find that Lowery, the general manager, was the representative of the appellant in determining how far mining operations should be carried on and extended, and it was conceded that he had full knowledge of the trespass committed. See U. S. v. Ute Coal & Coke Co., 158 Fed. 20, 85 C. C. A. 302. The decree of the Circuit Court is affirmed.

TEXAS & P. RY. CO. v. MORRIS et al. (Circuit Court of Appeals, Fifth Circuit. November 16, 1909.) No. 1,917. In Error to the Circuit Court of the United States for the Eastern District of Texas. F. H. Prendergast, for plaintiff in error. S. P. Jones, for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. All the assignments of error in this case complain of erroneous charges to the jury; but the record shows no seasonable exceptions were taken in the court below, either to the judge's charge as a whole or to any part thereof. The judgment of the Circuit Court is affirmed.

TRADERS' NAT. BANK v. RUMSEY et al. (Circuit Court of Appeals, Fifth Circuit, November 30, 1909.) No. 1,983. Appeal from the Circuit Court of the United States for the Northern District of Texas. W. P. McLean, S. B. Cantey, and R. L. Carlock, for appellant. John W. Wray, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The record shows that the transactions of Lee M. Rumsey with the Ft. Worth Machine & Foundry Company, wherein the said foundry company issued five promissory notes for the purchase of the stock of the said Rumsey, and granted its mortgage upon all the property of the company to secure payment of the same, were prior to the acquisition of interest by the appellants in this case, and that by the recording of the mortgage according to law and otherwise appellants had full notice of the same. The decree of the Circuit Court is affirmed.

UNITED STATES v. LECHENGER et al. (Circuit Court of Appeals, Fifth Circuit, November 9, 1909.) No. 1,868. In Error to the District Court of the United States for the Western District of Texas. Chas. A. Boynton, for the United States. Winchester Kelso and Chas. W. Ogden, for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This case, brought by information in rem for the condemnation of certain alleged smuggled goods, was tried on the claimants' plea of former jeopardy by the court under a stipulation in writing waiving a jury, and the finding was general in favor of the claimants. The assignments of error suggest conclusions of law based upon the evidence. There was no finding of facts nor bill of exceptions showing the evidence or any rulings of the court in the progress of the trial, and the only questions reviewable are as to the sufficiency of the pleadings to warrant the judgment of the court. The pleadings are sufficient, and the judgment of the District Court is therefore affirmed, on authority of Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684; United States v. McKee, Fed. Cas. No. 15,688.

WILLIAM A. FORCE & CO., Inc., v. BATES MACH. CO. (Circuit Court of Appeals, Second Circuit, October 14, 1909.) No. 100. Appeal from the Circuit Court of the United States for the Eastern District of New York. For opinions below, see 169 Fed. 647; 170 Fed. 446. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Affirmed, without costs, by consent.